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The Honorable Marshall L. Ferguson
Hearing Date: April 26, 2024 at 1:30 p.m.
With Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. THE KROGER CO., ET AL., Defendants.	NO. 24-2-00977-9 SEA STATE OF WASHINGTON'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION & RELIEF REQUESTED

Defendants' Motion does not show any reason why the Complaint fails to state a claim upon which relief can be granted. It should be denied. Washington's Consumer Protection Act ("CPA") expressly empowers the State to bring actions in Washington state court to challenge anticompetitive mergers like the one here and to seek and obtain injunctive relief prohibiting the consummation of such mergers. RCW 19.86.060; .080(1); *see also* Wash. Const. art. XII, § 22 (providing that "no incorporated company . . . shall . . . combine . . . with any other incorporated company, foreign or domestic" to restrain competition or create a monopoly and requiring the legislature to enact laws to enforce this provision). Defendants' proposed merger (the "Merger") seeks to combine the two largest (and, in some areas, the *only*) supermarket chains in the State: Kroger (operating as Fred Meyer and QFC) and Albertsons (operating as Haggen, Safeway, and Albertsons). Compl. 1 at ¶¶ 3-4, 8. Backed by the resources and services of national

organizations, Defendants compete head-to-head in at least 49 communities across Washington. *Id*. ¶¶ 4, 23, 76, 107. The Merger will eliminate that substantial competition, making it highly likely that supermarket shoppers will have to pay more for less. *Id*. ¶¶ 4, 9. Defendants all but concede that the Merger will substantially lessen competition in proposing a partial divestiture of a mix of assets to a wholesale distributor that is unlikely to viably compete with them. *Id*. ¶¶ 12, 124. Defendants have such an extensive footprint in Washington that their combined market share in communities across the state post-Merger is presumptively anticompetitive and therefore unlawful. *Id.* ¶ 83. Defendants' own executives understand this, and have privately acknowledged that they are "basically creating a monopoly in grocery with the merger." *Id*. ¶ 11. Given the Merger's projected extensive anticompetitive harm in Washington, the State filed this lawsuit seeking several forms of relief for CPA violations, including an injunction to "prevent" the Merger under RCW 19.86.080, as well as a declaration that this anticompetitive Merger violates RCW 19.86.060.

Defendants' various arguments for dismissal center on misstating and mischaracterizing the nature of the relief sought, and fail to show that the Court is unable to grant relief for their CPA violation as required to succeed on their CR 12(b)(6) Motion.

As a threshold matter, Defendants do not contest that they are subject to this Court's personal jurisdiction. Nor do they challenge the reasons the State alleges that their Merger is unlawful. They concede that the injunctive relief that they attack in their Motion is expressly authorized relief for their CPA violation. Mot. at 7. Therefore, Defendants' Motion fails to contest that the Complaint states a CPA "claim upon which relief can be granted," CR 12(b)(6), and can be denied on this basis alone.

While Defendants offer a long line of arguments that have previously been considered and rejected, the law offers the Court an express lane. Succinctly stated, Defendants' Motion fails for three additional reasons:

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1 ***First***, even if Defendants' challenge to the injunctive relief the State seeks was
2 correct—and it is not—the State seeks independently cognizable relief beyond the injunction
3 that the Motion attacks. *See State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 82 Wn.2d
4 265, 275 (1973) ("A suit brought by the state" to obtain a decree declaring defendants' actions
5 unlawful "has a legitimate state interest separate and apart from the question of whether an
6 injunction should lie."). And, in arguing that partial divestiture relief is "the most suitable
7 remedy" for this claim, Mot. at 8, Defendants concede that the Court *can* grant equitable relief
8 for the violation pled in the Complaint. The Washington Supreme Court has long held that so
9 long as "the plaintiff has set forth facts entitling him to *some* relief," dismissal is not appropriate
10 "even though the prayer is for relief to which the plaintiff is not entitled." *Prichard v. Conway*,
11 39 Wn.2d 117, 125 (1951) (emphasis added). Accordingly, the Court need not reach Defendants'
12 meritless arguments regarding the scope of the relief and its constitutionality to deny Defendants'
13 Motion.

14 ***Second,*** Defendants are wrong that "divestiture" is the "most suitable" merger remedy.
15 The CPA expressly authorizes injunctions to "prevent" conduct that the CPA declares unlawful,
16 RCW 19.86.080(1), including anticompetitive mergers. RCW 19.86.060. When, as here, a
17 merger has yet to be consummated, proactively enjoining it is both appropriate and preferred.
18 *California v. Am. Stores Co.*, 495 U.S. 271, 298 (1990) (Kennedy, J. joining the Court's opinion
19 affirming a trial court's discretion to award divestiture relief in a state's consummated merger
20 challenge seeking relief pursuant to a statutory provision providing for "injunctive relief," but
21 concurring to criticize the state for failing to proactively seek to enjoin the national merger before
22 the FTC settled with the merging parties and they completed the merger).

23 In any event, it would be improper for the Court to conclude *as a matter of law* that
24 divestiture is the most appropriate remedy for this Merger. That factual question must be
25 adjudicated based upon evidence. On this Motion, the State's factual allegations must be taken
26 as true, *Wahkiakum Sch. Dist. No. 200 v. State*, 2 Wn.3d 63 (Wash. 2023), and the Complaint

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alleges that Defendants' proposed limited divestiture relief is woefully inadequate. Compl. ¶¶ 12, 123-152. Washington consumers and workers experienced first-hand the substantial lessening of competition that occurred when Albertsons acquired Safeway and divested 146 stores, including 26 in Washington, to Haggen in order to assuage antitrust concerns. *Id.* ¶¶ 13, 31. That divestiture was a spectacular failure, resulting in Haggen's bankruptcy, the closure of more than 100 stores, and massive layoffs. *Id.* ¶ 13, 32-35. Washington consumers and workers should not be forced to bear the risk of another—even larger—merger and inadequate supermarket divestiture. It is *Defendants* who bear the burden of showing that the partial divestiture relief they propose for their violation of the CPA will not become Haggen 2.0. *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016).

Third, nothing in the U.S. Constitution or federal law limits this Court's authority to enjoin a merger that, like this one, will have a substantial effect on Washington. The dormant Commerce Clause is inapplicable to actions under the CPA. *State v. Sterling Theatres Co.*, 64 Wn.2d 761, 765 (1964) ("[T]he Consumer Protection Act is neither an impermissible burden on interstate commerce nor pre-empted by the federal antitrust acts.") And an order enjoining the merger implicates neither the Full Faith and Credit Clause nor the doctrine of comity, as no law conflicts with the CPA and no federal court has rendered a final decision regarding the Merger.

For all these reasons, Defendants' motion should be denied.

II. COUNTER STATEMENT OF FACTS

A. Defendants' History of Consolidation

Defendants are "two of the largest national supermarket companies in operation today," Compl. ¶ 23, and the "two biggest supermarket chains" in Washington. *Id.* ¶ 24. Their outsized presence in Washington is the product of several rounds of acquisitions that span more than two decades. *Id.* ¶¶ 29-36, 38. As a result of these prior transactions, Albertsons operates approximately 215 stores in Washington under the Haggen, Safeway, and Albertsons "banners"

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1 (i.e., brand names). *Id.* ¶ 36. Kroger operates approximately 114 stores in Washington under its
2 Fred Meyer and QFC banners. *Id.* ¶ 39.
3 Today, Kroger and Albertsons compete head-to-head for consumers across numerous
4 Washington communities. *Id.* ¶¶ 7, 24, 87. Together, they are responsible for more than 50% of
5 supermarket sales statewide. *Id.* ¶ 3.

6 **B. The Proposed Merger**

7 Rather than continue to compete against each other, Defendants agreed on October 13,
8 2022, to combine their collective assets and operations through Kroger's purchase of
9 Albertsons.[1] Compl. ¶ 41. In Washington alone, the Merger would place more than 300 stores
10 under Kroger's control, eliminating Albertsons as Kroger's largest and most significant
11 competitor. *Id.* ¶¶ 41, 78, 87-96. Combining Defendants' supermarket shares will result in such
12 a high market share that in at least 49 city areas in Washington, the Merger is *presumptively*
13 unlawful under established principles of antitrust law. *Id.* ¶¶ 76, 79-85.
14 Accepting the Complaint's allegations as true, the Merger will "create an appreciable
15 danger that there will be a substantial lessening of competition in the sale of food and grocery
16 products" by supermarkets in Washington. *Id.* ¶ 78. Not only will the Merger eliminate
17 "head-to-head competition between Albertsons and Kroger"—competition which has led to
18 better service, products, and prices for Washington consumers—it will "likely result in store
19 closures and worsening quality of store service." *Id.*
20
21
22
23 [1] The parties agree that the Court may take judicial notice of the Merger Agreement, which is referenced in the Complaint and is a public record on file with the Securities and Exchange Commission, in considering
24 Defendants' Motion. *See* Mot. at 3 n.1. *See also Wash. State Human Rights Comm'n v. Hous. Auth. of Seattle*, 21
25 Wn.App.2d 978, 983 509 P.3d 319, 322-23 (2022) (explaining that "documents whose contents are alleged in a complaint but which are not physically attached to the pleading" and public documents which "authenticity cannot be reasonably disputed" may be considered in ruling on a CR 12(b)(6) motion to dismiss). Such consideration does
26 not convert Defendants' motion to dismiss to a motion for summary judgment. *See id.*

C. The Proposed Divestiture

Defendants proposed divesting some of their combined assets to wholesale grocery supplier C&S Wholesaler Grocers, LLC ("C&S"). Specifically, Defendants have proposed to sell C&S 413 stores (104 of which are in Washington), as well as an array of other assets—banners, distribution centers, fuel centers, pharmacies, offices, and private brands. Compl. ¶ 124.

C&S, however, would acquire only a fraction of the assets currently relied upon by either Albertsons or Kroger to operate and effectively compete, and would lack the backing of a sophisticated national organization with expansive grocery retail infrastructure and strong private label brands. *Id.* ¶¶ 140-148. It therefore cannot replace Albertsons as a viable competitor. *Id.* ¶ 12. C&S has no track record of success in running a substantial grocery retail operation. *Id.* ¶¶ 133-136. It is unlikely to successfully complete the complex process of rebannering and developing independent pricing, analytics, and other IT systems. *Id.* ¶¶ 140-143, 149-151. These systems are necessary to compete against a combined Kroger and Albertsons conglomerate that would control a dominant share of the supermarket industry in Washington communities. *Id.* ¶¶ 138-52.

D. The State's Pre-Suit Investigation & Complaint

The State investigated the potential anticompetitive effects of the Merger pursuant to RCW 19.86.110. Compl. ¶ 22. Its investigation confirmed that Kroger's acquisition of Albertsons is likely to substantially lessen supermarket competition in many Washington communities, in violation of RCW 19.86.060. *Id.*

Accordingly, the State filed the present suit to defend its "sovereign interest in fostering fair and honest competition, protecting consumers from anticompetitive and unlawful practices, and supporting the general welfare of consumers and businesses in Washington and its economy." Compl. ¶ 21. In its Complaint, the State seeks a declaratory judgment, a permanent

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1 injunction of the Merger, reasonable costs and fees, and such other relief as this Court deems
2 just and proper. Compl. at XI Request for Relief ¶¶ 1-5.

3 **III. ALTERNATIVE STATEMENT OF THE ISSUES**

4 Whether the Court must deny Defendants' CR 12(b)(6) Motion when Defendants do not
5 dispute that the State has alleged a cognizable claim under the CPA that, when proven, will
6 entitle the State to *some* relief.

7 Whether, in the alternative, the Court must deny Defendants' CR 12(b)(6) Motion when
8 Defendants fail to demonstrate that an injunction blocking this Merger is unavailable as a matter
9 of law.

10 **IV. EVIDENCE RELIED UPON**

11 This Opposition relies on the allegations in the State's Complaint (Dkt. 1), and the record
12 before the Court.

13 **V. AUTHORITY**

14 Motions to dismiss are granted "sparingly and with care, and only in the unusual case in
15 which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief."
16 *San Juan Cnty. v. No New Gas Tax*, 160 Wn.2d 141, 164 (2007). Dismissal is appropriate only
17 "if the court concludes that the plaintiff can prove no sets of facts that would justify recovery."
18 *Wahkiakum*, 2 Wn.3d at 77. In assessing the adequacy of a Complaint, this Court must "presume
19 that the factual allegations of the complaint are true and draw all reasonable inferences from
20 those allegations in the plaintiff's favor." *Id.* "If a plaintiff sets forth facts constituting a cause
21 of action, and entitling him to *some* relief, he is not to be turned out of court because he has
22 misconceived the nature of his remedial right." *Damon v. Leque*, 14 Wash. 253, 254 (1896)
23 (emphasis added).

24 These foundational principles of law doom Defendants' Motion. Defendants do not
25 contest that the State has pleaded a valid claim under the CPA. Nor do they argue that this Court
26 is powerless to grant *any* relief. Because there are a range of statutorily authorized remedies this

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Court could ultimately award, including an injunction, declaratory relief, and—as Defendants expressly concede—divestiture, Defendants' arguments regarding the proper scope of any injunctive relief provide no basis for dismissing the Complaint. *See Damon*, 14 Wash. at 254; *Prichard*, 39 Wn.2d at 125. The Court can and should deny the Motion on this basis alone, and it need not reach Defendants' arguments attacking its authority to enjoin the Merger.

To the extent the Court chooses to entertain Defendants' arguments regarding the availability of an injunction, it should reject them. Injunctions blocking a merger are commonplace, and an injunction is appropriate here to protect Washington consumers from a combination of the two largest supermarkets in this state that is highly likely to result in less choice and higher prices for Washingtonians. Defendants' labelling of the State's requested relief as a "nationwide injunction" is both inaccurate and misleading—it also has no bearing on the propriety of the relief, which is plainly authorized under Washington law and targets conduct that has demonstrable effects in Washington. Nor is there any constitutional impediment that would prevent the Court from enjoining this merger.

A. Dismissal Is Improper Because the Complaint States a Cognizable Claim for Which Several Forms of Relief Are Independently Authorized and Sought

Defendants' threshold argument—that the Court "should dismiss the Complaint because the State can allege no set of facts that would entitle it to the only tangible remedy it seeks," Mot. at 7—fundamentally misapprehends the legal standard for a motion to dismiss in Washington.

The Washington Supreme Court has long held that a trial court must deny a motion to dismiss if the court has the power to grant *any* form of relief to a plaintiff who has pleaded a proper claim. *Prichard*, 39 Wn.2d at 125. As the Court has explained, "[t]he question of jurisdiction to try the action is determined, not by the remedy requested, but by what the facts alleged in the complaint entitle plaintiffs to receive." *Dale v. Cohn*, 14 Wn.2d 214, 218 (1942);

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see also Thompson v. Hunstad, 53 Wn.2d 87, 91 (1958) (reversing a dismissal where the plaintiff was entitled to a lesser remedy than requested in the prayer for relief); *Handlin v. On-Site Manager Inc.,* 187 Wn. App. 841, 845, 851-852 (2015) (declining to dismiss injunctive relief as a matter of law in a CPA action, and remanding for the trial court to "decide issues related to injunctive relief in due course"). This longstanding precedent comports with CR 54(c), which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Considered together with CR 12(b), these provisions make clear that "a complaint should not be dismissed for legal insufficiency except where there is a failure to state a claim on which some relief, not limited by the request in the complaint, can be granted." *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 925-26 (2d Cir. 1968) (discussing the identically worded Fed. R. Civ. P. 54(c)). *See also Allen v. Am. Land Rsch*., 95 Wn. 2d 841, 852 (1981) (affirming the superior court's broad inherent authority fashion judgments to grant relief for CPA violations).

Here, setting aside the fact that the Court *is* authorized to enjoin the merger for the reasons discussed *infra,* the State's allegations entitle it to at least two other independent forms of relief; the availability of which precludes dismissal.

First, Defendants' Motion advocates that the remedy of divestiture is a "particularly well-suited remedy for a case like this one." Mot. at 8-9. Divestiture, of course, "is a form of injunctive relief." *Am. Stores Co.*, 495 U.S. at 275. The CPA also plainly authorizes it. *See* RCW 19.86.060 ("*In addition to any other remedy provided by this chapter*, the superior court may order any corporation to divest itself of the stock or assets held contrary to this section[.]" (emphasis added)). It makes no difference at this juncture that the parties disagree about the precise shape of the appropriate injunctive relief to address this anticompetitive Merger. Defendants' concession that a statutorily authorized form of injunctive relief would remedy the allegations in the State's Complaint is fatal to their Motion.

1 *Second*, the CPA authorizes the State to independently seek declaratory relief. It is well
2 established that a court cannot dismiss the State's CPA complaint on the pleadings where the
3 State seeks an order declaring that "certain practices are unlawful," regardless of whether
4 injunctive relief is warranted. *Ralph Williams*, 82 Wn.2d 265. That is because "[a] suit brought
5 by the state" to obtain a decree declaring defendants' actions unlawful "has a legitimate state
6 interest separate and apart from the question of whether an injunction should lie." *Id*. What is
7 more, RCW 19.86.130 provides that any such decrees have an independent legal effect on
8 subsequent actions brought by private parties, further underscoring the fact that declaratory relief
9 operates as a standalone and independent form of relief. *Id.* at 275.

10 Here, just as in *Ralph Williams*, the State has requested an order declaring the Merger
11 unlawful under the CPA. Compl. at XI Request for Relief ¶ 1. Such an order would not only
12 clarify "what practices are prohibited," it would also become *prima facie* evidence in any private
13 suit regarding the Merger under Washington law. *Ralph Williams*, 82 Wn.2d at 275;
14 RCW 19.86.130. The Court in *Ralph Williams* held that in a suit such as this one—brought by
15 the State seeking a declaration that certain conduct is illegal under the CPA—"[t]here can . . . be
16 no contention that this case does not present a justiciable controversy." 82 Wn.2d at 275. Because
17 the State's request for declaratory relief is independently and expressly authorized by law to
18 serve a distinct purpose, it stands on its own as a form of available relief that precludes dismissal.

19 Defendants' argument to the contrary, relegated to a footnote, Mot. at 6 n.3, is foreclosed
20 by binding law. Defendants' reliance on *Diversified Indus. Dev. Corp. v. Ripley*, 82. Wn.2d 811
21 (1973), is inapposite. In *Ripley*, a private plaintiff brought suit under a different statute—the
22 Uniform Declaratory Judgments Act (UDJA). The plaintiff invoked the UDJA to seek an
23 adjudication of several private parties' potential financial responsibility for a theoretical future
24 damages claim. *Id.* at 812-13. The Washington Supreme Court held there was no justiciable
25 controversy because "the project of such a claim ever being made is left to speculation and
26 conjecture." *Id*. at 814. *Ripley* did not opine on how, if at all, declaratory relief interacts with

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1 injunctive relief and it certainly did not overrule *Ralph Williams*, which held that requests for
2 declaratory relief brought by the State under the CPA are independently justiciable. This matter
3 could not be any further removed from the circumstances addressed in *Ripley*. The State's action
4 does not call for any speculation or conjecture. Defendants have executed the Merger Agreement
5 and will undisputedly close their unlawful deal absent the injunctive relief the State is seeking.
6 *Ripley* has no application here.

7 Defendants' other cases support the State's position, as they underscore that dismissal of
8 an otherwise properly pleaded complaint is appropriate only where *no remedy of any kind* is
9 available. In *Quinn Const. Co. v. King Cnty. Fire Prot. Dist. No. 26*, 111 Wn. App. 19 (2002),
10 the trial court had already denied injunctive relief—the sole form of relief available to a
11 "disappointed bidder" plaintiff under Washington law—when it dismissed the plaintiff's claims
12 for damages. *Id.* at 36. Dismissal of the entire action was appropriate only because the court
13 could order *no* relief.

14 Defendants also cite *Automotive United Trades Organization v. Washington Public*
15 *Disclosure Commission*, No. 50652-1-II (Wash. Ct. App. May 14, 2019) (unpublished), which
16 has "no precedential value." GR 14.1(a). But in that case, too, it appears that the court's decision
17 on summary judgment was based on the lack of any possible remedy, as the only remedies
18 authorized by statute were unavailable to the plaintiff given the specific violation alleged. *Id.*,
19 slip op. at 6.

20 In neither case cited by Defendants did the court consider whether a plaintiff's complaint
21 must rise and fall on the specific forms of relief it requests. As such, these cases have no bearing
22 on the well-settled Supreme Court precedents that directly address this question.

23 Because the Complaint states a cognizable claim upon which multiple, independent
24 forms of relief are authorized and sought, the Motion fails, and can be denied in full on this basis
25 alone. Accordingly, the Court need not address Defendants' remaining arguments.

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1 **B. An Order Enjoining the Merger Would Not Be Overbroad and Defendants' Arguments to the Contrary Are Premature And Incorrect**
2
3 An injunction—not divestiture—is the preferred remedy to address an *unconsummated*
4 anticompetitive merger, like this one. In any case, it would be improper for the Court to conclude
5 *as a matter of law* that divestiture is the most appropriate remedy for this anticompetitive Merger.
6 Defendants' arguments on this point are premature, incorrect, and present a question of fact that
7 cannot be resolved on a motion to dismiss.

8 **1. Determining the Appropriate Remedy Is Premature**

9 This Court need not resolve the proper scope of any injunctive relief at the motion to
10 dismiss stage. "Any determination regarding" the propriety of a particular form of injunctive
11 relief in a merger case is plainly "premature" when the Court has not yet had the opportunity to
12 decide or even consider the merits of the antitrust violation. *Cia. Petrolera Caribe, Inc. v. Arco*
13 *Caribbean Inc.*, 754 F.2d 404, 430 (1st Cir. 1985) (declining to determine the appropriate relief
14 at summary judgment). As Defendants' own authority makes clear, "[i]njunctions must be
15 tailored to remedy the specific harms *shown*." Mot. at 9 (citing *Kitsap Cnty. v. Kev, Inc.*, 106
16 Wn.2d 135, 143 (1986) (emphasis added)).

17 Defendants' insistence that the Court determine at this juncture that an order enjoining
18 the Merger would be "overbroad" is misguided, particularly considering that it is Defendants'
19 burden to demonstrate that something less than a full-stop injunction can remedy the harm that
20 their anticompetitive Merger is likely to cause. Compl. ¶¶ 78, 86-115. Once the State has made
21 a prima facie showing that the Merger is presumptively unlawful, the burden will shift to
22 Defendants to establish the existence of an adequate remedy that, if implemented, would permit
23 the Merger to close. *See, e.g.*, *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 99 (D.D.C. 2017)
24 (holding that the defendant failed to overcome the demonstrated prima facie showing of
25 presumptive illegality); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 88 (D.D.C. 2015) (same).
26 Defendants have not, and cannot put forward *any* evidence at this stage supporting the conclusion

1 that their proposed divestiture—or any divestiture, for that matter—could rebut the State's prima
2 facie case, which further underscores the inappropriateness of the argument on a motion to
3 dismiss.

4 **2. Defendants' Remedy Arguments Are Meritless**

5 Even if the Court were to reach Defendants' premature arguments regarding the
6 appropriate remedy for this anticompetitive Merger, it will find they lack merit for the reasons
7 discussed below.

8 *(a) An Injunction Blocking This Merger Is an Appropriate Remedy*

9 Defendants do not dispute that the CPA expressly authorizes the State to bring actions to
10 "restrain and *prevent*"—that is, enjoin—unlawful mergers. RCW 19.86.080(1) (emphasis
11 added), RCW 19.86.060. A merger is unlawful when its effect "may be to substantially lessen
12 competition or tend to create a monopoly in any line of commerce." RCW 19.86.060.

13 The allegations in the Complaint—which Defendants cannot and do not dispute at this
14 stage —demonstrate why this Merger is unlawful and should be enjoined. Defendants operate
15 the two largest supermarket chains in Washington. Compl. ¶ 3. The merged entity would
16 therefore possess a dominant market share, accounting for more than 50% of supermarket sales
17 in the state. *Id.* The Merger would also eliminate Kroger's "#1 direct competitor" in the state:
18 Albertsons, *id.* ¶¶ 86-96, who competes fiercely in Washington in part due to its national
19 corporate infrastructure, including sophisticated analytics and IT systems, and access to
20 nationally recognized private label brands, *id.* ¶¶ 53, 61, 140. The Merger would result in a
21 substantial lessening of competition, which in turn would lead to higher prices, lower quality,
22 and less choice in Washington's supermarket aisles. *Id.* ¶ 3. The resulting market concentration
23 would be so significant that the Merger is presumptively unlawful. *Id.* ¶ 84. Accordingly, there
24 can be no serious dispute that enjoining the Merger is appropriate and expressly authorized by
25 law. RCW 19.86.060; .080.
26

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(b) An Order Enjoining the Merger Is Not a "Nationwide Injunction"

Perhaps realizing the weakness of their position on the law, Defendants attempt to discredit the State's requested relief by classifying it as a "nationwide injunction." Mot. at 7. This is a red herring. The CPA authorizes the State to seek an injunction against an unlawful merger that is likely to cause harm in Washington. The Washington Supreme Court has recognized that it is appropriate to grant relief against out-of-state defendants for conduct declared unlawful by the CPA, so long as the unlawful or deceptive acts "directly or indirectly affect the people of Washington." *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 803 (2015); *see State v. Reader's Digest Ass'n*, 81 Wn.2d 259 (1972) (rejecting interpretation of CPA that would have limited it to conduct occurring exclusively within the State's borders). Defendants do not dispute that the Merger will affect consumers in Washington, and they cite no authority suggesting that the State is powerless to prevent the harms that are likely to occur here.

Furthermore, the "nationwide injunction" label is inapposite here. As evidenced by the cases on which Defendants rely, this term generally refers to an order enjoining the operation of a federal statute, regulation, or policy—i.e., one with nationwide application. *See City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 766 (9th Cir. 2020) (declining to issue "nationwide injunction" regarding operation of federal policy); *Washington v. United States Food & Drug Admin.*, 668 F. Supp. 3d 1125 (E.D. Wash.), *opinion clarified,* 669 F. Supp. 3d 1057 (E.D. Wash. 2023) (declining to issue "nationwide injunction" regarding operation of federal agency action). Such injunctions require "the government to take (or not take) some action" not only with respect to "the plaintiffs in the case before it," but also "with respect to those who are strangers to the suit." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). Defendants have cited no case that describes an order enjoining an anticompetitive merger as a "nationwide injunction."

1 The injunctive relief the State seeks is not directed at a federal governmental entity nor
2 does it require Defendants to take any action with respect to strangers to the suit. It requires only
3 that Defendants—all of whom are parties to this suit, and who do substantial business in
4 Washington—refrain from a single discrete transaction that will have substantial effects on
5 Washington. The fact that the Merger Agreement eliminates Albertsons as Kroger's competitor
6 in more than one relevant market in Washington—and across the country—is a product of
7 Defendants' own drafting and not a defect in the State's pleading.

8 *(c) Defendants' Argument That Divestiture Is a Preferred Remedy Is Erroneous*

9 Defendants rely on cherry-picked language from inapposite cases to argue that divestiture
10 is a more suitable remedy than enjoining the Merger. But those cases are about the remedies
11 available *after* a merger has occurred, when the eggs are scrambled and an injunction to stop the
12 merger is no longer available. To be sure, divestiture is the preferred remedy once a preventative
13 injunction is no longer an option. *Prior* to consummation of a merger, however, the better remedy
14 is an order enjoining the transaction. Here, for the reasons alleged in the Complaint, the best and
15 most meaningful relief is to enjoin the Merger entirely. Compl. ¶¶ 116-122, 157-158.

16 As the Washington Supreme Court has recognized, "[t]he Attorney General's
17 responsibility in bringing [injunctive actions to restrain conduct] is to protect the public from the
18 kinds of business practices which are prohibited by the [CPA]." *Seaboard Sur. Co. v. Ralph*
19 *Williams' Nw. Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 746 (1973). An order blocking the merger
20 is a *preventative* measure—one intended to stop anticompetitive effects from mergers like the
21 one at issue before they have the chance to arise.

22 Divestiture, by contrast, is the preferred method to remediate the anticompetitive effects
23 of a merger *after* consummation. Accordingly, where an injunction to stop the merger remains
24 available, courts have recognized that "divestiture is an inadequate and unsatisfactory remedy in
25 a merger case," *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001), as it is difficult to
26 administer and less certain to afford relief. *See Aetna Inc.*, 240 F. Supp. 3d 1 (concluding the

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proposed divestiture remedy would not be sufficient to remedy the merger's anticompetitive effects and instead entering an order permanently enjoining the merger); *Laidlaw Acquisition Corp. v. Mayflower Grp., Inc.*, 636 F. Supp. 1513, 1517 (S.D. Ind. 1986) (observing "[t]he virtual impossibility of 'unscrambling the scrambled eggs'" via divestiture "once these parties are joined in corporate (shotgun) matrimony" as one reason to preliminarily enjoin the merger).

Defendants' Motion elides this point by citing exclusively to cases involving consummated mergers. *See* Mot. at 8-9 (citing *Am. Stores Co.*, 495 U.S. 271; *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015)). Accordingly, the Motion's quotations from these post-consummation cases referring to divestiture as the "most suitable," "most effective," or "customary" form of relief, are *not* comparing divestiture to an order enjoining the merger—as Defendants' Motion implies—but are instead comparing divestiture to *other* forms of relief that remain available after consummation, such as conduct remedies.[2] *See, e.g.*, *Saint Alphonsus*, 778 F.3d at 793 ("[T]he district court did not abuse its discretion in choosing divestiture over St. Luke's' proposed 'conduct remedy.'").

Defendants also conflate judicial assessments of *complete divestitures* with those of *partial divestitures*. A complete divestiture undoes an unlawful transaction entirely, with the intent of restoring the pre-merger status quo; a partial divestiture, by contrast, involves the forced sale of only a portion of the acquired assets. Here, Defendants have proposed a partial divestiture.

The Motion quotes at length from *E.I. du Pont*, but omits the fact that the *E.I. du Pont* Court ordered a "complete divestiture," and in fact expressly rejected "partial divestiture" as "not an effective remedy." 366 U.S. at 328.[3] Accordingly, the quotations that Defendants draw from that case—that divestiture is "simple, relatively easy to administer, and sure" and "should

[2] Conduct remedies are injunctive provisions aimed to restrict the merged entity's conduct or pricing practices, and typically include "firewall, non-discrimination, mandatory licensing, transparency, and anti-retaliation provisions, as well as prohibitions on certain contracting practices." *Saint Alphonsus*, 778 F.3d at 793 (internal quotation marks omitted).

[3] *Saint Alphonsus* also involved complete divestiture. *See* 778 F.3d at 792.

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always be in the forefront of a court's mind," Mot. at 9—are not only inapplicable in the pre-merger context, but are also directed at a form of relief that is distinct from that which Defendants promote. None of Defendants' cases support the proposition that partial divestiture is preferable to a preventative injunction, let alone that it is "simple," "easy to administer," or "sure."

Partial divestiture is particularly disfavored where—as here—it involves the sale of a collection of assets rather than a complete business. Courts recognize that "divestiture of an 'existing business entity'" is often more likely to remedy a merger's anticompetitive harm than is "divestiture of some lesser set of assets," the latter of which may deprive the divestiture buyer of the "'personnel, customer lists, information systems, intangible assets, and management infrastructure' necessary to compet[e]." *Aetna Inc.*, 240 F. Supp. 3d at 60 (cleaned up). *See id.* at 59, 99 (rejecting a proposed divestiture involving the sale of only "certain assets" and instead entering an order enjoining the merger).

In addition to being less effective at restoring competition, partial divestitures can carry real risks for consumers, above and beyond the failure to remedy competitive harm from a merger. Defendant Albertsons' partial divestiture of stores following its 2015 merger with Safeway offers a case in point. Albertsons divested 170 stores, including 146 that it sold to Washington-based grocer Haggen, in order to resolve competition concerns. Compl. ¶ 32. Haggen, however, lacked the resources, experience, and sophistication needed to effectively operate the acquired stores. *Id*. ¶ 13. Within six months of the divestiture, it closed more than 100 stores and laid off thousands of workers. *Id*. And within a year of the divestiture, Haggen filed for bankruptcy and sold dozens of its newly acquired stores back to Albertsons. *Id*. ¶ 34-35.

The partial divestiture proposed by Defendants poses similar—if not greater—risks. It involves the sale of a hodgepodge collection of hundreds of stores, in addition to an array of banners, offices, brands and other assets, to a buyer with no history of successfully operating a

1 large retail grocery business. *Id*. ¶¶ 124, 126. A "remedy" that risks immediate operational
2 challenges, store closures, job losses, and the re-purchase of divested assets by the merged entity
3 is neither "easy to administer" nor "sure," and it is certainly not preferred.

4 Defendants' arguments regarding the propriety and scope of any potential order enjoining
5 the Merger are both premature and meritless, and provide no basis for dismissing the Complaint.

6 **C. Defendants' Constitutional Arguments Need Not Be Reached and Are Meritless**

7 This Court need not—and should not—reach Defendants' constitutional arguments that
8 the State's requested injunction would violate the dormant Commerce Clause, the Full Faith and
9 Credit Clause, or principles of interstate comity. Defendants' constitutional arguments attack
10 only one version of the several independently authorized forms of relief available to and
11 requested by the State. Accordingly, even if these arguments had merit (they do not), dismissal
12 would not be warranted, as the Court could still award "some relief." *Prichard*, 39 Wn.2d at 125.
13 Courts should not "reach a constitutional issue 'unless absolutely necessary to the determination
14 of the case.'" *Stout v. Felix*, 198 Wn.2d 180, 184 (2021); *see State v. Hall*, 95 Wn.2d 536, 539
15 (1981). Here, the Court can reject Defendants' Motion for the reasons discussed above. *See* Part
16 V.A, *supra*.

17 If the Court nevertheless chooses to reach Defendants' constitutional arguments, it
18 should reject them. The dormant Commerce Clause, Full Faith and Credit Clause, and interstate
19 comity do not—either alone or in combination—prohibit the Court from enjoining this Merger.

20 **1. The Dormant Commerce Clause Is Inapplicable**

21 Defendants' arguments under the dormant Commerce Clause fail for three independent
22 reasons. First, the Clause does not limit the application of state antitrust law, including the CPA.
23 Second, binding precedent establishes that the Clause does not apply where supposed burdens
24 on interstate commerce are not "discriminatory" in character. Third, even if the Clause applied,
25 Defendants fail to identify any cognizable burden on interstate commerce.
26

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(a) The dormant Commerce Clause does not limit the remedies available under the CPA

The dormant Commerce Clause places limited constraints on the enforcement of state economic regulations "when Congress has failed to legislate on the subject," *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368-69 (2023) (quotation omitted). If Congress has "specifically authorized" states to engage in certain actions, those actions are "removed from the reach of the dormant Commerce Clause" even if they interfere with interstate commerce. *S-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). Congress "need not expressly state that it is authorizing a state to engage in activity that would otherwise violate the dormant Commerce Clause." *Am. Trucking Assn's, Inc. v. N.Y. State Thruway Auth.*, 886 F.3d 238, 245 (2d Cir. 2018). As long as Congress "clearly allow[s] the state to engage" in the challenged conduct, that action is immune to challenge. *Id.* Moreover, when Congress legislates in a field traditionally occupied by the States, such as antitrust, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *California, et al v. ARC America Corp.*, *et al.,* 490 U.S. 93, 101 (1989).

These foundational principles of constitutional law foreclose Defendants' dormant Commerce Clause arguments. To begin, state antitrust laws and enforcement actions predate federal antitrust laws.[4] *See, e.g., State v. Superior Ct.*, 51 Wash. 346 (1909) (considering whether purported consolidation violated state constitution antitrust provisions). *See also Richard v. Buhl*, 77 Mich. 632, 658 (1889) (condemning as unlawful corporation that acquired multiple companies across the country to obtain a monopoly). The U.S. Supreme Court has recognized the long history of state antitrust enforcement, noting that "it is plain that [antitrust] is an area traditionally regulated by the States," *ARC America Corp.*, 490 U.S. at 101.

[4] Twenty-one states had already enacted their own antitrust laws before the passage of the first federal antitrust law, the Sherman Act, in 1890. *ARC America Corp.,* 490 U.S. 93, at 101 n.4.

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1 This Court therefore begins with the assumption that the Clayton Act did *not* disturb the
2 State's ability to enforce its antitrust laws. Congress was aware of this landscape of state
3 enforcement—which historically has not been limited to exclusively intrastate conduct—when
4 it enacted the Clayton Act in 1914, and chose not to eliminate or limit the ability of states to seek
5 injunctions for national or multi-state mergers. Instead, "the [federal antitrust laws] w[ere]
6 intended to supplement, not displace, state antitrust remedies," *State v. LG Elec., Inc.*, 185 Wn.
7 App. 123, 133 (2014) (quoting *ARC Am. Corp.*, 490 U.S. at 101 n.4). And the Clayton Act
8 preserves the ability of states to enforce federal antitrust law as well. *State of Ga. v. Pennsylvania*
9 *R. Co.*, 324 U.S. 439, 447 (1945). Enforcement by states and private parties was "an integral part
10 of the congressional plan for protecting competition." *Am. Stores Co.*, 495 U.S. at 284. Because
11 Congress deliberately left state antitrust authority to enjoin mergers intact, the dormant
12 Commerce Clause does not apply to this action or to any injunctive relief the State seeks, which,
13 consistent with the CPA, is targeted at conduct that directly affects Washington.
14 For these reasons, the Washington Supreme Court has reached the "inescapable"
15 conclusion that the CPA is not "an impermissible burden on interstate commerce," holding that
16 the dormant Commerce Clause is inapplicable to actions under the CPA. *State v. Sterling*
17 *Theatres Co.*, 64 Wn.2d 761, 764-65 (1964) (en banc). In *Sterling*, the State moved to enforce
18 the then-newly-enacted CPA against "a segment of an industry which unquestionably carries on
19 part of its activities in interstate commerce," seeking injunctive and other relief. *Id.* at 762.
20 Recognizing that "the factors" relevant to "Congressional intent to pre-empt the field of antitrust
21 regulation are essentially the same as those involved . . . to determine whether the commerce
22 clause would exclude state action," *Sterling* explained that preemption factors "are wholly absent
23 in this area," and that "uniformity of regulation was expressly foregone when antitrust
24 enforcement was permitted by not only the United States Attorney General and the Federal Trade
25 Commission, but also by private litigants." *Id.* It added that the "goal of federal and state
26 regulation is the same, [which] leads to the conclusion that state enforcement, far from frustrating

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or interfering with federal purpose or national policy, will actually further it." *Id.* Defendants' dormant Commerce Clause argument is thus foreclosed by law.

(b) The CPA does not discriminate against out-of-state interests

In addition, neither the CPA nor the State's requested injunction discriminates against out-of-state firms, and Defendants' Motion does not claim otherwise. The U.S. Supreme Court's most recent dormant Commerce Clause case, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023), makes clear that the prohibition on favoring in-state firms at the expense of out-of-state firms "lies at the core . . . of dormant Commerce Clause jurisprudence." *Id.* at 377. Subject to limited exceptions that are not applicable here,[5] a dormant Commerce Clause challenge cannot be sustained absent evidence that a statute facially or practically has the effect of discriminating "in favor of in-state business." *Id.* Here, neither the CPA nor the State's requested injunction favors in-state supermarket chains at the expense of out-of-state ones. Rather, both the CPA and the requested injunction apply evenhandedly based on a transaction's effects on competition. Defendants do not argue otherwise.

Defendants' argument that "the State may not apply its state antitrust law to regulate the Transaction's effects in other states," Mot. at 11, is foreclosed by *Pork Producers*. The Court in *Pork Producers* rejected a blanket "rule against state laws with 'extraterritorial effects,'" regardless of whether those laws also have the "practical effect of control[ling] commerce occurring wholly outside the boundaries of [the] State." 598 U.S. at 374 (cleaned up). Instead, such laws are invalid only where the extraterritorial effect at issue was one that advantaged in-state firms at the expense of out-of-state firms. *Id.* at 374-75.

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[5] The Supreme Court observed in *Pork Producers* that it has previously "left the courtroom door open to challenges premised on even nondiscriminatory burdens" and that even genuinely nondiscriminatory state laws have on occasion been invalidated for disproportionately burdening interstate commerce. 598 U.S. at 379. The Court suggested that this exception to the antidiscrimination rule applies to "state regulations on instrumentalities of interstate transportation—trucks, trains, and the like"—that is, where the challenged regulation impeded "*the flow* of interstate goods." *Id.* at 379 n.2. Because this merger does not implicate the instrumentalities of interstate transportation, this potential exception does not apply.

1 Defendants' arguments under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), fail for the same reason. *Pork Producers* clarified that the *Pike* test is meant to assist a court in evaluating whether it is likely that any given statute was *intended to have a discriminatory effect*. 598 U.S. at 377. Here, Defendants' arguments do not so much as hint at discriminatory intent.

And to the extent *Pork Producers* left any ambiguity as to whether a party could bring certain dormant Commerce Clause claims *not* alleging discrimination under the *Pike* test, the Washington Supreme Court has settled the matter: they cannot. In *Washington Bankers Ass'n v. State*, the Court made clear that "Pike's balancing test is triggered 'only' when the challenged law discriminates against interstate commerce in practice." 198 Wn.2d 418, 451 (2021) (quoting *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 502 (7th Cir. 2017)). By contrast, where, as here, a law "does not discriminate facially or in practice against interstate commerce[,] [n]either the commerce clause nor *Pike* is implicated." *Id.* at 452.

(c) Even if a balancing test were applicable, Defendants cannot satisfy it on a motion to dismiss

Finally, even if *Pike* could apply here (it does not), Defendants cannot show on a CR 12(b)(6) motion that the "the burden imposed on [interstate] commerce (by the State's requested remedy) is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142.

On Defendants' Motion, the Court is limited to consideration of the State's allegations, which it takes as true. The State has not alleged any manner in which its requested injunction would harm interstate commerce. The State's allegations establish a significant local benefit from preventing this unlawful Merger, which if consummated, is likely to lead to substantial loss of retail grocery competition in supermarkets in Washington, and cause millions of

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Washingtonians to face higher prices, lower quality, and fewer choices. Defendants' dormant Commerce Clause argument fails in all events.

2. Enjoining the Merger under Washington Law Would Not Violate the Full Faith and Credit Clause or Principles of Interstate Comity

Defendants' conclusory Full Faith and Credit Clause and interstate comity arguments, which rely on the same principles as their dormant Commerce Clause challenge,[6] likewise misconstrue the law.

As an initial matter, Defendants fail to recognize that "[w]hile the full faith and credit clause applies in full force to judgments, its effect is lessened when the statutes . . . of another forum are at issue," as they are here. *State v. Berry*, 141 Wn.2d 121, 129 (2000). The fact that multiple states may properly exercise legislative jurisdiction over the same transaction or occurrence does not render it unconstitutional for any of those states to do so. *See Hilb Rogal & Hobbs Co. v. Rick Strategy Partners, Inc.*, No. CIV.A.3:05CV355, 2006 WL 5908727, at *9 (E.D. Va. Feb. 10, 2006).

The Full Faith and Credit Clause "provides a means for ending litigation by putting to rest matters previously decided between adverse parties in any state or territory of the United States." *In re Estate of Tolson*, 89 Wn. App. 21, 29 (1997). In Washington, the application of the Clause "requires the registration of a judgment of a sister state having jurisdiction of the parties and the subject matter." *Indus. Fin. Co. v. Lovell*, 9 Wn. App. 829, 831 (1973) (citations omitted). There cannot be any re-litigation when litigation has not occurred. Here, no jurisdiction has rendered any judgment that would merit consideration of the Full Faith and Credit Clause.

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[6] Both sets of Defendants' constitutional arguments are, at heart, about a state's ability to enjoin a multi-state merger based on effects felt within the state. *Compare* Mot. at 12 (arguing that enjoining the Merger would violate the dormant Commerce Clause because "[t]he State's Washington-specific allegations represent the local interests of one state, while seeking a remedy that would have extraterritorial effects in all others") *with* Mot. at 12-13 (arguing that enjoining the Merger would violate the Full Faith and Credit Clause and interstate comity because "citizens in states and cities throughout the country . . . would lose the procompetitive benefits" of the Merger and because Washington should not "dictat[e] merger policy nationwide under state law").

1 The doctrine of comity, meanwhile, "is not a rule of law, but one of practice, convenience
2 and expediency." *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 160
3 (1987). "Comity allows the courts of one jurisdiction to give effect to laws of another jurisdiction
4 out of deference and respect, considering the interests of each state." *Id.*

5 An order enjoining the merger does not implicate either of these two doctrines, much less
6 violate them. Washington has an indisputably significant interest in the application of its law to
7 a merger that combines the two largest supermarkets in the state. Compl. ¶ 3. Defendants'
8 Motion fails to identify any jurisdiction with a substantial interest and a potentially applicable
9 law that *conflicts* with the CPA. Defendants' argument fails because they have not shown "[a]n
10 actual conflict between the law of Washington and the law of another state," as Washington
11 courts require for "a conflict of law analysis" under the Full Faith and Credit Clause. *Burnside
12 v. Simpson Paper Co.,* 123 Wn.2d 93, 103 (1994). Defendants have not shown any such conflict.

13 Defendants' contention that "[a]pplying Washington law to enjoin this Transaction
14 nationwide would prevent the citizens of other states from enjoying the procompetitive benefits
15 flowing from the Transaction," Mot. at 12-13, also fails. Defendants have not introduced any
16 evidence suggesting that the Merger will have "procompetitive benefits," and the Court cannot
17 presume their existence—which would go beyond the Complaint's allegations. The law is clear
18 that a merger violates the antitrust laws if it may substantially lessen competition in *any*
19 geographic market, without regard for any benefits the merger may have anywhere outside of
20 the affected geographic markets. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355
21 (1963); U.S. Dep't of Justice & FTC, Merger Guidelines § 4.3 n. 77 (2023)
22 https://www.ftc.gov/reports/merger-guidelines-2023 ("Illegality in . . . any city or town
23 comprising a relevant geographic market would suffice to prohibit the merger.") (citing *Brown
24 Shoe Co. v. United States*, 370 U.S. 294, 375 (1962).

25 The fact that some states have no interest in the merger—because, as Defendants point
26 out, Albertsons and Kroger do not own any stores or do not compete in those states,

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Mot. at 13—does not mean that the states that *are* harmed by the Merger lose the ability to protect their citizens from it. Defendants' Full Faith and Credit Clause and comity arguments thus have it backwards: an order dismissing this action for the reasons Defendants assert would give dispositive effect to the interests of states that have "insignificant contact with the parties"—precisely the opposite of what comity and the Full Faith and Credit Clause require. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) ("[I]f a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.").

At its core, Defendants' comity argument is not about the Constitution, but their preference. But that is no basis on which to dismiss the State's Complaint. The Washington Legislature has expressly authorized the Washington Attorney General to sue in *this* Court to protect Washingtonians and prevent illegal mergers that harm them. This suit does just that.

VI. CONCLUSION

The State's Complaint pleads a cognizable claim that the Merger violates RCW 19.86.060, for which this Court can grant the State any of the forms of relief it seeks—injunctive, declaratory, or otherwise. The State thus respectfully requests that the Court deny Defendants' Motion to Dismiss.

DATED this 3rd day of April 2024.

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**The signing attorney certifies that this memorandum contains 8,396 words, consistent with the limits in the King County Local Rules.*

DECLARATION OF SERVICE

I declare that I caused the foregoing document to be electronically served through the Court's Electronic Filing System on all counsel of record in this action.

DATED this 3rd day of April 2024, in Seattle, Washington.

s/ Paula Pera C.
PAULA PERA C., WSBA No. 54630

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The Honorable Marshall L. Ferguson
Hearing Date: April 26, 2024 at 1:30 p.m.
With Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

THE KROGER CO., ET AL.,

Defendants.

NO. 24-2-00977-9 SEA

ORDER DENYING DEFENDANTS' MOTION TO DISMISS [PROPOSED]

THIS MATTER having come before the Court on Defendants' Motion to Dismiss, and the Court having considered the following pleadings and filings of record in this matter:

1. Complaint;
2. Defendants' Motion to Dismiss;
3. State of Washington's Opposition to Defendants' Motion to Dismiss;
4. Any reply to Defendants' Motion; and
5. The parties' oral arguments;

IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss is **DENIED**.

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2. Defendants must file an Answer to the State's Complaint within ten (10) days of the entry of this Order.

DATED this _______ day of April 2024.

____
THE HONORABLE MARSHALL L. FERGUSON

Presented by:

ROBERT W. FERGUSON
Attorney General

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DECLARATION OF SERVICE
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I declare that I caused the foregoing document to be electronically served through the
3
Court's Electronic Filing System on all counsel of record in this action.
4
DATED this 3rd day of April 2024 in Seattle, Washington.
5
s/Paula Pera C.
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PAULA PERA C., WSBA No. 54630

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6 The Honorable Marshall L. Ferguson
Hearing Date: April 26, 2024 at 1:30 p.m.
7 With Oral Argument

8 **STATE OF WASHINGTON**
KING COUNTY SUPERIOR COURT
9

STATE OF WASHINGTON, Plaintiff, v. THE KROGER CO., ET AL., Defendants.	NO. 24-2-00977-9 SEA NOTICE OF NON-WASHINGTON AUTHORITIES CITED IN THE STATE OF WASHINGTON'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

10
11
12
13
14

15 Pursuant to Local Civil Rule 7(b)(5)(B)(v), Plaintiff State of Washington provides copies
16 of the non-Washington Authorities cited, in alphabetical order, in its Opposition To Defendants'
17 Motion To Dismiss:

18 1. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)
19 2. *Am. Trucking Ass'ns, Inc. v. New York State Thruway Auth.*, 886 F.3d 238
20 (2d Cir. 2018)
21 3. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)
22 4. *California v. Am. Stores Co.*, 495 U.S. 271 (1990)
23 5. *California v. ARC Am. Corp.*, 490 U.S. 93 (1989)
24 6. *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985)
25 7. *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020)
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8. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020)
9. *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001)
10. *Fed. Trade Comm'n v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016)
11. *Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015)
12. *Hilb Rogal & Hobbs Co. v. Rick Strategy Partners, Inc.*, No. CIV.A.3:05CV355, 2006 WL 5908727 (E.D. Va. Feb. 10, 2006)
13. *Laidlaw Acquisition Corp. v. Mayflower Grp., Inc.*, 636 F. Supp. 1513 (S.D. Ind. 1986)
14. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023)
15. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968)
16. *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495 (7th Cir. 2017)
17. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)
18. *Richard v. Buhl*, 77 Mich. 632 (1889)
19. *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015)
20. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984)
21. *State of Ga. v. Pennsylvania R. Co.*, 324 U.S. 439 (1945)
22. *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017)
23. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961)
24. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)
25. *Washington v. FDA*, 668 F. Supp. 3d 1125 (E.D. Wash. Apr. 7, 2023)

DATED this 3rd day of April 2024.

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DECLARATION OF SERVICE

I declare that I caused the foregoing document to be electronically served through the Court's Electronic Filing System on all counsel of record in this action.

DATED this 3rd day of April 2024, in Seattle, Washington.

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101 S.Ct. 633
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY, Petitioner,
v.
Lavina HAGUE, Personal Representative of Hague's Estate.

No. 79–938
|
Argued Oct. 6, 1980.
|
Decided Jan. 13, 1981.
|
Rehearing Denied March 2, 1981.
|
See 450 U.S. 971, 101 S.Ct. 1494.

Synopsis
Wife, whose husband was killed in Wisconsin when motorcycle on which he was a passenger was struck from behind by an automobile brought suit in Minnesota against issuer of insurance policy covering three vehicles owned by husband, seeking to “stack” uninsured motorist coverages available thereunder. The District Court, Allen Oleisky, J., rendered judgment for the widow, who sued as personal representative, and insurer appealed. The Minnesota Supreme Court affirmed, 289 N.W.2d 43. Certiorari was granted. The Supreme Court, Justice Brennan, held that neither due process clause nor full faith and credit clause were violated by application of Minnesota law to allow “stacking” where although policy was issued in Wisconsin and at time of accident all parties were Wisconsin residents the husband had worked in Minnesota for 16 years preceding his death, at all times insurer was present and doing business in Minnesota and widow, for bona fide reasons, had become a Minnesota resident prior to institution of suit, and fact that husband was not killed while commuting to work or while in Minnesota did not dictate a different result.

Affirmed.

Justice Stevens filed an opinion concurring in the judgment.

Justice Powell filed a dissenting opinion, in which The Chief Justice and Justice Rehnquist join.

Justice Stewart took no part in consideration or decision of the case.

Procedural Posture(s): On Appeal.

****634** *Syllabus* *

***302** Respondent's husband died of injuries suffered when a motorcycle on which he was a passenger was struck by an automobile. The accident occurred in Wisconsin near the Minnesota border. The operators of both vehicles were Wisconsin residents, as was the decedent, who, however, had been employed in Minnesota and had commuted daily to work from Wisconsin. Neither vehicle operator carried valid insurance, but the decedent held a policy issued by petitioner covering three automobiles owned by him and containing an uninsured motorist clause insuring him against loss incurred from accidents with uninsured motorists, but limiting such coverage to $15,000 for each automobile. After the accident, respondent moved to and became a resident of Minnesota, and was subsequently appointed in that State as personal representative of her husband's

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estate. She then brought an action in a Minnesota court seeking a declaration under Minnesota law that the $15,000 uninsured motorist coverage on each of her late husband's three automobiles could be "stacked" to provide total coverage of $45,000. Petitioner defended on the ground that whether the three uninsured motorist coverages could be stacked should be determined by Wisconsin law, since the insurance policy was delivered in Wisconsin, the accident occurred there, and all persons involved were Wisconsin residents at the time of the accident. The trial court, interpreting Wisconsin law to disallow stacking, concluded that Minnesota's choice–of–law rules required the application of Minnesota law permitting stacking, and granted summary judgment for respondent. The Minnesota Supreme Court affirmed.

Held : The judgment is affirmed. Pp. 637–644; 645–650.

Minn., 289 N.W.2d 43, affirmed.

Justice BRENNAN, joined by Justice WHITE, Justice MARSHALL, and Justice BLACKMUN, concluded that Minnesota has a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of ****635** its law is neither arbitrary nor fundamentally unfair, and, accordingly, the choice of law by the Minnesota Supreme Court does not violate the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause. Pp. 637–644.

***303** a) Respondent's decedent was a member of Minnesota's work force. The State of employment has police power responsibilities towards nonresident employees that are analogous to those it has towards residents, as such employees use state services and amenities and may call upon state facilities in appropriate circumstances. Also, the State's interest in its commuting nonresident employees, such as the respondent's decedent, reflects a state concern for the safety and well–being of its work force and the concomitant effect on Minnesota employers. That the decedent was not killed while commuting to work or while in Minnesota does not dictate a different result, since vindication of the rights of the estate of a Minnesota employee is an important state concern. Nor does the decedent's residence in Wisconsin constitutionally mandate application of Wisconsin law to the exclusion of forum law. Employment status is not a sufficiently less important status than residence, when combined with the decedent's daily commute across state lines and the other Minnesota contacts present, to prohibit the choice–of–law result in this case on constitutional grounds. Pp. 640–642.

(b) Petitioner was at all times present and doing business in Minnesota. By virtue of such presence, petitioner can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved. Moreover, such presence gave Minnesota an interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident and court–appointed representative (respondent) and a longstanding member of Minnesota's work force (respondent's decedent). Pp. 642–643.

(c) Respondent became a Minnesota resident prior to institution of the instant litigation. Such residence and subsequent appointment in Minnesota as personal representative of her late husband's estate constitute a Minnesota contact which gives Minnesota an interest in respondent's recovery. Pp. 643–644.

Justice STEVENS concluded:

1. The Full Faith and Credit Clause did not require Minnesota, the forum State, to apply Wisconsin law to the contract–interpretation question presented. Although the Minnesota courts' decision to apply Minnesota law was unsound as a matter of conflicts law, no threat to Wisconsin's sovereignty ensued from allowing the substantive question as to the meaning of the insurance contract to be determined by the law of another State. Pp. 645–647.

2. The Due Process Clause of the Fourteenth Amendment did not prevent Minnesota from applying its own law. Neither the "stacking" rule itself nor Minnesota's application of it to these litigants raised any ***304** serious question of fairness. Nor did the Minnesota courts' decision to apply this rule violate due process because that decision frustrated the contracting parties'

reasonable expectations. The decision was consistent with due process because it did not result in unfairness to either litigant, nor because Minnesota had an interest in the plaintiff as resident or the decedent as employee. Pp. 647–650.

Attorneys and Law Firms

Mark M. Nolan, St. Paul, Minn., for petitioner.

Andreas F. Lowenfeld, New York City, for respondent.

Opinion

Justice BRENNAN announced the judgment of the Court and delivered an opinion, in which Justice WHITE, Justice MARSHALL, and Justice BLACKMUN joined.

This Court granted certiorari to determine whether the Due Process Clause of the ****636** Fourteenth Amendment [1] or the Full Faith and Credit Clause of Art. IV, § 1, [2] of the United States Constitution bars the Minnesota Supreme Court's choice of substantive Minnesota law to govern the effect of a provision in an insurance policy issued to respondent's decedent. 444 U.S. 1070, 100 S.Ct. 1012, 62 L.Ed.2d 750 (1980).

***305** I

Respondent's late husband, Ralph Hague, died of injuries suffered when a motorcycle on which he was a passenger was struck from behind by an automobile. The accident occurred in Pierce County, Wis., which is immediately across the Minnesota border from Red Wing, Minn. The operators of both vehicles were Wisconsin residents, as was the decedent, who, at the time of the accident, resided with respondent in Hager City, Wis., which is one and one–half miles from Red Wing. Mr. Hague had been employed in Red Wing for the 15 years immediately preceding his death and had commuted daily from Wisconsin to his place of employment.

Neither the operator of the motorcycle nor the operator of the automobile carried valid insurance. However, the decedent held a policy issued by petitioner Allstate Insurance Co. covering three automobiles owned by him and containing an uninsured motorist clause insuring him against loss incurred from accidents with uninsured motorists. The uninsured motorist coverage was limited to $15,000 for each automobile. [3]

After the accident, but prior to the initiation of this lawsuit, respondent moved to Red Wing. Subsequently, she married a Minnesota resident and established residence with her new husband in Savage, Minn. At approximately the same time, a Minnesota Registrar of Probate appointed respondent personal representative of her deceased husband's estate. Following her appointment, she brought this action in Minnesota District Court seeking a declaration under Minnesota law that the $15,000 uninsured motorist coverage on each of her late husband's three automobiles could be “stacked” to provide total coverage of $45,000. Petitioner defended on the ground that whether the three uninsured motorist ***306** coverages could be stacked should be determined by Wisconsin law, since the insurance policy was delivered in Wisconsin, the accident occurred in Wisconsin, and all persons involved were Wisconsin residents at the time of the accident.

The Minnesota District Court disagreed. Interpreting Wisconsin law to disallow stacking, the court concluded that Minnesota's choice–of–law rules required the application of Minnesota law permitting stacking. The court refused to apply Wisconsin law as “inimical to the public policy of Minnesota” and granted summary judgment for respondent. [4]

The Minnesota Supreme Court, sitting en banc, affirmed the District Court.[5] The court, also interpreting Wisconsin law to prohibit stacking,[6] applied Minnesota law ****637** after analyzing the relevant Minnesota contacts and interests within the analytical framework developed by Professor Leflar.[7] See Leflar, Choice–Influencing Considerations in Conflicts Law, 41 N.Y.U.L.Rev. 267 (1966). The state court, therefore, examined the conflict–of–laws issue in terms of (1) predictability of result, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law. Although stating that the Minnesota contacts might not be, “in themselves, sufficient to mandate application of [Minnesota] law,”[8] ***307** 289 N.W.2d 43, 49 1978), under the first four factors, the court concluded that the fifth factor–application of the better rule of law–favored selection of Minnesota law. The court emphasized that a majority of States allow stacking and that legal decisions allowing stacking “are fairly recent and well considered in light of current uses of automobiles.” *Ibid.* In addition, the court found the Minnesota rule superior to Wisconsin's “because it requires the cost of accidents with uninsured motorists to be spread more broadly through insurance premiums than does the Wisconsin rule.” *Ibid.* Finally, after rehearing en banc,[9] the court buttressed its initial opinion by indicating “that contracts of insurance on motor vehicles are in a class by themselves” since an insurance company “knows the automobile is a movable item which will be driven from state to state.” 289 N.W.2d, at 50 (1979). From this premise the court concluded that application of Minnesota law was “not so arbitrary and unreasonable as to violate due process.” *Ibid.*

II

It is not for this Court to say whether the choice–of–law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice–of–law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations. Implicit in this inquiry is the recognition, long accepted by this Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction. See, *e. g. Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 72–73, 75 S.Ct. 166, 169–170, 99 L.Ed. 74 (1954); n.11, *infra*. See generally ***308** *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179, 181–182, 84 S.Ct. 1197, 1198, 12 L.Ed. 229 (1964) (hereinafter cited as *Clay II*). As a result, the forum State may have to select one law from among the laws of several jurisdictions having some contact with the controversy.

In deciding constitutional choice–of–law questions, whether under the Due Process Clause or the Full Faith and Credit Clause,[10] this Court has traditionally examined ****638** the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. See *Clay II, supra*, at 183, 84 S.Ct., at 1199. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, see *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 542, 55 S.Ct. 518, 521, 79 L.Ed. 1044 (1935), the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.[11]

***309** Two instructive examples of such invalidation are *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930), and *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936). In both cases, the selection of forum law rested exclusively on the presence of one nonsignificant forum contact.

Home Ins. Co. v. Dick involved interpretation of an insurance policy which had been issued in Mexico, by a Mexican insurer, to a Mexican citizen, covering a Mexican risk. The policy was subsequently assigned to Mr. Dick, who was domiciled in Mexico and “physically present and acting in Mexico,” 281 U.S., at 408, 50 S.Ct., at 341, although he remained a nominal, permanent

resident of Texas. The policy restricted coverage to losses occurring in certain Mexican waters and, indeed the loss occurred in those waters. Dick brought suit ***310** in Texas against a New York reinsurer. Neither the Mexican insurer nor the New York reinsurer had any connection to Texas. [12] The Court held that application of Texas law to void the insurance contract's limitation–of–actions clause violated due process. [13]

****639** The relationship of the forum State to the parties and the transaction was similarly attenuated in *John Hancock Mutual Life Ins. Co. v. Yates*. There, the insurer, a Massachusetts corporation, issued a contract of insurance on the life of a New York resident. The contract was applied for, issued, and delivered in New York where the insured and his spouse resided. After the insured died in New York, his spouse moved to Georgia and brought suit on the policy in Georgia. Under Georgia law, the jury was permitted to take into account oral modifications when deciding whether an insurance policy application contained material misrepresentations. Under New York law, however, such misrepresentations were to be evaluated solely on the basis of the written application. The Georgia court applied Georgia law. This Court reversed finding application of Georgia law to be unconstitutional.

Dick and *Yates* stand for the proposition that if a State has only an insignificant contact with the parties and the ***311** occurrence or transaction, application of its law is unconstitutional. [14] *Dick* concluded that nominal residence—standing alone—was inadequate; *Yates* held that a postoccurrence change of residence to the forum State—standing alone—was insufficient to justify application of forum law. Although instructive as extreme examples of selection of forum law, neither *Dick* nor *Yates* governs this case. For in contrast to those decisions, here the Minnesota contacts with the parties and the occurrence are obviously significant. Thus, this case is like *Alaska Packers, Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947), and *Clay II*—cases where this Court sustained choice–of–law decisions based on the contacts of the State, whose law was applied, with the parties and occurrence.

In *Alaska Packers*, the Court upheld California's application of its Workmen's Compensation Act, where the most significant contact of the worker with California was his execution of an employment contract in California. The worker, a nonresident alien from Mexico, was hired in California for seasonal work in a salmon canning factory in Alaska. As part of the employment contract, the employer, who was doing business in California, agreed to transport the worker to Alaska and to return him to California when the work was completed. Even though the employee contracted to be bound by the Alaska Workmen's Compensation Law and was injured in Alaska, he sought an award under the California Workmen's Compensation Act. The Court held that the choice of California law was not "so arbitrary or unreasonable as to amount to a denial of due process," 294 U.S., at 542, because "[w]ithout a remedy in California, [he] would be remediless," *ibid.*, and because of California's interest that the worker not become a public charge, *ibid.* [15]

***312** In *Cardillo v. Liberty Mutual Ins. Co., supra*, a District of Columbia resident, employed by a District of Columbia employer and assigned by the employer for the three years prior to his death to work in Virginia, was killed in an automobile crash in Virginia in the course of his daily commute home from work. The Court found the District's contacts with the parties and the occurrence sufficient to satisfy constitutional requirements, based on the employee's residence in the District, his commute between home and the Virginia workplace, and his status as an employee of a company "engaged in ****640** electrical construction work in the District of Columbia and surrounding areas." *Id.*, at 471, 67 S.Ct., at 803. [16]
Similarly, *Clay II* upheld the constitutionality of the application of forum law. There, a policy of insurance had issued in Illinois to an Illinois resident. Subsequently the insured moved to Florida and suffered a property loss in Florida. Relying explicitly on the nationwide coverage of the policy and the presence of the insurance company in Florida and implicitly on the plaintiff's Florida residence and the occurrence of the property loss in Florida, the Court sustained the Florida court's choice of Florida law.

The lesson from *Dick* and *Yates*, which found insufficient forum contacts to apply forum law, and from *Alaska Packers, Cardillo*, and *Clay II*, which found adequate contacts to sustain the choice of forum law, [17] is that for a State's substantive ***313** law

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to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. Application of this principle to the facts of this case persuades us that the Minnesota Supreme Court's choice of its own law did not offend the Federal Constitution.

III

Minnesota has three contacts with the parties and the occurrence giving rise to the litigation. In the aggregate, these contacts permit selection by the Minnesota Supreme Court of Minnesota law allowing the stacking of Mr. Hague's uninsured motorist coverages.

First, and for our purposes a very important contact, Mr. Hague was a member of Minnesota's work force, having been employed by a Red Wing, Minn., enterprise for the 15 ***314** years preceding his death. While employment status may implicate a state interest less substantial than does resident status, that interest is nevertheless important. The State of employment has police power responsibilities towards the nonresident employee that are analogous, if somewhat less profound, than towards residents. Thus, such employees use state services and amenities and may call upon state facilities in appropriate circumstances.

In addition, Mr. Hague commuted to work in Minnesota, a contact which was important in *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S., at 475–476, 67 S.Ct., at 805–806 (daily commute between residence in ****641** District of Columbia and workplace in Virginia), and was presumably covered by his uninsured motorist coverage during the commute. [18] The State's interest in its commuting nonresident employees reflects a state concern for the safety and well–being of its work force and the concomitant effect on Minnesota employers.

That Mr. Hague was not killed while commuting to work or while in Minnesota does not dictate a different result. To hold that the Minnesota Supreme Court's choice of Minnesota law violated the Constitution for that reason would require too narrow a view of Minnesota's relationship with the parties and the occurrence giving rise to the litigation. An automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected to the occurrence. [19] ***315** Similarly, the occurrence of a crash fatal to a Minnesota employee in another State is a Minnesota contact. [20] If Mr. Hague had only been injured and missed work for a few weeks the effect on the Minnesota employer would have been palpable and Minnesota's interest in having its employee made whole would be evident. Mr. Hague's death affects Minnesota's interest still more acutely, even though Mr. Hague will not return to the Minnesota work force. Minnesota's work force is surely affected by the level of protection the State extends to it, either directly or indirectly. Vindication of the rights of the estate of a Minnesota employee, therefore, is an important state concern.

Mr. Hague's residence in Wisconsin does not—as Allstate seems to argue—constitutionally mandate application of Wisconsin law to the exclusion of forum law. [21] If, in the instant ***316** case, the accident had occurred in Minnesota between Mr. Hague and an uninsured Minnesota motorist, if the insurance contract had been executed ****642** in Minnesota covering a Minnesota registered company automobile which Mr. Hague was permitted to drive, and if a Wisconsin court sought to apply Wisconsin law, certainly Mr. Hague's residence in Wisconsin, his commute between Wisconsin and Minnesota, and the insurer's presence in Wisconsin should be adequate to apply Wisconsin's law. [22] See generally ***317** *Cardillo v. Liberty Mutual Ins. Co., supra*; *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1935); *Home Ins. Co. v. Dick*, 281 U.S., at 408, n.5, 50 S.Ct., at 341. Employment status is not a sufficiently less important status than residence, see generally *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1955); *Alaska Packers Assn. v. Industrial Accident Comm'n, supra*, when combined with Mr. Hague's daily commute across state lines and the other Minnesota contacts present, to prohibit the choice–of–law result in this case on constitutional grounds.

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Second, Allstate was at all times present and doing business in Minnesota. [23] By virtue of its presence, Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation ***318** in which the company is involved. "Particularly since the company was licensed to do ****643** business in [the forum], it must have known it might be sued there, and that [the forum] courts would feel bound by [forum] law." [24] *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207, 221, 80 S.Ct. 1222, 1230, 4 L.Ed.2d 1170 (1960) (Black, J., dissenting). [25] Moreover, Allstate's presence in Minnesota gave Minnesota an interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident and court-appointed representative—respondent—and a longstanding member of Minnesota's work force—Mr. Hague. See *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316, 63 S.Ct. 602, 604, 87 L.Ed. 777 (1943).

Third, respondent became a Minnesota resident prior to institution of this litigation. The stipulated facts reveal that she first settled in Red Wing, Minn., the town in which ***319** her late husband had worked. [26] She subsequently moved to Savage, Minn., after marrying a Minnesota resident who operated an automobile service station in Bloomington, Minn. Her move to Savage occurred "almost concurrently," 289 N.W.2d, at 45, with the initiation of the instant case. [27] There is no suggestion that Mrs. Hague moved to Minnesota in anticipation of this litigation or for the purpose of finding a legal climate especially hospitable to her claim. [28] The stipulated facts, sparse as they are, negate any such inference.

While *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936), held that a postoccurrence change of residence to the forum State was insufficient in and of itself to confer power on the forum State to choose its law, that case did not hold that such a change of residence was irrelevant. Here, of course, respondent's bona fide residence in Minnesota was not the sole contact Minnesota had with this litigation. And in connection with her residence in Minnesota, respondent was appointed personal representative of Mr. Hague's estate by the Registrar of Probate for the County of Goodhue, Minn. Respondent's residence and subsequent appointment in Minnesota as personal representative of her late husband's estate constitute a Minnesota contact which gives Minnesota an interest in respondent's recovery, an interest which the court below identified as full compensation for "resident accident ****644** victims" to keep them "off welfare rolls" and able "to meet financial obligations." 289 N.W.2d, at 49.

***320** In sum, Minnesota had a significant aggregation [29] of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair. Accordingly, the choice of Minnesota law by the Minnesota Supreme Court did not violate the Due Process Clause or the Full Faith and Credit Clause.
Affirmed.

Justice STEWART took no part in the consideration or decision of this case.

Justice STEVENS, concurring in the judgment.
As I view this unusual case—in which neither precedent nor constitutional language provides sure guidance—two separate questions must be answered. First, does the Full Faith and Credit Clause [1] *require* Minnesota, the forum State, to apply Wisconsin law? Second, does the Due Process Clause [2] of the Fourteenth Amendment *prevent* Minnesota from applying its own law? The first inquiry implicates the federal interest in ensuring that Minnesota respect the sovereignty of the State of Wisconsin; the second implicates the litigants' interests in a fair adjudication of their rights. [3]

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***321** I realize that both this Court's analysis of choice–of–law questions [4] and scholarly criticism of those decisions [5] have treated these ****645** two inquiries as though they were indistinguishable. ***322** [6] Nevertheless, I am persuaded that the two constitutional provisions protect different interests and that proper analysis requires separate consideration of each.

I

The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 271–272, 100 S.Ct. 2647, 2655–2656, 65 L.Ed.2d 757 (1980) (plurality opinion); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276–277, 56 S.Ct. 229, 233–234, 80 L.Ed. 220 (1935). [7] The Full Faith and Credit Clause implements this design by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty. The Clause does not, however, rigidly ***323** require the forum State to apply foreign law whenever another State has a valid interest in the litigation. See *Nevada v. Hall*, 440 U.S. 410, 424, 99 S.Ct. 1182, 1190, 59 L.Ed.2d 416 (1979); *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 546–548, 55 S.Ct. 518, 523–524, 79 L.Ed. 1044 (1935); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501–502, 59 S.Ct. 629, 632–633, 83 L.Ed. 940 (1939). [8] On the contrary, in view of the fact that the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests. [9] Accordingly, the fact that a choice–of–law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause. Rather in my opinion, the Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing ****646** upon the legitimate interests of another State. [10]

***324** In this case, I think the Minnesota courts' decision to apply Minnesota law was plainly unsound as a matter of normal conflicts law. Both the execution of the insurance contract and the accident giving rise to the litigation took place in Wisconsin. Moreover, when both of those events occurred the plaintiff, the decedent, and the operators of both vehicles were all residents of Wisconsin. Nevertheless, I do not believe that any threat to national unity or Wisconsin's sovereignty ensues from allowing the substantive question presented by this case to be determined by the law of another State.

The question on the merits is one of interpreting the meaning of the insurance contract. Neither the contract itself, nor anything else in the record, reflects any express understanding of the parties with respect to what law would be applied or with respect to whether the separate uninsured motorist coverage for each of the decedent's three cars could be "stacked." Since the policy provided coverage for accidents that might occur in other States, it was obvious to the parties at the time of contracting that it might give rise to the application of the law of States other than Wisconsin. Therefore, while Wisconsin may have an interest in ensuring that contracts formed in Wisconsin in reliance upon Wisconsin law are interpreted in accordance with that law, that interest is not implicated in this case. [11]

***325** ****647** Petitioner has failed to establish that Minnesota's refusal to apply Wisconsin law poses any direct [12] or indirect threat to Wisconsin's sovereignty. [13] In the absence of any such ***326** threat, I find it unnecessary to evaluate the forum State's interest in the litigation in order to reach the conclusion that the Full Faith and Credit Clause does not require the Minnesota courts to apply Wisconsin law to the question of contract interpretation presented in this case.

II

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It may be assumed that a choice–of–law decision would violate the Due Process Clause if it were totally arbitrary or if it were fundamentally unfair to either litigant. I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State. [14] The forum State's interest in the fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction.

The forum State's interest in the efficient operation of its judicial system is clearly not sufficient, however, to justify the application of a rule of law that is fundamentally unfair to one of the litigants. Arguably, a litigant could demonstrate such unfairness in a variety of ways. Concern about the fairness of the forum's choice of its own rule might arise ***327** if that rule favored residents over nonresidents, if it represented a dramatic departure from the rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied. [15]

The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law. A choice–of–law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a ****648** litigant has been the central concern in this Court's review of choice–of–law decisions under the Due Process Clause. [16]

Neither the "stacking" rule itself, nor Minnesota's application of that rule to these litigants, raises any serious question of fairness. As the plurality observes, "[s]tacking was ***328** the rule in most States at the time the policy was issued." *Ante*, at 642, n. 22. [17] Moreover, the rule is consistent with the economics of a contractual relationship in which the policyholder paid three separate premiums for insurance coverage for three automobiles, including a separate premium for each uninsured motorist coverage. [18] Nor am I persuaded that the decision of the Minnesota courts to apply the "stacking" rule in this case can be said to violate due process because that decision frustrates the reasonable expectations of the contracting parties.

Contracting parties can, of course, make their expectations explicit by providing in their contract either that the law of a particular jurisdiction shall govern questions of contract interpretation, [19] or that a particular substantive rule, for instance "stacking," shall or shall not apply. [20] In the absence ***329** of such express provisions, the contract nonetheless may implicitly reveal the expectations of the parties. For example, if a liability insurance policy issued by a resident of a particular State provides coverage only with respect to accidents within ****649** that State, it is reasonable to infer that the contracting parties expected that their obligations under the policy would be governed by that State's law. [21]

In this case, no express indication of the parties' expectations is available. The insurance policy provided coverage for accidents throughout the United States; thus, at the time of contracting, the parties certainly could have anticipated that the law of States other than Wisconsin would govern particular claims arising under the policy. [22] By virtue of doing business ***330** in Minnesota, Allstate was aware that it could be sued in the Minnesota courts; Allstate also presumably was aware that Minnesota law, as well as the law of most States, permitted "stacking." Nothing in the record requires that a different inference be drawn. Therefore, the decision of the Minnesota courts to apply the law of the forum in this case does not frustrate the reasonable expectations of the contracting parties, and I can find no fundamental unfairness in that decision requiring the attention of this Court. [23]

***331** In terms of fundamental fairness, it seems to me that two factors relied upon by the plurality—the plaintiff's postaccident move to Minnesota and the decedent's Minnesota employment—are either irrelevant to or possibly even tend to undermine the plurality's conclusion. When the expectations of the parties at the time of contracting are the central due process concern, as they are in this case, an unanticipated post–accident occurrence is clearly irrelevant for due process purposes. The fact that

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the plaintiff became a resident of the forum State after the accident surely cannot justify a ruling in her favor that would not be made if the plaintiff were a nonresident. Similarly, ****650** while the fact that the decedent regularly drove into Minnesota might be relevant to the expectations of the contracting parties,[24] the fact that he did so because he was employed in Minnesota adds nothing to the due process analysis. The choice–of–law decision of the Minnesota courts is consistent with due process because it does not result in unfairness to either litigant, not because Minnesota now has an interest in the plaintiff as resident or formerly had an interest in the decedent as employee.

III

Although I regard the Minnesota courts' decision to apply forum law as unsound as a matter of conflicts law, and there ***332** is little in this record other than the presumption in favor of the forum's own law to support that decision, I concur in the plurality's judgment. It is not this Court's function to establish and impose upon state courts a federal choice–of–law rule, nor is it our function to ensure that state courts correctly apply whatever choice–of–law rules they have themselves adopted.[25] Our authority may be exercised in the choice–of–law area only to prevent a violation of the Full Faith and Credit or the Due Process Clause. For the reasons stated above, I find no such violation in this case.

Justice POWELL, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, dissenting.
My disagreement with the plurality is narrow. I accept with few reservations Part II of the plurality opinion, which sets forth the basic principles that guide us in reviewing state choice–of–law decisions under the Constitution. The Court should invalidate a forum State's decision to apply its own law only when there are no significant contacts between the State and the litigation. This modest check on state power is mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Art. IV, § 1. I do not believe, however, that the plurality adequately analyzes the policies such review must serve. In consequence, it has found significant what appear to me to be trivial contacts between the forum State and the litigation.

***333** I

At least since *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1955), the Court has recognized that both the Due Process and the Full Faith and Credit Clauses are satisfied if the forum has such significant contacts with the litigation that it has a legitimate state interest in applying its own law. The significance of asserted contacts must be evaluated in light of the constitutional policies that oversight by this Court should serve. Two enduring policies emerge from our cases.

First, the contacts between the forum State and the litigation should not be so "slight and casual" that it would be fundamentally ****651** unfair to a litigant for the forum to apply its own State's law. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 182, 84 S.Ct. 1197, 1198, 12 L.Ed.2d 229 (1964). The touchstone here is the reasonable expectation of the parties. See Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L.Rev. 449, 445–457 (1959) (Weintraub). Thus, in *Clay*, the insurer sold a policy to Clay " 'with knowledge that he could take his property anywhere in the world he saw fit without losing the protection of his insurance.' " 377 U.S., at 182, 84 S.Ct., at 1198, quoting *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 221, 80 S.Ct. 1222, 1230, 4 L.Ed.2d 1170 (1960) (Black, J., dissenting). When the insured moved to Florida with the knowledge of the insurer, and a loss occurred in that State, this Court found no unfairness in Florida's applying its own rule of decision to permit recovery on the policy. The insurer "must have known it might be sued there." *Ibid*. See also *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1954).[1]

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***334** Second, the forum State must have a legitimate interest in the outcome of the litigation before it. *Pacific Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 (1939). The Full Faith and Credit Clause addresses the accommodation of sovereign power among the various States. Under limited circumstances, it requires one State to give effect to the statutory law of another State. *Nevada v. Hall*, 440 U.S. 410, 423, 99 S.Ct. 1182, 1189, 59 L.Ed.2d 416 (1979). To be sure, a forum State need not give effect to another State's law if that law is in "violation of its own legitimate public policy." *Id.*, at 422, 99 S.Ct., at 1189. Nonetheless, for a forum State to further its legitimate public policy by applying its own law to a controversy, there must be some connection between the facts giving rise to the litigation and the scope of the State's lawmaking jurisdiction.
Both the Due Process and Full Faith and Credit Clauses ensure that the States do not "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980) (addressing Fourteenth Amendment limitations on state-court jurisdiction). As the Court stated in *Pacific Ins. Co., supra*: "[T]he full faith and credit clause does not require one state to substitute for its own statute, *applicable to persons and events within it*, the conflicting statute of another state." *Id.*, 306 U.S., at 502, 59 S.Ct., at 633 (emphasis added). The State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed. To assess the sufficiency of asserted contacts between the forum and the litigation, the court must determine if the contacts form a reasonable link between the litigation and a state policy. In short, examination of contacts addresses whether "the state ***335** has an interest in the application of its policy in this instance." Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, in B. Currie, Selected Essays on the Conflict of Laws 188, 189 (1963) (Currie). If it does, the Constitution is satisfied.

John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936), illustrates this principle. A life insurance policy was executed in New York, ****652** on a New York insured with a New York beneficiary. The insured died in New York; his beneficiary moved to Georgia and sued to recover on the policy. The insurance company defended on the ground that the insured, in the application for the policy, had made materially false statements that rendered it void under New York law. This Court reversed the Georgia court's application of its contrary rule that all questions of the policy's validity must be determined by the jury. The Court found a violation of the Full Faith and Credit Clause, because "[i]n respect to the accrual of the right asserted under the contract ... there was no occurrence, nothing done, to which the law of Georgia could apply." *Id.*, at 182, 57 S.Ct., at 131. In other words, the Court determined that Georgia had no legitimate interest in applying its own law to the legal issue of liability. Georgia's contacts with the contract of insurance were nonexistent. [2] See *Home Ins. Co. v. Dick*, 281 U.S. 397, 408, 50 S.Ct. 338, 341, 74 L.Ed. 926 (1930).

In summary, the significance of the contacts between a forum State and the litigation must be assessed in light of ***336** these two important constitutional policies. [3] A contact, or a pattern of contacts, satisfies the Constitution when it protects the litigants from being unfairly surprised if the forum State applies its own law, and when the application of the forum's law reasonably can be understood to further a legitimate public policy of the forum State.

II

Recognition of the complexity of the constitutional inquiry requires that this Court apply these principles with restraint. Applying these principles to the facts of this case, I do not believe, however, that Minnesota had sufficient contacts with the "persons and events" in this litigation to apply its rule permitting stacking. I would agree that no reasonable expectations of the parties were frustrated. The risk insured by petitioner was not geographically limited. See *Clay v. Sun Ins. Office, Ltd., supra*, 377

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U.S., at 182, 84 S.Ct., at 1198. The close proximity of Hager City, Wis., to Minnesota, and the fact that Hague commuted daily to Red Wing, Minn., for many years should have led the insurer to realize that there was a reasonable probability that the risk would materialize in Minnesota. Under our precedents, it is plain that Minnesota could have applied its own law to an accident occurring within its borders. See *ante*, at 643, n. 24. The fact that the accident did not, in fact, occur in Minnesota is not controlling because the expectations of the litigants *before* the cause of ***337** action accrues provide the pertinent perspective. See Weintraub at 445; n.1, *supra*.

The more doubtful question in this case is whether application of Minnesota's substantive law reasonably furthers a legitimate state interest. The plurality attempts to give substance to the tenuous contacts between Minnesota and this litigation. Upon examination, however, these contacts are ****653** either trivial or irrelevant to the furthering of any public policy in Minnesota.

First, the postaccident residence of the plaintiff–beneficiary is constitutionally irrelevant to the choice–of–law question. *John Hancock Mut. Life Ins. Co. v. Yates, supra*. The plurality today insists that *Yates* only held that a postoccurrence move to the forum State could not "in and of itself" confer power on the forum to apply its own law, but did not establish that such a change of residence was irrelevant. *Ante*, at 643. What the *Yates* Court held, however, was that "there was no occurrence, *nothing* done, to which the law of Georgia could apply." 299 U.S., at 182, 57 S.Ct. at 131, (emphasis added). Any possible ambiguity in the Court's view of the significance of a postoccurrence change of residence is dispelled by *Home Ins. Co. v. Dick, supra*, cited by the *Yates* Court, where it was held squarely that Dick's postaccident move to the forum State was "without significance." 281 U.S., at 408, 50 S.Ct., at 341.

This rule is sound. If a plaintiff could choose the substantive rules to be applied to an action by moving to a hospitable forum, the invitation to forum shopping would be irresistible. Moreover, it would permit the defendant's reasonable expectations at the time the cause of action accrues to be frustrated, because it would permit the choice–of–law question to turn on a postaccrual circumstance. Finally, postaccrual residence has nothing to do with facts to which the forum State proposes to apply its rule; it is unrelated to the substantive legal issues presented by the litigation.

Second, the plurality finds it significant that the insurer does business in the forum State. *Ante*, at 642–643. The State ***338** does have a legitimate interest in regulating the practices of such an insurer. But this argument proves too much. The insurer here does business in all 50 States. The forum State has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State.[4] See *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 319, 63 S.Ct. 602, 606, 87 L.Ed. 777 (1943). The plurality recognizes this flaw and attempts to bolster the significance of the local presence of the insurer by combining it with the other factors deemed significant: the presence of the plaintiff and the fact that the deceased worked in the forum State. This merely restates the basic question in the case.

Third, the plurality emphasizes particularly that the insured worked in the forum State.[5] *Ante*, at 640–642. The fact that the insured was a nonresident employee in the forum ***339** State provides a significant contact for the furtherance of some local policies. See, *e. g., Pacific Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 (1939) (forum State's interest in compensating workers for employment–related injuries occurring within the ****654** State); *Alaska Packers Assn. v. Industrial Accident Comm'n,* 294 U.S. 532, 549, 55 S.Ct. 518, 524, 79 L.Ed. 1044 (1935) (forum State's interest in compensating the employment–related injuries of a worker hired in the State). The insured's place of employment is not, however, significant in this case. Neither the nature of the insurance policy, the events related to the accident, nor the immediate question of stacking coverage is in any way affected or implicated by the insured's employment status. The plurality's opinion is understandably vague in explaining how trebling the benefits to be paid to the estate of a nonresident employee furthers any substantial state interest relating to employment. Minnesota does not wish its workers to die in automobile accidents, but permitting stacking will not further this interest. The substantive issue here is solely one of compensation, and whether the compensation provided by this policy is increased or not will have no relation to the State's employment policies or police power. See n. 5, *supra*.

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Neither taken separately nor in the aggregate do the contacts asserted by the plurality today indicate that Minnesota's application of its substantive rule in this case will further any legitimate state interest.[6] The plurality focuses ***340** only on physical contacts *vel non*, and in doing so pays scant attention to the more fundamental reasons why our precedents require reasonable policy–related contacts in choice–of–law cases. Therefore, I dissent.

All Citations

449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Due Process Clause of the Fourteenth Amendment provides that no State “shall ... deprive any person of life, liberty, or property, without due process of law....”

2 The Full Faith and Credit Clause, Art. IV, § 1, provides:

> “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”

3 Ralph Hague paid a separate premium for each automobile including an additional separate premium for each uninsured motorist coverage.

4 App. C to Pet. for Cert. A–29.

5 289 N.W.2d 43 (1978).

6 Respondent has suggested that this case presents a “false conflict.” The court below rejected this contention and applied Minnesota law. Even though the Minnesota Supreme Court's choice of Minnesota law followed a discussion of whether this case presents a false conflict, the fact is that the court chose to apply Minnesota law. Thus, the only question before this Court is whether that choice was constitutional.

7 Minnesota had previously adopted the conceptual model developed by Professor Leflar in *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

8 The court apparently was referring to sufficiency as a matter of choice of law and not as a matter of constitutional limitation on its choice–of–law decision.

9 289 N.W.2d, at 50 (1979).

10 This Court has taken a similar approach in deciding choice–of–law cases under both the Due Process Clause and the Full Faith and Credit Clause. In each instance, the Court has examined the relevant contacts and resulting interests of the State whose law was applied. See, *e. g., Nevada v. Hall*, 440 U.S. 410, 424, 99 S.Ct. 1182, 1190, 59 L.Ed.2d 416 (1979). Although at one time the Court required a more exacting standard under the Full Faith and Credit Clause than under the Due Process Clause for evaluating the constitutionality of choice–of–law decisions, see *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 549–550, 55 S.Ct. 518, 524–525, 79 L.Ed. 1044 (1935) (interest of State whose law was applied was no less than interest of State whose law was rejected), the Court has since abandoned the weighing–of–interests requirement. *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1955); see *Nevada v. Hall, supra*; Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L.Rev. 449 (1959). Different considerations are of course at issue when full faith and credit is to be accorded to acts, records, and proceedings outside the choice–of–law area, such as in the case of sister state–court judgments.

11 Prior to the advent of interest analysis in the state courts as the "dominant mode of analysis in modern choice of law theory," Silberman, *Shaffer v. Heitner* : The End of an Era, 53 N.Y.U.L.Rev. 33, 80, n.259 (1978); cf. *Richards v. United States*, 369 U.S. 1, 11–13, and nn.26–27, 82 S.Ct. 585, 591–593, 7 L.Ed.2d 492 (1962) (discussing trend toward interest analysis in state courts), the prevailing choice–of–law methodology focused on the jurisdiction where a particular event occurred. See, *e. g.*, Restatement of Conflict of Laws (1934). For example, in cases characterized as contract cases, the law of the place of contracting controlled the determination of such issues as capacity, fraud, consideration, duty, performance, and the like. *Id.*, § 332; see Beale, What Law Governs the Validity of a Contract, 23 Harv.L.Rev. 260, 270–271 (1910). In the tort context, the law of the place of the wrong usually governed traditional choice–of–law analysis. Restatement, *supra*, § 378; see *Richards v. United States, supra*, at 11–12, 82 S.Ct., at 591–592.

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178 (1934), can, perhaps, best be explained as an example of that period. In that case, the Court struck down application by the Mississippi courts of Mississippi law which voided the limitations provision in a fidelity bond written in Tennessee between a Connecticut insurer and Delta, both of which were doing business in Tennessee and Mississippi. By its terms, the bond covered misapplication of funds "by any employee 'in any position, anywhere. ...' " *Id.*, at 145, 54 S.Ct., at 634. After Delta discovered defalcations by one of its Mississippi-based employees, a lawsuit was commenced in Mississippi.

That case, however, has scant relevance for today. It implied a choice—of—law analysis which, for all intents and purposes, gave an isolated event—the writing of the bond in Tennessee—controlling constitutional significance, even though there might have been contacts with another State (there Mississippi) which would make application of its law neither unfair nor unexpected. See Martin, Personal Jurisdiction and Choice of Law, 78 Mich.L.Rev. 872, 874, and n.11 (1980).

12 Dick sought to obtain *quasi–in–rem* jurisdiction by garnishing the reinsurance obligation of the New York reinsurer. The reinsurer had never transacted business in Texas, but it "was cited by publication, in accordance with a Texas statute; attorneys were appointed for it by the trial court; and they filed on its behalf an answer which denied liability." 281 U.S., at 402, 50 S.Ct., at 339. There would be no jurisdiction in the Texas courts to entertain such a lawsuit today. See *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); Silberman, *supra*, at 62–65.

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13 The Court noted that the result might have been different if there had been some connection to Texas upon "which the State could properly lay hold as the basis of the regulations there imposed." *Supra*, 281 U.S., at 408, n.5, 50 S.Ct., at 341, n.5; see *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66, 71, 75 S.Ct. 166, 169, 99 L.Ed. 74 (1954).

14 See generally, Weintraub, *supra*, n.10, at 455–457.

15 The Court found no violation of the Full Faith and Credit Clause, since California's interest was considered to be no less than Alaska's, 294 U.S., at 547–548, 549–550, 55 S.Ct., at 523–524, 524–525, even though the injury occurred in Alaska while the employee was performing his contract obligations there. While *Alaska Packers* balanced the interests of California and Alaska to determine the full faith and credit issue, such balancing is no longer required. See *Nevada v. Hall*, 440 U.S., at 424, 99 S.Ct., at 1190; n.10, *supra*.

16 The precise question raised was whether the Virginia Compensation Commission "had sole jurisdiction over the claim." 330 U.S., at 472–473, 67 S.Ct., at 804. In finding that application of the District's law did not violate either due process or full faith and credit requirements, the Court in effect treated the question as a constitutional choice–of–law issue.

17 The Court has upheld choice–of–law decisions challenged on constitutional grounds in numerous other decisions. See *Nevada v. Hall, supra* (upholding California's application of California law to automobile accident in California between two California residents and a Nevada official driving car owned by State of Nevada while engaged in official business in California); *Carroll v. Lanza,* 394 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1955) (upholding Arkansas' choice of Arkansas law where Missouri employee executed employment contract with Missouri employer and was injured on job in Arkansas but was removed immediately to a Missouri hospital); *Watson v. Employers Liability Assurance Corp.,* 384 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1954) (allowing application of Louisiana direct action statute by Louisiana resident against insurer even though policy was written and delivered in another State, where plaintiff was injured in Louisiana); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 (1939) (holding Full Faith and Credit Clause not violated where California applied own Workmen's Compensation Act in case of injury suffered by Massachusetts employee temporarily in California in course of employment). Thus, *Nevada v. Hall, supra*, and *Watson v. Employers Liability Assurance Corp., supra*, upheld application of forum law where the relevant contacts consisted of plaintiff's residence and the place of the injury. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n, supra*, and *Carroll v. Lanza, infra*, relied on the place of the injury arising from the respective employee's temporary presence in the forum State in connection with his employment.

18 The policy issued to Mr. Hague provided that Allstate would pay to the insured, or his legal representative, damages "sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of [an] uninsured automobile. ..." No suggestion has been made that Mr. Hague's uninsured motorist protection is unavailable because he was not killed while driving one of his insured automobiles.

19 Numerous cases have applied the law of a jurisdiction other than the situs of the injury where there existed some other link between that jurisdiction and the occurrence. See, *e. g., Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947); *Alaska Packers Assn. v. Industrial Accident Comm'n,* 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1935); *Rosenthal v. Warren*, 475 F.2d 438 (CA2), cert. denied, 414 U.S. 856, 94 S.Ct. 159, 38 L.Ed.2d 106 (1973); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Tooker v. Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969); *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

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20 The injury or death of a resident of State A in State B is a contact of State A with the occurrence in State B. See cases cited in n.19, *supra*.

21 Petitioner's statement that the instant dispute involves the interpretation of insurance contracts which were “underwritten, applied for, and paid for by Wisconsin residents and issued covering cars garaged in Wisconsin,” Brief for Petitioner 6, is simply another way of stating that Mr. Hague was a Wisconsin resident. Respondent could have replied that the insurance contract was underwritten, applied for and paid for by a Minnesota worker, and issued covering cars that were driven to work in Minnesota and garaged there for a substantial portion of the day. The former statement is hardly more significant than the latter since the accident in any event did not involve any of the automobiles which were covered under Mr. Hague's policy. Recovery is sought pursuant to the uninsured motorist coverage.

In addition, petitioner's statement that the contracts were “underwritten ... by Wisconsin residents” is not supported by the stipulated facts if petitioner means to include itself within that phrase. Indeed, the policy, which is part of the record, recites that Allstate signed the policy in Northbrook, Ill. Under some versions of the hoary rule of *lex loci contractus*, and depending on the precise sequence of events, a sequence which is unclear from the record before us, the law of Illinois arguably might apply to govern contract construction, even though Illinois would have less contact with the parties and the occurrence than either Wisconsin or Minnesota. No party sought application of Illinois law on that basis in the court below.

22 Of course Allstate could not be certain that Wisconsin law would necessarily govern any accident which occurred in Wisconsin, whether brought in the Wisconsin courts or elsewhere. Such an expectation would give controlling significance to the wooden *lex loci delicti* doctrine. While the place of the accident is a factor to be considered in choice–of–law analysis, to apply blindly the traditional, but now largely abandoned, doctrine, Silberman, *supra*, n.11, at 80, n.259; see n.11, *supra*, would fail to distinguish between the relative importance of various legal issues involved in a lawsuit as well as the relationship of other jurisdictions to the parties and the occurrence or transaction. If, for example, Mr. Hague had been a Wisconsin resident and employee who was injured in Wisconsin and was then taken by ambulance to a hospital in Red Wing, Minn., where he languished for several weeks before dying, Minnesota's interest in ensuring that its medical creditors were paid would be obvious. Moreover, under such circumstances, the accident itself might be reasonably characterized as a bistate occurrence beginning in Wisconsin and ending in Minnesota. Thus, reliance by the insurer that Wisconsin law would necessarily govern any accident that occurred in Wisconsin, or that the law of another jurisdiction would necessarily govern any accident that did not occur in Wisconsin, would be unwarranted. See n.11, *supra*; cf. *Rosenthal v. Warren, supra* (Massachusetts hospital could not have purchased insurance with expectation that Massachusetts law would govern damages recovery as to New York patient who died in hospital and whose widow brought suit in New York).

If the law of a jurisdiction other than Wisconsin did govern, there was a substantial likelihood, with respect to uninsured motorist coverage, that stacking would be allowed. Stacking was the rule in most States at the time the policy was issued. Indeed, the Wisconsin Supreme Court, in *Nelson v. Employers Mutual Casualty Co.*, 63 Wis.2d 558, 563–566, and nn.2, 3, 217 N.W.2d 670, 672, 674, and nn.2, 3 (1974), identified 29 States, including Minnesota, whose law it interpreted to allow stacking, and only 9 States whose law it interpreted to prohibit stacking. Clearly then, Allstate could not have expected that an antistacking rule would govern any particular accident in which the insured might be involved and thus cannot claim unfair surprise from the Minnesota Supreme Court's choice of forum law.

23 The Court has recognized that examination of a State's contacts may result in divergent conclusions for jurisdiction and choice–of–law purposes. See *Kulko v. California Superior Court*, 436 U.S. 84, 98, 98 S.Ct. 1690, 1700, 56 L.Ed.2d 132 (1978) (no jurisdiction in California but California law “arguably might” apply); *Shaffer v. Heitner,* 433 U.S., at 215, 97 S.Ct., at 2585 (no jurisdiction in Delaware, although Delaware interest “may support the application of Delaware law”); cf. *Hanson v. Denckla*, 357 U.S. 235, 254, and n.27, 78 S.Ct. 1228, 1240, n.27, 2 L.Ed.2d 1283 (1958) (no jurisdiction in Florida; the “issue is personal jurisdiction, not choice of law,” an issue which the Court found

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no need to decide). Nevertheless, "both inquiries 'are often closely related and to a substantial degree depend upon similar considerations.' " *Shaffer*, 433 U.S., at 224–225, 97 S.Ct., at 2590 (BRENNAN, J., concurring in part and dissenting in part). Here, of course, jurisdiction in the Minnesota courts is unquestioned, a factor not without significance in assessing the constitutionality of Minnesota's choice of its own substantive law. Cf. *id.*, at 225, 97 S.Ct., at 2590 ("the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy").

24 There is no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law. Because Allstate was doing business in Minnesota and was undoubtedly aware that Mr. Hague was a Minnesota employee, it had to have anticipated that Minnesota law might apply to an accident in which Mr. Hague was involved. See *Clay II*, 377 U.S. 179, 182, 84 S.Ct. 1197, 1198, 12 L.Ed.2d 229 (1964); *Watson v. Employers Liability Assurance Corp.*, 348 U.S., at 72–73, 75 S.Ct., at 169; *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S., at 538–543, 55 S.Ct., at 519–522; cf. *Home Ins. Co. v. Dick*, 281 U.S., at 404, 50 S.Ct., at 340 (neither insurer nor reinsurer present in forum State). Indeed, Allstate specifically anticipated that Mr. Hague might suffer an accident either in Minnesota or elsewhere in the United States, outside of Wisconsin, since the policy it issued offered continental coverage. Cf. *id.*, at 403, 50 S.Ct., at 339 (coverage limited to losses occurring in certain Mexican waters which were outside of jurisdiction whose law was applied). At the same time, Allstate did not seek to control construction of the contract since the policy contained no choice–of–law clause dictating application of Wisconsin law. See *Clay II, supra*, at 182, 84 S.Ct., at 1198 (nationwide coverage of policy and lack of choice–of–law clause).

25 Justice Black's dissent in the first *Clay* decision, a decision which vacated and remanded a lower-court determination to obtain an authoritative construction of state law that might moot the constitutional question, subsequently commanded majority support in the second *Clay* decision. *Clay II, supra*, at 180–183, 84 S.Ct., at 1197–1199.

26 The facts do not reveal the date on which Mrs. Hague first moved to Red Wing.

27 These proceedings began on May 28, 1976. Mrs. Hague was remarried on June 19, 1976.

28 The dissent suggests that considering respondent's postoccurrence change of residence as one of the Minnesota contacts will encourage forum shopping. *Post*, at 653. This overlooks the fact that her change of residence was bona fide and not motivated by litigation considerations.

29 We express no view whether the first two contacts, either together or separately, would have sufficed to sustain the choice of Minnesota law made by the Minnesota Supreme Court.

1 Article IV, § 1, provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

2 Section 1 of the Fourteenth Amendment provides, in part:

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> "No State shall ... deprive any person of life, liberty, or property, without due process of law...."

3 The two questions presented by the choice–of–law issue arise only after it is assumed or established that the defendant's contacts with the forum State are sufficient to support personal jurisdiction. Although the choice–of–law concerns—respect for another sovereign and fairness to the litigants—are similar to the two functions performed by the jurisdictional inquiry, they are not identical. In *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980), we stated:

> "The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."

See also Reese, Legislative Jurisdiction, 78 Colum.L.Rev. 1587, 1589–1590 (1978). While it has been suggested that this same minimum–contacts analysis be used to define the constitutional limitations on choice of law, see, *e. g.*, Martin, Personal Jurisdiction and Choice of Law, 78 Mich.L.Rev. 872 (1980), the Court has made it clear over the years that the personal jurisdiction and choice–of–law inquiries are not the same. See *Kulko v. California Superior Court*, 436 U.S. 84, 98, 98 S.Ct. 1690, 1700, 56 L.Ed.2d 132 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 215, 97 S.Ct. 2569, 2585, 53 L.Ed.2d 683 (1977); *id.*, at 224–226, 97 S.Ct., at 2590–2591 (BRENNAN, J., dissenting in part); *Hanson v. Denckla*, 357 U.S. 235, 253–254, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958); *id.*, at 258, 78 S.Ct., at 1241 (Black, J., dissenting).

4 Although the Court has struck down a state court's choice of forum law on both due process, see, *e. g., Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930), and full faith and credit grounds, see, *e. g., John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936), no clear analytical distinction between the two constitutional provisions has emerged. The Full Faith and Credit Clause, of course, was inapplicable in *Home Ins. Co.* because the law of a foreign nation, rather than of a sister State, was at issue; a similarly clear explanation for the Court's reliance upon the Full Faith and Credit Clause in *John Hancock Mutual Life Ins.* cannot be found. Indeed, *John Hancock Mutual Life Ins.* is probably best understood as a due process case. See Reese, *supra*, at 1589, and n. 17; Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L.Rev. 449, 457–458 (1959).

5 See R. Leflar, American Conflicts Law § 5, p. 7, § 55, pp. 106–107 (3d ed. 1977). The Court's frequent failure to distinguish between the two Clauses in the choice–of–law context may underlie the suggestions of various commentators that either the Full Faith and Credit Clause or the Due Process Clause be recognized as the single appropriate source for constitutional limitations on choice of law. Compare Martin, Constitutional Limitations on Choice of Law, 61 Cornell L.Rev. 185 (1976) (full faith and credit), with Reese, *supra* (due process); see also Kirgis, The Roles of Due Process and Full Faith and Credit in Choice of Law, 62 Cornell L.Rev. 94 (1976).

6 Even when the Court has explicitly considered both provisions in a single case, the requirements of the Due Process and Full Faith and Credit Clauses have been measured by essentially the same standard. For example, in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1954), the Court separately considered

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the due process and full faith and credit questions. See *id.*, at 70–73, 75 S.Ct., at 168–170. However, in concluding that the Full Faith and Credit Clause did not bar the Louisiana courts from applying Louisiana law in that case, the Court substantially relied upon its preceding analysis of the requirements of due process. *Id.*, at 73, 75 S.Ct., at 170. By way of contrast, in *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 544–550, 55 S.Ct. 518, 79 L.Ed. 1044 (1935), the Court's full faith and credit analysis differed significantly from its due process analysis. However, as noted in the plurality opinion, *ante*, at 637, n. 10, the Court has since abandoned the full faith and credit standard represented by *Alaska Packers*.

7 See also Sumner, The Full–Faith–and–Credit–Clause—Its History and Purpose, 34 Or.L.Rev. 224, 242 (1955); Weintraub, *supra*, at 477; R. Leflar, *supra*, § 73, p. 143.

8 As the Court observed in *Alaska Packers, supra*, an overly rigid application of the Full Faith and Credit Clause would produce anomalous results:

> "A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." 294 U.S., at 547, 55 S.Ct., at 523.

9 For example, it is well established that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422, 99 S.Ct. 1182, 1189, 59 L.Ed.2d 416 (1979) (footnote omitted).

10 The kind of state action the Full Faith and Credit Clause was designed to prevent has been described in a variety of ways by this Court. In *Carroll v. Lanza*, 349 U.S. 408, 413, 75 S.Ct. 804, 807, 99 L.Ed. 1183 (1955), the Court indicated that the Clause would be invoked to restrain "any policy of hostility to the public Acts" of another State. In *Nevada v. Hall, supra*, at 424, n. 24, 99 S.Ct., at 1190, n. 24, we approved action which "pose[d] no substantial threat to our constitutional system of cooperative federalism." And in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272, 100 S.Ct. 2647, 2656, 65 L.Ed.2d 757 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

11 While the justifiable expectations of the litigants are a major concern for purposes of due process scrutiny of choice–of–law decisions, see Part II, *infra*, the decision in *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936), suggests that this concern may also implicate state interests cognizable under the Full Faith and Credit Clause. In *John Hancock Mutual Life Ins.*, the Court struck down on full faith and credit grounds a Georgia court's choice of Georgia law over a conflicting New York statute in a suit on a New York life insurance contract brought after the insured's death in New York. Central to the decision in that case was the Court's apparent concern that application of Georgia law would result in unfair surprise to one of the contracting parties. The Court found that the New York statute was "a rule of substantive law which became a term of the contract, as much so as the amount of the premium to be paid or the time for its payment." *Id.*, at 182, 57 S.Ct., at 131 (footnote omitted). This statute "determine[d] the substantive rights of the parties as fully as if a provision to that effect had been embodied in writing in the policy." *Id.*, at 182–183, 57 S.Ct., at 131–132. The insurer had no reason to expect that the New York statute would not control all claims arising under the life insurance policy. The parties to a life insurance contract normally would not expect the place of death to have any bearing upon the proper construction of the policy; by way of contrast, in the case of a liability policy, the place of the tort might well be relevant. For that reason, in a life insurance contract relationship, it is likely that neither party would expect the law of any State other than the place of contracting to have any

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relevance in possible subsequent litigation. See generally C. Carnahan, Conflict of Laws and Life Insurance Contracts § 15, pp. 51–52, § 47, pp. 264–265, 267–268, § 60, pp. 325–327 (2d ed. 1958).

Paul Freund has aptly characterized *John Hancock Mutual Life Ins.* as perhaps this Court's "most ambitious application of the full faith and credit clause." Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv.L.Rev. 1210, 1233 (1946). Like *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 254 (1932), on which the Court relied, see 299 U.S., at 183, 57 S.Ct., at 132 *John Hancock Mutual Life Ins.* was one of a series of constitutional decisions in the 1930's that have been limited by subsequent cases. See *Carroll v. Lanza*, 349 U.S., at 412, 75 S.Ct., at 806; *Thomas v. Washington Gas Light Co., supra*, at 272–273, n.18, 100 S.Ct., at 2656, n.18 (1980) (plurality opinion). See also Traynor, Is This Conflict Really Necessary?, 37 Texas L.Rev. 657, 675 (1959).

12 Compare *Nevada v. Hall, supra*, in which the Court permitted a California court to disregard Nevada's statutory limitation on damages available against the State. The Court found this direct intrusion upon Nevada's sovereignty justified because the Nevada statute was "obnoxious" to California's public policy. *Id.*, at 424, 99 S.Ct., at 1190.

13 It is clear that a litigant challenging the forum's application of its own law to a lawsuit properly brought in its courts bears the burden of establishing that this choice of law infringes upon interests protected by the Full Faith and Credit Clause. See *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S., at 547–548, 55 S.Ct., at 523–524.

It is equally clear that a state court's decision to apply its own law cannot violate the Full Faith and Credit Clause where the application of forum law does not impinge at all upon the interests of other States. Cf. Reese, *supra* n.3, at 1601.

14 This task can be particularly difficult for a trial judge who does not have ready access to a law library containing the statutes and decisions of all 50 States. If that judge is able to apply law with which he is thoroughly familiar or can easily discover, substantial savings can accrue to the State's judicial system. Moreover, an erroneous interpretation of the governing rule is less likely when the judge is applying a familiar rule. Cf. *Shaffer v. Heitner*, 433 U.S., at 225–226, 97 S.Ct., at 2590–2591 (BRENNAN, J., dissenting in part) (such concerns indicate that a State's ability to apply its own law to a transaction should be relevant for purposes of evaluating its power to exercise jurisdiction over the parties to that transaction).

15 Discrimination against nonresidents would be constitutionally suspect even if the Due Process Clause were not a check upon a State's choice–of–law decisions. See Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection, 28 U.Chi.L.Rev. 1 (1960); Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L.J. 1323 (1960); Note, Unconstitutional Discrimination in Choice of Law, 77 Colum.L.Rev. 272 (1977). Moreover, both discriminatory and substantively unfair rules of law may be detected and remedied without any special choice–of–law analysis; familiar constitutional principles are available to deal with both varieties of unfairness. See, *e. g.*, Martin, *supra* n.5, at 199.

16 Upon careful analysis most of the decisions of this Court that struck down on due process grounds a state court's choice of forum law can be explained as attempts to prevent a State with a minimal contact with the litigation from materially enlarging the contractual obligations of one of the parties where that party had no reason to anticipate the possibility of such enlargement. See, *e. g., Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930); *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178 (1934); cf. *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936) (similar concern under Full Faith and Credit Clause, see n. 11, *supra*). See generally Weintraub, *supra* n. 4, at 457–460.

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17 See also *Nelson v. Employers Mutual Casualty Co.*, 63 Wis.2d 558, 563–566, and nn. 2–3, 217 N.W.2d 670, 672–674, and nn. 2, 3 (1974), discussed *ante*, at 642, n. 22.

18 The "stacking" rule provides that all of the uninsured motorist coverage purchased by an insured party may be aggregated, or "stacked," to create a fund available to provide a recovery for a single accident.

19 For example, in *Home Ins. Co. v. Dick, supra*, at 403, and n. 1, 50 S.Ct., at 339, and n. 1, the insurance policy was subject, by its express terms, to Mexican law.

20 *Home Ins. Co., supra*, again provides a useful example. In that case, the insurance policy expressly provided a 1–year limitations period for claims arising thereunder. *Id.*, at 403, 50 S.Ct., at 339. Similarly, the insurance policy at issue in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., supra*, at 146, 54 S.Ct., at 635, also prescribed a specific limitations period.

While such express provisions are obviously relevant, they are not always dispositive. In *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229 (1964), the Court allowed the lower court's choice of forum law to override an express contractual limitations period. The Court emphasized the fact that the insurer had issued the insurance policy with the knowledge that it would cover the insured property wherever it was taken. *Id.*, at 181–182, 84 S.Ct., at 1198. The Court also noted that the insurer had not attempted to provide in the policy that the law of another State would control. *Id.*, at 182, 84 S.Ct., at 1198.

In *Watson v. Employers Liability Assurance Corp.*, 348 U.S., at 68, 75 S.Ct., at 167, the insurance policy expressly provided that an injured party could not maintain a direct action against the insurer until after the insured's liability had been determined. The Court found that neither the Due Process Clause nor the Full Faith and Credit Clause prevented the Louisiana courts from applying forum law to permit a direct action against the insurer prior to determination of the insured's liability. As in *Clay*, the Court noted that the policy provided coverage for injuries anywhere in the United States. 348 U.S. at 71–72, 75 S.Ct., at 169. An additional, although unarticulated, factor in *Watson* was the fact that the litigant urging that forum law be applied was not a party to the insurance contract. While contracting parties may be able to provide in advance that a particular rule of law will govern disputes between them, their expectations are clearly entitled to less weight when the rights of third-party litigants are at issue.

21 In *Home Ins. Co., supra*, the insurance policy was issued in Mexico by a Mexican corporation and covered the insured vessel only in certain Mexican waters. *Id.*, at 403, 50 S.Ct., at 339.

22 In *Clay v. Sun Insurance Office, Ltd., supra*, at 182, 84 S.Ct., at 1198, and *Watson v. Employers Liability Assurance Corp., supra*, at 71–72, 75 S.Ct., at 169, the Court considered it significant, in upholding the lower courts' choice of forum law, that the insurance policies provided coverage throughout the United States. See n. 20, *supra.* Of course, in both *Clay* and *Watson* the loss to which the insurance applied actually occurred in the forum State, whereas the accident in this case occurred in Wisconsin, not Minnesota. However, as the dissent recognizes, *post*, at 652–653, because the question on the merits is one of contract interpretation rather than tort liability, the actual site of the accident is not dispositive with respect to the due process inquiry. More relevant is the fact that the parties, at the time of contracting, anticipated that an accident covered by the policy could occur in a "stacking" State. The fact that this particular accident did not occur in Minnesota does not undercut the expectations formed by the parties at the time of contracting.

In *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., supra*, the Court struck down a state court's choice of forum law despite the fact that the insurance contract's coverage was not limited by state boundaries. While *Hartford Accident* may indeed have "scant relevance for today," *ante*, at 638, n. 11, it is nonetheless consistent with a due process

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analysis based upon fundamental fairness to the parties. One of the statutes applied by the Mississippi courts in *Hartford Accident* was offensively broad, providing that "[a]ll contracts of insurance on property, lives or interests in this state shall be deemed to be made therein." 292 U.S., at 148, 54 S.Ct., at 635. No similar statute is involved in this case. In addition, the Mississippi courts applied the law of the forum to override an express contractual provision, and thus frustrated the expectations of the contracting parties. In the present case, the insurance contract contains no similar declaration of the intent of the parties.

23 Comparison of this case with *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930), confirms my conclusion that the application of Minnesota law in this case does not offend the Due Process Clause. In *Home Ins. Co.*, the contract expressly provided that a particular limitations period would govern claims arising under the insurance contract and that Mexican law was to be applied in interpreting the contract; in addition, the contract was limited in effect to certain Mexican waters. The parties could hardly have made their expectations with respect to the applicable law more plain. In this case, by way of contrast, nothing in the contract suggests that Wisconsin law should be applied or that Minnesota's "stacking" rule should not be applied. In this case, unlike *Home Ins. Co.*, the court's choice of forum law results in no unfair surprise to the insurer.

24 Even this factor may not be of substantial significance. At the time of contracting, the parties were aware that the insurance policy was effective throughout the United States and that the law of any State, including Minnesota, might be applicable to particular claims. The fact that the decedent regularly drove to Minnesota, for whatever purpose, is relevant only to the extent that it affected the parties' evaluation, at the time of contracting, of the likelihood that Minnesota law would actually be applied at some point in the future. However, because the applicability of Minnesota law was perceived as possible at the time of contracting, it does not seem especially significant for due process purposes that the parties may also have considered it likely that Minnesota law would be applied. This factor merely reinforces the expectation revealed by the policy's national coverage.

25 In *Kryger v. Wilson*, 242 U.S. 171, 176, 37 S.Ct. 34, 35, 61 L.Ed. 229 (1916), after rejecting a due process challenge to a state court's choice of law, the Court stated:

> "The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned."

1 *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930), is a case where the reasonable expectations of a litigant were frustrated. The insurance contract confined the risk to Mexico, where the loss occurred and where both the insurer and the insured resided until the claim accrued. This Court found a violation of the Due Process Clause when Texas, the forum State, applied a local rule to allow the insured to gain a recovery unavailable under Mexican law. Because of the geographic limitation on the risk, and because there were no contacts with the forum State until the claim accrued, the insurer could have had no reasonable expectation that Texas law would be applied to interpret its obligations under the contract. See Weintraub 455.

2 "It is manifest that Georgia had no interest in the application to this case of any policy to be found in its laws. When the contract was entered into, and at all times until the insured died, the parties and the transaction were beyond the legitimate reach of whatever policy Georgia may have had. Any interest asserted by Georgia must relate to the circumstance that the action is tried there, and must arise not from any policy directed to the business of life insurance but from some policy having to do with the business of the courts. This was apparently recognized even by the Georgia court; hence

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the disingenuous characterization of the matter as one of 'procedure' rather than of 'substance.' " Currie 236. See also, *id.*, at 232–233.

3 The plurality today apparently recognizes that the significance of the contacts must be evaluated in light of the policies our review serves. It acknowledges that the sufficiency of the same contacts sometimes will differ in jurisdiction and choice–of–law questions. *Ante*, at 642, n. 23. The plurality, however, pursues the rationale for the requirement of sufficient contacts in choice–of–law cases no further than to observe that the forum's application of its own law must be "neither arbitrary nor fundamentally unfair." *Ante*, at 640. But this general prohibition does not distinguish questions of choice of law from those of jurisdiction, or from much of the jurisprudence of the Fourteenth Amendment.

4 The petitioner in *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936), did business in Georgia, the forum State, at the time of that case. See The Insurance Almanac 715 (1935). Also, Georgia extensively regulated insurance practices within the State at that time. See Ga.Code § 56–101 *et seq*. (1933). This Court did not hint in *Yates* that this fact was of the slightest significance to the choice–of–law question, although it would have been crucial for the exercise of *in personam* jurisdiction.

5 The plurality exacts double service from this fact, by finding a separate contact in that the insured commuted daily to his job. *Ante*, at 641. This is merely a repetition of the facts that the insured lived in Wisconsin and worked in Minnesota. The State does have an interest in the safety of motorists who use its roads. This interest is not limited to employees, but extends to all nonresident motorists on its highways. This safety interest, however, cannot encompass, either in logic or in any practical sense, the determination whether a nonresident's estate can stack benefit coverage in a policy written in another State regarding an accident that occurred on another State's roads.

Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947), hardly establishes commutation as an independent contact; the case merely approved the application of a forum State's law to an industrial accident occurring in a neighboring State when the employer and the employee both resided in the forum State.

6 The opinion of Justice STEVENS concurring in the judgment supports my view that the forum State's application of its own law to this case cannot be justified by the existence of relevant minimum contacts. As Justice STEVENS observes, the principal factors relied on by the plurality are "either irrelevant to or possibly even tend to undermine the [plurality's] conclusion." *Ante*, at 650. The interesting analysis he proposes to uphold the State's judgment is, however, difficult to reconcile with our prior decisions and may create more problems than it solves. For example, it seems questionable to measure the interest of a State in a controversy by the degree of conscious reliance on that State's law by private parties to a contract. *Ante*, at 646. Moreover, scrutinizing the strength of the interests of a nonforum State may draw this Court back into the discredited practice of weighing the relative interests of various States in a particular controversy. See *ante*, at 637, n.10 (plurality opinion).

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886 F.3d 238
United States Court of Appeals, Second Circuit.

AMERICAN TRUCKING ASSOCIATIONS, INC., Wadhams Enterprises, Inc., Lightning Express Delivery Service Inc., Ward Transport & Logistics Corp., on behalf of themselves and all others similarly situated, American Bus Association, DATTCO, Inc., Starr Transit Co., Inc., on behalf of themselves and all others similarly situated, Plaintiffs–Appellants,
v.
NEW YORK STATE THRUWAY AUTHORITY, New York State Canal Corporation, Thomas J. Madison, Jr., in his official capacity as Executive Director of the New York State Thruway Authority, Howard Milstein, in his official capacity as Chair of the New York State Thruway Authority/Canal Corporation Boards of Directors, Donna J. Luh, in her official capacity as Vice–Chair of New York State Thruway Authority/Canal Corporation Boards of Directors, E. Virgil Conway, in their official capacities as members of the New York State Thruway Authority/ Canal Corporation Board of Directors, Richard N. Simberg, in their official capacities as Members of the New York State Thruway Authority/Canal Corporation Board of Directors, Brandon R. Sall, in their official capacities as Members of the New York State Thruway Authority/Canal Corporation Board of Directors, J. Rice Donald, Jr., in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, Jose Holguin–Veras, in their official capacities as members of the New York State Thruway Authority/ Canal Corporation Board of Directors, Bill Finch, in his official capacity as Acting Executive Director of the New York State Thruway Authority, Joanne M. Mahoney, in her official capacity as Chair of the New York State Thruway Authority/Canal Corporation Boards of Directors, Robert L. Megna, in his official capacity as a member of the New York State Thruway Authority/Canal Corporation Boards of Directors, Stephen M. Saland, in his official capacity as a member of the New York State Thruway Authority/Canal Corporation Boards of Directors, Defendants–Appellees.

No. 17-737 (L), 17-873 (Con)
|
August Term 2017
|
Argued: March 6, 2018
|
Decided: March 29, 2018

Synopsis
Background: Trucking industry trade association brought action against New York State Thruway Authority and aligned state entities, alleging it violated the Dormant Commerce Clause when it used surplus revenue from highway tolls to fund New York State's canal system. The United States District Court for the Southern District of New York, Colleen McMahon, Chief District Judge, 2014 WL 4229982, dismissed action. Trucking association appealed. The Court of Appeals, Dennis Jacobs, Circuit Judge, 795 F.3d 351, vacated and remanded. On remand, the District Court, McMahon, J., 199 F.Supp.3d 855, granted partial summary judgment to trucking association, and subsequently dismissed action, 238 F.Supp.3d 527. Trucking association appealed.

Holdings: The Court of Appeals, José A. Cabranes, Circuit Judge, held that:

Thruway Authority's action in allocating excess highway toll revenues to canal system did not violate Dormant Commerce Clause, and

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district court had discretion to reach merits of Thruway Authority's argument that Intermodal Surface Transportation Efficiency Act (ISTEA) permitted it to allocate excess toll revenues to canal system.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

***240** Appeal from the United States District Court for the Southern District of New York. Nos. 1:13-cv-08123 and 1:17-cv-00782—Colleen McMahon, *Chief District Judge*.

Attorneys and Law Firms

Charles A. Rothfeld, Evan M. Tager, Matthew A. Waring, Mayer Brown LLP, Washington, DC; Richard Pianka, ATA Litigation Center, Arlington, VA, for Plaintiffs–Appellants.

Andrew W. Amend, Senior Assistant Solicitor General, of counsel, (Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, on the brief), for Eric T. Schneiderman, Attorney General, State of New York, for Defendants–Appellees.

Before: Calabresi, Cabranes and Lohier, Circuit Judges.

Opinion

José A. Cabranes, Circuit Judge:

***239** The questions presented are: (1) whether the District Court correctly dismissed the Dormant Commerce Clause claims of plaintiffs, challenging the authority of defendants to allocate surplus highway toll revenues to New York's canal system; and (2) whether the District Court properly determined that defendants did not waive the argument that Congress authorized ***241** them to depart from the Dormant Commerce Clause.

American Trucking Associations, Inc. and its fellow plaintiffs (jointly, "ATA") claim that the New York State Thruway Authority and its aligned state entities (jointly, the "Thruway Authority") violated the Dormant Commerce Clause when it used surplus revenue from highway tolls to fund New York State's Canal System ("the Canal System"). The District Court dismissed this claim, finding that Congress specifically authorized the Thruway Authority to allocate highway tolls to canal uses. ATA further claims that the District Court abused its discretion in reaching the question of congressional authorization because the Thruway Authority did not discover or raise this argument until several years into the litigation.

We conclude that Congress evinced unmistakably clear intent to authorize the Thruway Authority to allocate highway tolls to support the Canal System. We also conclude that the District Court had discretion to reach the question of congressional authorization. Accordingly, we **AFFIRM** the judgment of the District Court.

I. BACKGROUND

A. The Thruway Authority's Tolling Powers

The New York State Thruway Authority is a public benefit corporation, created in 1950 by the New York State Legislature to construct and operate transportation facilities. [1] Since its establishment, it has operated the Governor Thomas E. Dewey Thruway System (the "Thruway"), a 570–mile cross-state highway that is a "major artery of interstate commerce in the Northeast" United States and a "critical route for commercial truckers serving the region." [2]

New York originally funded the Thruway through bond issuances, and authorized the Thruway Authority to charge tolls both to repay the bonds and to support maintenance and operations.[3] In 1956, Congress passed the Federal–Aid Highway Act, which incorporated existing toll highways, including the Thruway, into the Interstate Highway System, but prohibited the use of any federal funds to construct or improve such highways.[4] The Thruway and other toll highways became eligible for federal financial support only when, in 1978, Congress enacted the Surface Transportation Assistance Act ("STAA").[5] Section 105 of that statute mandated that, in order to receive federal financial aid, state public authorities responsible for toll highways in the Interstate Highway System had to discontinue levying tolls once they had collected sufficient revenues to retire outstanding bonds.[6] If those authorities failed to make a toll road free once they had collected sufficient tolls to retire those ***242** bonds, STAA required them to repay the federal government for the financing it had provided them.[7]

Against this background, Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), the statute at issue here.[8] Through ISTEA, Congress sought to foster "a National Intermodal Transportation System," consisting of "all forms of transportation in a unified, interconnected manner."[9] To do so, ISTEA freed states from their obligation under the STAA to repay the federal government should they continue to collect tolls after retiring outstanding debts, and granted them greater flexibility to operate toll facilities and use toll revenues for a variety of transportation projects.

Two provisions of ISTEA stand at the heart of this case. The first, section 1012(a), authorized state public authorities to collect highway tolls without repaying the federal government, so long as those funds "will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility."[10] Once a state certified adequate maintenance, it could use any excess toll revenues "for any purpose for which Federal funds may be obligated by a State under [Title 23]."[11]

As part of ISTEA, Congress simultaneously broadened the list of purposes for which states could use federal funds under Title 23. The expanded list included "transportation enhancement activities," such as "historic preservation, rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and *canals*)."[12]

In the second provision, section 1012(e), Congress enacted a "Special Rule" that largely paralleled section 1012(a) but added specific conditions regarding two toll facilities: the New York State Thruway and the Fort McHenry Tunnel in Maryland. Regarding the Thruway, it provided that the Thruway Authority could use excess toll revenues to cover "costs associated with transportation facilities under [its] jurisdiction ..., including debt service and costs related to the construction, reconstruction, restoration, repair, operation ***243** and maintenance of such facilities."[13]

Following the passage of ISTEA, in 1992 the New York State Legislature directed the Thruway Authority to assume management of the Canal System.[14] At all times relevant to these appeals, the Thruway Authority managed the Canal System.

B. The Canal System

The rise of the Interstate Highway System, a marvel of American infrastructure, cemented the decline of perhaps the most awesome earlier such marvel: the New York Canal System. That system is "a network of waterways that stretches across upstate New York, including the Erie, Oswego, Champlain, Cayuga, and Seneca Canals."[15] In the nineteenth century, it served as "the model for canal-building throughout the world" and fueled "the unprecedented development and prosperity that came not alone to New York State but to ... the whole country."[16] In the words of Senator Daniel Patrick Moynihan of New York—then chairman of the Water Resources, Transportation, and Infrastructure Subcommittee of the Senate Committee on Environment and Public Works, and the principal architect of ISTEA—the Canal System is "what has made America great."[17]

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As road and air transportation proliferated, however, the Canal System largely became “a recreational byway, drawing pleasure boats, fishing lines and the occasional canal fan.” [18] Traditionally supported through taxpayer funds and managed by the New York State Department of Transportation, the Canal System, as noted, was transferred to the management of the Thruway Authority in 1992. [19] The Thruway Authority began funding the Canal System principally through excess highway toll revenues. Between 1992 and 2016, it expended approximately 9 to 14 percent of Thruway tolls to the Canal System. [20]

***244** C. Procedural History

In November 2013, ATA, a trucking industry trade group, and three of its members brought a class action suit against the Thruway Authority, the New York State Canal Corporation, and certain Thruway officials, alleging that they violated the Dormant Commerce Clause by using Thruway tolls to fund the Canal System. [21] In August 2014, the District Court dismissed the complaint for failure to join the State of New York as a necessary party. [22] The following year, we vacated that judgment and remanded for further proceedings. [23]

On remand, in August 2016, the District Court granted partial summary judgment to the ATA, finding that the allocation of Thruway tolls to the Canal System violated the Dormant Commerce Clause. [24] At the time, the Thruway had not yet contended that Congress had expressly authorized the use of Thruway tolls for canal purposes, and neither the District Court nor the parties considered any such authorization.

Before the District Court could rule on ATA's class-certification motion or hold a damages trial, however, the Thruway Authority discovered information indicating that Congress had indeed authorized it to devote surplus highway toll revenue toward the Canal System. [25] It moved to dismiss plaintiffs' action for failure to state a claim. On February 28, 2017, the District Court granted that motion, finding that “Congress decided, with great specificity, to exempt the New York State Thruway Authority's expenditure of excess toll revenues on the New York State Canal System from the reach of the Dormant Commerce Clause.” [26] The District Court expressed displeasure with the fact that the Thruway Authority failed to discover its defense of congressional authorization for so long, but it ultimately rejected ATA's claim that the Thruway Authority had waived that argument by raising it too late. [27] Accordingly, the District Court vacated its order of August 10, 2016 granting ATA's motion for partial summary judgment and denying defendants' cross-motion for summary judgment. [28]

On February 1, 2017, while the *ATA* case was pending, the American Bus Association (“ABA”) and several of its members filed a parallel action against the Thruway Authority and the other defendants, raising the same Dormant Commerce Clause claims. Soon after the District Court dismissed *ATA*, it entered an order dismissing the *ABA* case “[f]or substantially the reasons discussed by the court” in *ATA*. [29]

II. DISCUSSION

A. Standard of Review

We review a district court's grant of a motion to dismiss *de novo*. [30] We ***245** review for abuse of discretion a district court's decision that a party did not waive an argument by failing to raise it earlier in the proceedings. [31]

B. Whether Congress Authorized the Thruway Authority to Allocate Excess Highway Tolls to the Canal System

ATA contends that Congress did not evince an “unmistakably clear” intent to authorize the Thruway Authority to allocate excess revenues from highway tolls to the Canal System. [32] The Thruway Authority, on the other hand, argues that Congress did expressly authorize it to do so. We agree with the Thruway Authority.

The Commerce Clause gives Congress the power "to regulate Commerce ... among the several states." [33] The Supreme Court has long recognized that the Commerce Clause "also limits the power of the States to erect barriers against interstate trade"—the so-called Dormant Commerce Clause. [34] Under the Dormant Commerce Clause, a highway toll is constitutional only if it is "based on some fair approximation of use or privilege for use ... and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred." [35]

The Supreme Court has also recognized, however, that "[w]here state or local government action is specifically authorized by Congress, it is not subject to the [Dormant] Commerce Clause even if it interferes with interstate commerce." [36] In issuing such an authorization, "Congress must manifest its unambiguous intent." [37] Put another way, "Congress' intent and policy to sustain state legislation from attack under the Commerce Clause [must be] 'expressly stated.' " [38] That said, "[t]here is no talismanic significance to the phrase 'expressly stated,' " which "merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the [D]ormant Commerce Clause, congressional intent must be *unmistakably clear*." [39] In other words, Congress need not expressly state that it is authorizing a state to engage in activity that would otherwise violate the Dormant Commerce Clause; it need only clearly allow the state to engage in such activity.

The plain language of ISTEA manifestly contains such "unmistakably clear" evidence of an intent to authorize the Thruway ***246** Authority to use excess highway toll revenues for canal purposes.

ISTEA section 1012 permitted the Thruway Authority to allocate excess toll revenues (1) to any transportation facilities under the Thruway Authority's jurisdiction or (2) for any project eligible to receive federal assistance under Title 23. [40] The Canal System meets both conditions. On the first score, the New York State Legislature in 1992 transferred jurisdiction of the Canal System to the Thruway Authority, which maintained jurisdiction at all times relevant to this appeal. And on the second score, as part of ISTEA, Congress modified Title 23 to define canals as eligible for federal assistance. ATA acknowledges this fact—thereby conceding that Congress plainly authorized the Thruway Authority to use *at least some* excess highway toll revenues for canal purposes. [41]

Having (quietly) made this concession, ATA is left to argue that, while Congress authorized the Thruway Authority to devote *some* excess toll revenue to the Canal System, it still meant to limit the *amount* of such allocations. Read in context, ATA contends, section 1012(e) is best understood to lift the prior statutory limit on state tolls, permitting the Thruway Authority merely to continue tolling regimes as they existed at the time of ISTEA's enactment.

To support its interpretation, ATA points to phrases in the statute, such as "allow for the *continuance* of tolls." [42] The ordinary meaning of "continuance," according to ATA, is "[t]o remain in the same state." [43] And its use thus indicates that Congress expected any post-ISTEA tolls to be substantially similar in nature and purpose. Since the tolls that Congress permitted to continue in 1992 were calculated to pay for highway maintenance, they could not have been used to fund unrelated projects at any substantial level.

In our view, there is no basis to interpret the word "continuance" as freezing in place the tolling regime at the time of ISTEA's enactment. Instead, a plain reading of the statute reveals that Congress meant to permit the Thruway Authority to continue collecting tolls of whatever amount *without having to repay federal funds*—something that it was previously barred from doing once it satisfied its debt obligations. If and when the Thruway Authority did so, it would have surplus revenue on hand to devote to other transportation projects, an outcome that ISTEA not only contemplated but expressly sanctioned.

Here, too, ATA makes a critical admission. It acknowledges that the District Court's conclusion that "nothing in ISTEA caps the amount of excess toll revenue that can be used to support transportation enhancement ***247** activities," such as canals, is

"perhaps true as a literal matter."[44] Inasmuch as ATA concedes that Congress authorized the Thruway Authority to allocate excess toll revenues for canal purposes, and likewise concedes that it is "true as a literal matter" that ISTEA contains no language limiting the amount of revenue for allocation, its argument necessarily relies merely on context, not text.[45]

The text is clear: Congress manifested its unambiguous intent to authorize the Thruway Authority to allocate excess toll funds to the Canal System. Although ISTEA does not expressly invoke the Commerce Clause or state its intent to abrogate Dormant Commerce Clause limitations, it need not do so if congressional intent is unmistakable—as it is here.

C. Whether the Thruway Authority Forfeited Its Argument That Congress Authorized It to Depart from the Commerce Clause

We next address whether the Thruway Authority forfeited its argument ***248** that Congress authorized it to allocate excess highway toll revenues to the Canal System.[46]

ATA argues that the Thruway Authority failed to raise its argument regarding congressional authorization for more than three years after ATA filed its complaint and for almost six months after the District Court granted partial summary judgment on liability in favor of ATA. That failure, according to ATA, constitutes forfeiture.

Yet ATA concedes that, regardless of whether the Thruway Authority indeed forfeited its argument, the District Court had discretion to reach the merits to correct a clear error.[47] As we have explained, Congress's intent in ISTEA section 1012(e) to exempt the Thruway Authority from the Dormant Commerce Clause was unmistakably clear. Thus, regardless of whether the District Court relied on the proper standard for forfeiture, it had discretion to reach the merits of the Thruway Authority's defense.[48]

III. CONCLUSION

In summary, we hold as follows:

(1) Congress evinced an "unmistakably clear" intent to authorize the Thruway Authority to depart from the strictures of the Dormant Commerce Clause by allocating surplus highway toll revenues to New York's Canal System;

(2) Congress placed no limits on the amount of such surplus highway toll revenue that the Thruway Authority could allocate to the Canal System;

(3) The District Court correctly granted defendants' motion to dismiss on the basis of Congressional authorization and vacated its previous order granting plaintiffs' motion for partial summary judgment; and

(4) The District Court had discretion to reach the merits of the Thruway Authority's defense that Congress had authorized it to devote surplus highway toll revenues to the Canal System.

For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

All Citations

886 F.3d 238

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Footnotes

1 *See* N.Y. Public Authorities Law ("PAL") §§ 352–353.

2 *Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 795 F.3d 351, 354 (2d Cir. 2015).

3 PAL § 354(8); *see also* Ch. 143, § 1, 1950 N.Y. Laws 653, 655, 659 (enacting PAL § 359(1)). *See generally* ROBERT A. CARO, THE POWER BROKER 15–19, 615–31, 633–34 (1974) (discussing Robert Moses's use of public authorities to shape infrastructure in New York, his utilization and expansion of the concept of public authorities, the role of bond issuances in raising financing for and perpetuating public authorities, and the role of tolls in sustaining public authorities).

4 *See* Pub. L. No. 84-627, § 113(a), 70 Stat. 374, 384 (1956).

5 Pub. L. No. 95-599, 92 Stat. 2689 (1978).

6 § 105, 92 Stat. at 2692–93. Section 105's requirements were effectuated through "tripartite agreements" between the relevant state public authority, the state highway department, and the U.S. Secretary of Transportation. Pursuant to section 105, the Thruway Authority, the New York State Department of Transportation, and the U.S. Department of Transportation's Federal Highway Administration entered into a Tripartite Agreement in July 1982. Among other provisions, the Agreement provided that the Thruway Authority could continue to collect tolls until it paid off its outstanding debt, projected to occur in 1996. *See* J.A. 167–72.

7 § 105, 92 Stat. at 2693 ("[I]f, for any reason, a toll road receiving Federal assistance under this section does not become free to the public upon collection of sufficient tolls, as specified in the preceding sentence, Federal funds used for projects on such toll road pursuant to this section shall be repaid to the Federal Treasury[.]").

8 23 U.S.C. § 129; Pub. L. No. 102-240, 105 Stat. 1914 (1991).

9 § 2, 105 Stat. at 1914.

10 § 1012(a)(3), 105 Stat. at 1936–37.

11 *Id.*

12 23 U.S.C. § 101(a); ISTEA § 1007(c), 105 Stat. at 1931 (emphasis added). Although the text of 23 U.S.C. § 101 has been amended from time to time, as the District Court stated, "none of the amendments eliminated the statutory authorization allowing the Thruway Authority to spend excess toll revenues (i.e., toll revenues not needed for Thruway maintenance) on the canals." *Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 238 F.Supp.3d 527, 534 (S.D.N.Y. 2017).

13 § 1012(e), 105 Stat. at 1939.

14 N.Y. Canal Law § 6.

15 *Am. Trucking Ass'ns*, 795 F.3d at 355 (internal quotation marks omitted).

16 Roy G. Finch, *The Story of the New York State Canals* 4 (rev. ed. 1998), https://www.canals.ny.gov/history/finch_history_print.pdf.

17 *Field Hearings Before the S. Comm. on Env't & Public Works and the Subcomm. on Water Res., Transp., & Infrastructure*, 102nd Cong. 305 (Apr. 5, 1991) (statement of Sen. Daniel Patrick Moynihan, member, S. Comm. on Environment and Public Works), J.A. 210. Legislators from both parties credited Senator Moynihan "with masterminding much of the legislation." Lindsey Gruson, *Transit Bill Seen as Boon to Metro Area*, N.Y. TIMES, Nov. 27, 1991, https://www.nytimes.com/1991/11/27/nyregion/transit-bill-seen-as-boon-to-metro-area.html. For the history of ISTEA's passage, see Richard F. Weingroff, *Creating a Landmark: The Intermodal Surface Transportation Act of 1991*, PUB. ROADS, Nov.–Dec. 2001, https://www.fhwa.dot.gov/publications/publicroads/01novdec/istea.cfm.

18 Jesse McKinley, *Afloat on the Erie Canal: Sonar Gear, Ferris Wheel Parts and Beer Tanks*, N.Y. TIMES, May 28, 2017, https://www.nytimes.com/2017/05/28/nyregion/erie-canal-rebound-commercialshipping.html. In recent years, however, the Canal System has experienced an uptick in commercial shipping thanks to its "use as a niche waterway for cargo whose size or weight make it impossible, impractical or too expensive to haul any other way," including electrical turbines, Navy equipment, pedestals for a Ferris wheel under construction in Staten Island, and even giant tanks of beer. *Id.*

19 *Ante*, note 14.

20 *Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 199 F.Supp.3d 855, 879 (S.D.N.Y. 2016), *vacated*, 238 F.Supp.3d 527 (S.D.N.Y. 2017). In 2016, the New York State Legislature transferred jurisdiction over the Canal System to the New York Power Authority, which is not a party to these appeals. *See* N.Y. Canal Law § 5. The Legislature shifted control as a means of providing financial relief to the Thruway Authority, which had been spending roughly $87 million annually for canal operations and debt. *See* Rick Karlin, *NY Power Authority to Absorb Canal System*, TIMES UNION (Albany), Apr. 6, 2016, https://www.timesunion.com/local/article/NY-Power-Authority-to-absorb-canal-system-7233185.php.

21 J.A. 22–45.

22 *Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, No. 13 Civ. 8123, 2014 WL 4229982, at *6–7 (S.D.N.Y. Aug. 6, 2014).

23 *Am. Trucking Ass'ns*, 795 F.3d at 360–61.

24 *Am. Trucking Ass'ns*, 199 F.Supp.3d at 878.

25 *Am. Trucking Ass'ns,* 238 F.Supp.3d at 532.

26 *Id.* at 541.

27 *Id.* at 540–41.

28 *Id.* at 541.

29 J.A. 272.

30 *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

31 *Brown v. City of New York*, 862 F.3d 182, 187 (2d Cir. 2017).

32 *See* *S.–Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984).

33 U.S. CONST. art. I, § 8, cl. 3.

34 *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980).

35 *Evansville–Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716–17, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972); *see also* *Nw. Airlines, Inc. v. Cty. of Kent, Mich.*, 510 U.S. 355, 362–63, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994).

36 *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 213, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983).

37 *Wyoming v. Oklahoma*, 502 U.S. 437, 458, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992).

38 *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 960, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982).

39 *S.–Cent. Timber Dev.*, 467 U.S. at 91, 104 S.Ct. 2237 (emphasis added).

40 23 U.S.C. § 101(a); ISTEA § 1012(e), § 1007(a)-(c).

41 Pls. Br. at 18 n.4 ("The district court concluded that the Canal System was a project eligible for assistance under Title 23 ..., a determination that is not at issue in this appeal."). It is true that "[w]e do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993). Here, however, ATA makes an admission, not an argument. And ATA concedes this point again in its main brief. Pls. Br. at 33–34 (noting that the second sentence of ISTEA section 1012(e) provides that revenues collected from tolls in excess of those needed for debt service and operation and maintenance can be used for "specified purposes (including various transportation-related projects and facilities, among them the canals)").

42 Pls. Br. at 33–34 (quoting ISTEA section 1012(e)) (emphasis in original).

43 *Id.* at 34 (quoting Webster's II New Riverside University Dictionary 305 (1984)).

44 *Am. Trucking Ass'ns.*, 238 F.Supp.3d at 536; Pls. Br. at 39–40.

45 But if anything, the *context* militates in favor of recognizing that Congress intended to authorize the Thruway Authority to devote excess highway toll revenue to the Canal System.

Senator Moynihan, who, as noted above, was the mastermind of ISTEA, sought as a general matter to devolve transportation policy to states and cities. *Ante*, note 17. As *The New York Times* put it, the bill gave states "freedom in how they spend Federal transportation money," for the first time allowing them "to choose the projects they think they most need rather than hav[ing] to follow a Federal model." Richard L. Berke, *Senate Approves Bill to Overhaul Transportation*, N.Y. TIMES, June 20, 1991, https://www.nytimes.com/1991/06/20/us/senateapproves-bill-to-overhaul-transportation.html. To achieve that goal, Senator Moynihan proposed that highway money be "fungible," such that states could use funds on other modes of transportation, such as mass transit. *See* Weingroff, *ante* note 17. It is worth noting that ATA opposed the measure for precisely this reason, fearing that by permitting states to devote resources to other transportation projects, the bill would "threaten[ ] the future of America's highways." *Id.*

More specifically, Senator Moynihan pressed from the beginning for language specific to New York that would permit the state to maintain tolls as a source of revenue, declaring that he would "be responsible" for coordinating the bill's

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passage. *Tolls on Thruway May Not Disappear, State Will Keep Fees and U.S. Aid if Congress Passes Pending Bill*, BUFFALO NEWS, Feb. 22, 1991, at A1, *available at* 1991 WLNR 956953. As the drafting process began, he conducted several Field Hearings in which he urged the Commissioner of the New York State Department of Transportation not to "forget that canal system," and called the Canal System "just a treasure." *Field Hearings*, *ante* note 17, at 304; J.A. 209. Moynihan's interest in finding financing for the Canal System is hardly surprising; he was widely known as a "longtime aficionado of the canal and its lore." Joseph Berger, *U.S. Allots $120 Million for Banks of Erie Canal*, N.Y. TIMES, Nov. 26, 1996, http://www.nytimes.com/1996/11/26/nyregion/us-allots-120million-for-banks-of-erie-canal.html.

Later, when the bill that would become ISTEA emerged from the Senate Committee on Environment and Public Works without any New York-specific language, Senator Moynihan proposed an amendment, which would eventually become section 1012(e). The amendment allowed the state agencies in charge of the New York State Thruway and the Fort McHenry Tunnel in Maryland to use excess highway toll revenues to cover transportation facilities under Title 23, as well as those "under the jurisdiction" of those agencies. 137 Cong. Rec. 14774, 14883 (June 13, 1991). In introducing the amendment, Senator Moynihan highlighted how Maryland could allocate tolls raised from the Fort McHenry Tunnel. He explained that section 1012(e) was designed to "make possible the movement of toll receipts on and off the particular systems in such a way that the State, in this case Maryland, can optimize its transportation choices and provision thereof." *Id.* at 14774. "We very much want Maryland to do with Maryland money what Maryland thinks is best." *Id.*

46 The forfeiture question applies only in *ATA*, not in *ABA*. The plaintiffs in *ABA* filed suit only in February 2017, after the Thruway Authority had discovered its congressional-authorization defense. In *ATA*, however—originally filed in 2013—the Thruway Authority failed to raise that defense for over three years.

47 Pls. Br. at 56.

48 ATA argues that the District Court applied an erroneous legal standard by reasoning that because the Thruway Authority did not know of its defense previously, it could not have waived or forfeited it. *Id.* That standard, according to ATA, does not apply to waivers or forfeitures of legal *arguments*, and, instead, the District Court should have asked whether " 'the need to correct a clear error or prevent manifest injustice' justified considering defendants' belated argument," *Id.* at 57 (quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013)). Since the District Court had discretion to reach the merits, we need not reach the question of whether it applied the proper legal standard.

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82 S.Ct. 1502
Supreme Court of the United States

BROWN SHOE CO., Appellant,
v.
UNITED STATES.

No. 4
|
Argued Dec. 6, 1961.
|
Decided June 25, 1962.

Synopsis
Government's civil antitrust action challenging, as violative of the Clayton Act, merger of two manufacturers and sellers of shoes. The United States District Court for the Eastern District of Missouri, 179 F.Supp. 721, rendered judgment for the Government, ordering the defendant shoe company to divest itself completely of all stock, assets and interests it held in the shoe company which merged with it. The defendant took a direct appeal. The Supreme Court, Mr. Chief Justice Warren, held that merger of defendant shoe manufacturer and seller which was third largest seller of shoes by dollar volume in United States with the eighth largest company by dollar volume among those primarily engaged in selling shoes, itself a large manufacturer of shoes, was one which might tend to lessen competition substantially in retail sale of men's, women's and children's shoes in overwhelming majority of those cities and their environs in which they both sold through owned or controlled outlets, so that the merger was proscribed by the Clayton Act.

Affirmed.

Mr. Justice Harlan dissented in part.

Attorneys and Law Firms

****1508** ***296** Arthur H. Dean, New York City, for appellant.

Sol. Gen. Archibald Cox, for appellee.

Mr. Chief Justice WARREN delivered the opinion of the Court.

I.

This suit was initiated in November 1955 when the Government filed a civil action in the United States District Court for the Eastern District of Missouri alleging that a contemplated merger between the G. R. Kinney Company, Inc. (Kinney) and the Brown Shoe Company, Inc. (Brown), through an exchange of Kinney for Brown stock, would violate s 7 of the Clayton Act, 15 U.S.C. s 18, 15 U.S.C.A. s 18. The Act, as amended, provides in pertinent part:
'No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'

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The complaint sought injunctive relief under s 15 of the Clayton Act, 15 U.S.C. s 25, 15 U.S.C.A. s 25, to restrain consummation of the merger.

A motion by the Government for a preliminary injunction pendente lite was denied, and the companies were permitted to merge provided, however, that their businesses be operated separately and that their assets be kept separately identifiable. The merger was then effected on May 1, 1956.

***297** In the District Court, the Government contended that the effect of the merger of Brown—the third largest seller of shoes by dollar volume in the United States, a leading manufacturer of men's, Women's, and children's shoes, and a retailer with over 1,230 owned, operated or controlled retail outlets [1] —and Kinney—the eighth largest company, by dollar volume, among those primarily engaged ****1509** in selling shoes, itself a large manufacturer of shoes, and a retailer with over 350 retail outlets —'may be substantially to lessen competition or to tend to create a monopoly' by eliminating actual or potential competition in the production of shoes for the national wholesale shoe market and in the sale of shoes at retail in the Nation, by foreclosing competition from 'a market represented by Kinney's retail outlets whose annual sales exceed $42,000,000,' and by enhancing Brown's competitive advantage over other producers, distributors and sellers of shoes. The Government argued that the 'line of commerce' affected by this merger is 'footwear,' or alternatively, that the 'line(s)' are 'men's,' 'women's,' and 'children's' shoes, separately considered, and that the 'section of the country,' within which the anticompetitive effect of the merger is to be judged, is the Nation as a whole, or alternatively, each separate city or city and its ***298** immediate surrounding area in which the parties sell shoes at retail.

In the District Court, Brown contended that the merger would be shown not to endanger competition if the 'line(s) of commerce' and the 'section(s) of the country' were properly determined. Brown urged that not only were the age and sex of the intended customers to be considered in determining the relevant line of commerce, but that differences in grade of material, quality of workmanship, price, and customer use of shoes resulted in establishing different lines of commerce. While agreeing with the Government that, with regard to manufacturing, the relevant geographic market for assessing the effect of the merger upon competition is the country as a whole, Brown contended that with regard to retailing, the market must vary with economic reality from the central business district of a large city to a 'standard metropolitan area' [2] for a smaller community. Brown further contended that, both at the manufacturing level and at the retail level, the shoe industry enjoyed healthy competition and that the vigor of this competition would not, in any event, be diminished by the proposed merger because Kinney manufactured less than 0.5% and retailed less than 2% of the Nation's shoes.

The District Court rejected the broadest contentions of both parties. The District Court found that 'there is one group of classifications which is understood and recognized ***299** by the entire industry and the public—the classification into 'men's,' 'women's' and 'children's' shoes separately and independently.' On the other hand, '(t)o classify shoes as a whole could be unfair and unjust; to classify them further would be impractical, unwarranted and unrealistic.'

Realizing that 'the areas of effective competition for retailing purposes cannot be fixed with mathematical precision,' the District Court found that 'when determined by economic reality, for retailing, a 'section of the country' is a city of 10,000 or more population and its immediate and contiguous surrounding area, regardless of name designation, and in which a Kinney store and a Brown (operated, franchise, or plan) [3] store are located.'

The District Court rejected the Government's contention that the combining ****1510** of the manufacturing facilities of Brown and Kinney would substantially lessen competition in the production of men's, women's, or children's shoes for the national wholesale market. However, the District Court did find that the likely foreclosure of other manufacturers from the market represented by Kinney's retail outlets may substantially lessen competition in the manufacturers' distribution of 'men's,' 'women's,' and 'children's' shoes, considered separately, throughout the Nation. The District Court also found that the merger may substantially lessen competition in retailing alone in 'men's,' 'women's,' and 'children's' shoes, considered separately, in every city of 10,000 or more population and its immediate surrounding area in which both a Kinney and a Brown store are located.

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Brown's contentions here differ only slightly from those made before the District Court. In order fully to understand and appraise these assertions, it is necessary to set ***300** out in some detail the District Court's findings concerning the nature of the shoe industry and the place of Brown and Kinney within that industry.

The Industry.

The District Court found that although domestic shoe production was scattered among a large number of manufacturers, a small number of large companies occupied a commanding position. Thus, while the 24 largest manufacturers produced about 35% of the Nation's shoes, the top 4—International, Endicott-Johnson, Brown (including Kinney) and General Shoe—alone produced approximately 23% of the Nation's shoes or 65% of the production of the top 24.

In 1955, domestic production of nonrubber shoes was 509.2 million pairs, of which about 103.6 million pairs were men's shoes, about 271 million pairs were women's shoes, and about 134.6 million pairs were children's shoes.[4] The District Court found that men's, women's, and children's shoes are normally produced in separate factories.

The public buys these shoes through about 70,000 retail outlets, only 22,000 of which, however, derive 50% or more of their gross receipts from the sale of shoes and are classified as 'shoe stores' by the Census Bureau.[5] These ***301** 22,000 shoe stores were found generally to sell (1) men's shoes only, (2) women's shoes only, (3) women's and children's shoes, or (4) men's, women's, and children's shoes.

The District Court found a 'definite trend' among shoe manufacturers to acquire retail outlets. For example, International Shoe Company had no retail outlets in 1945, but by 1956 had acquired 130; General Shoe Company had only 80 retail outlets in 1945 but had 526 by 1956; Shoe Corporation of America, in the same period increased its retail holdings from 301 to 842; Melville Shoe Company from 536 to 947; and Endicott-Johnson from 488 to 540. Brown, itself, with no retail outlets of its own prior to 1951, had acquired 845 such outlets by 1956. Moreover, between 1950 and 1956 nine independent shoe store chains, operating 1,114 retail shoe stores, were found to have become subsidiaries of ****1511** these large firms and to have ceased their independent operations.

And once the manufacturers acquired retail outlets, the District Court found there was a 'definite trend' for the parent-manufacturers to supply an ever increasing percentage of the retail outlets' needs, thereby foreclosing other manufacturers from effectively competing for the retail accounts. Manufacturer-dominated stores were found to be 'drying up' the available outlets for independent producers.

Another 'definite trend' found to exist in the shoe industry was a decrease in the number of plants manufacturing shoes. And there appears to have been a concomitant decrease in the number of firms manufacturing shoes. In 1947, there were 1,077 independent manufacturers of shoes, but by 1954 their number had decreased about 10% to 970.[6]

***302** Brown Shoe.

Brown Shoe was found not only to have been a participant, but also a moving factor, in these industry trends. Although Brown had experimented several times with operating its own retail outlets, by 1945 it had disposed of them all. However, in 1951, Brown again began to seek retail outlets by acquiring the Nation's largest operator of leased shoe departments, Wohl Shoe Company (Wohl), which operated 250 shoe departments in department stores throughout the United States. Between 1952 and 1955 Brown made a number of smaller acquisitions: Wetherby-Kayser Shoe Company (three retail stores), Barnes & Company (two stores), Reilly Shoe Company (two leased shoe departments), Richardson Shoe Store (one store), and Wohl Shoe Company of Dallas (not connected with Wohl) (leased shoe departments in Dallas). In 1954, Brown made another major acquisition: Regal Shoe Corporation which, at the time, operated one manufacturing plant producing men's shoes and 110 retail outlets.

The acquisition of these corporations was found to lead to increased sales by Brown to the acquired companies. Thus although prior to Brown's acquisition of Wohl in 1951, Wohl bought from Brown only 12.8% of its total purchases of shoes, it subsequently increased its purchases to 21.4% in 1952 and to 32.6% in 1955. Wetherby-Kayser's purchases from Brown

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increased from 10.4% before acquisition to over 50% after. Regal, which had previously sold no shoes to Wohl and shoes worth only $89,000 to Brown, in 1956 sold shoes worth $265,000 to Wohl and $744,000 to Brown.

During the same period of time, Brown also acquired the stock or assets of seven companies engaged solely in shoe manufacturing. As a result, in 1955, Brown was the ***303** fourth largest shoe manufacturer in the country, producing about 25.6 million pairs of shoes or about 4% of the Nation's total footwear production.

Kinney.

Kinney is principally engaged in operating the largest family-style shoe store chain in the United States. At the time of trial, Kinney was found to be operating over 400 such stores in more than 270 cities. These stores were found to make about 1.2% of all national retail shoe sales by dollar volume. Moreover, in 1955 the Kinney stores sold approximately 8 million pairs of nonrubber shoes or about 1.6% of the national pairage sales of such shoes. Of these sales, approximately 1.1 million pairs were of men's shoes or about 1% of the national pairage sales of men's shoes; approximately 4.2 million pairs were of women's shoes or about 1.5% of the national pairage sales of women's shoes; and approximately 2.7 million pairs were of children's ****1512** shoes or about 2% of the national pairage sales of children's shoes. [7]

In addition to this extensive retail activity, Kinney owned and operated four plants which manufactured men's, women's, and children's shoes and whose combined output was 0.5% of the national shoe production in 1955, making Kinney the twelfth largest shoe manufacturer in the United States.

Kinney stores were found to obtain about 20% of their shoes from Kinney's own manufacturing plants. At the time of the merger, Kinney bought no shoes from Brown; ***304** however, in line with Brown's conceded reasons [8] for acquiring Kinney, Brown had, by 1957, become the largest outside supplier of Kinney's shoes, supplying 7.9% of all Kinney's needs.

It is in this setting that the merger was considered and held to violate s 7 of the Clayton Act. The District Court ordered Brown to divest itself completely of all stock, share capital, assets or other interests it held in Kinney, to operate Kinney to the greatest degree possible as an independent concern pending complete divestiture, to refrain thereafter from acquiring or having any interest in Kinney's business or assets, and to file with the court within 90 days a plan for carrying into effect the divestiture decreed. The District Court also stated it would retain jurisdiction over the cause to enable the parties to apply for such further relief as might be necessary to enforce and apply the judgment. Prior to its submission of a divestiture plan, Brown filed a notice of appeal in the District Court. It then filed a jurisdictional statement in this Court, seeking review of the judgment below as entered.

II.

JURISDICTION.

Appellant's jurisdictional statement cites as the basis of our jurisdiction over this appeal s 2 of the Expediting ***305** Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. s 29, 15 U.S.C.A. s 29. In a civil antitrust action in which the United States is the complainant that Act provides for a direct appeal to this Court from 'the final judgment of the district court.' (Emphasis supplied.) [9] The Government does not contest appellant's claim of jurisdiction; on the contrary, it moved to have the judgment below summarily affirmed, conceding our present jurisdiction to review the merits of that judgment. We deferred ruling on the Government's motion for summary affirmance and noted probable ****1513** jurisdiction over the appeal. 363 U.S. 825, 80 S.Ct. 1595, 4 L.Ed.2d 1521. [10]

It was suggested from the bench during the oral argument that, since the judgment of the District Court does not include a specific plan for the dissolution of the Brown-Kinney merger, but reserves such a ruling pending the filing of suggested plans for implementing divestiture, the judgment below is not 'final' as contemplated by the Expediting Act. In response to that suggestion, both parties have filed briefs contending that we do have jurisdiction to dispose of the case on the merits in its

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present posture. However, the mere consent of the parties to the Court's consideration and decision of the case cannot, by itself, confer jurisdiction on the Court. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17—18, 71 S.Ct. 534, 541, 95 L.Ed. 702; People's Bank of Belville v. Calhoun, 102 U.S. 256, 260—261, 26 L.Ed. 101; Capron v. Van Noorden, 2 Cranch 126, 127, 2 L.Ed. 229. Therefore, a review of the sources of the Court's jurisdiction is a threshold ***306** inquiry appropriate to the disposition of every case that comes before us. Revised Rules of the Supreme Court, 15(1)(b), 23(1)(b), 28 U.S.C.A.; Kesler v. Department of Public Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641; Collins v. Miller, 252 U.S. 364, 40 S.Ct. 347, 64 L.Ed. 616; United States v. More, 3 Cranch 159, 2 L.Ed. 397.

The requirement that a final judgment shall have been entered in a case by a lower court before a right of appeal attaches has an ancient history in federal practice, first appearing in the Judiciary Act of 1789. [11] With occasional modifications, the requirement has remained a cornerstone of the structure of appeals in the federal courts. [12] The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.' See, e.g., Cobbledick v. United States, 309 U.S. 323, 326, 60 S.Ct. 540, 541, 84 L.Ed. 783; Market Street R. Co. v. Railroad Comm., 324 U.S. 548, 552, 65 S.Ct. 770, 773, 89 L.Ed. 1171; Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 69, 68 S.Ct. 972, 977, 92 L.Ed. 1212; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528; DiBella v. United States, 369 U.S. 121, 124, 129, 82 S.Ct. 654, 656, 7 L.Ed.2d 614; cf. Federal Trade Comm. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 212, 73 S.Ct. 245, 249, 97 L.Ed. 245; United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 232, 78 S.Ct. 674, 677, 2 L.Ed.2d 721. A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': [13] the touchstones of federal procedure.

In most cases in which the Expediting Act has been cited as the basis of this Court's jurisdiction, the issue of 'finality' has not been raised or discussed by the parties or the Court. On but few occasions have particular ***307** orders in suits to which that Act is applicable been considered in the light of claims that ****1514** they were insufficiently 'final' so as to preclude appeal to this Court. Compare Schine Chain Theatres v. United States, 329 U.S. 686, 67 S.Ct. 367, 91 L.Ed. 602, with Schine Chain Theatres v. United States, 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245. The question has generally been passed over without comment in adjudications on the merits. While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, United States v. Tucker Truck Lines, Inc., 344 U.S. 33, 38, 73 S.Ct. 67, 69, 97 L.Ed. 54; United States ex rel. Arant v. Lane, 245 U.S. 166, 170, 38 S.Ct. 94, 96, 62 L.Ed. 223, neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years. [14] Cf. Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 379—380, 69 S.Ct. 606, 612, 93 L.Ed. 741; Radio Station WOW v. Johnson, 326 U.S. 120, 125—126, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092.

***308** We think the decree of the District Court in this case had sufficient indicia of finality for us to hold that the judgment is properly appealable at this time. We note, first, that the District Court disposed on the entire complaint filed by the Government. Every prayer for relief was passed upon. Full divestiture by Brown of Kinney's stock and assets was expressly required. Appellant was permanently enjoined from acquiring or having any further interest in the business, stock or assets of the other defendant in the suit. The single provision of the judgment by which its finality may be questioned is the one requiring appellant to propose in the immediate future a plan for carrying into effect the court's order of divestiture. However, when we reach the merits of, and affirm, the judgment below, the sole remaining task for the District Court will be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted. Further rulings of the District Court in administering its decree, facilitated by the fact that the defendants below have been required to maintain separate books pendente lite, are sufficiently independent of, and subordinate to, the issues presented by this appeal to make the case in its present posture a proper one for

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review now.[15] Appellant here does not attack ****1515** the full divestiture ordered by the District Court as such; it is appellant's contention that ***309** under the facts of the case, as alleged and proved by the Government, no order of divestiture could have been proper. The propriety of divestiture was considered below and is disputed here on an 'all or nothing' basis. It is ripe for review now, and will, thereafter, be foreclosed. Repetitive judicial consideration of the same question in a single suit will not occur here. Cf. Radio Station WOW v. Johnson, supra, 326 U.S. at 127, 65 S.Ct. 1480; Catlin v. United States, 324 U.S. 229, 233—234, 65 S.Ct. 631, 633, 89 L.Ed. 911; Cobbledick v. United States, supra, 309 U.S. at 325, 330, 60 S.Ct. 541.

A second consideration supporting our view is the character of the decree still to be entered in this suit. It will be an order of full divestiture. Such an order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the antitrust laws. The delay in withholding review of any of the issues in the case until the details of a divestiture had been approved by the District Court and reviewed here could well mean a change in market conditions sufficiently pronounced to render impractical or otherwise unenforceable the very plan of asset disposition for which the litigation was held. The public interest, as well as that of the parties, would lose by such procedure.

Lastly, holding the decree of the District Court in the instant case less than 'final' and, thus, not appealable, would require a departure from a settled course of the Court's practice. It has consistently reviewed antitrust decrees contemplating either future divestiture or other comparable remedial action prior to the formulation and ***310** entry of the precise details of the relief ordered. No instance has been found in which the Court has reviewed a case following a divestiture decree such as the one we are asked to consider here, in which the party subject to that decree has later brought the case back to this Court with claims of error in the details of the divestiture finally approved.[16] And only two years ago, we were unanimous in accepting ****1516** jurisdiction, and in affirming the judgment of a District Court similar to the one entered here, in the only case under amended s 7 of the Clayton Act brought before us at a juncture comparable to the instant litigation. See Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 472—473, 80 S.Ct. 847, 856, 4 L.Ed.2d 880.[17] A fear of piecemeal appeals because of our adherence to existing procedure can find no support in history. Thus, the substantial body ***311** of precedent for accepting jurisdiction over this case in its present posture supports the practical considerations previously discussed. We believe a contrary result would be inconsistent with the very purposes for which the Expediting Act was passed and that gave it its name.

III.

LEGISLATIVE HISTORY.

This case is one of the first to come before us in which the Government's complaint is based upon allegations that the appellant has violated s 7 of the Clayton Act, as that section was amended in 1950.[18] The amendments adopted in 1950 culminated extensive efforts over a number of years, on the parts of both the Federal Trade Commission and some members of Congress, to secure revision of a section of the antitrust laws considered by many observers to be ineffective in its then existing form. Sixteen bills to amend s 7 during the period 1943 to 1949 ***312** alone were introduced for consideration by the Congress, and full public hearings on proposed amendments were held in three separate sessions.[19] ****1517** In the light of this extensive legislative attention to the measure, and the broad, general language finally selected by Congress for the expression of its will, we think it appropriate to review the history of the amended Act in determining whether the judgment of the court below was consistent with the intent of the legislature. See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 591—592, 77 S.Ct. 872, 876, 1 L.Ed.2d 1057; Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 390—395, 71 S.Ct. 745,

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748, 95 L.Ed. 1035; Federal Trade Comm. v. Morton Salt Co., 334 U.S. 37, 43—46, 49, 68 S.Ct. 822, 826, 92 L.Ed. 1196; Corn Products Refining Co. v. Federal Trade Comm., 324 U.S. 726, 734—737, 65 S.Ct. 961, 965, 89 L.Ed. 1320.

As enacted in 1914, s 7 of the original Clayton Act prohibited the acquisition by one corporation of the stock of another corporation when such acquisition would result in a substantial lessening of competition between the acquiring and the acquired companies, or tend to ***313** create a monopoly in any line of commerce. The Act did not, by its explicit terms, or as construed by this Court, bar the acquisition by one corporation of the assets of another. [20] Nor did it appear to preclude the acquisition of stock in any corporation other than a direct competitor. [21] Although proponents of the 1950 amendments to the Act suggested that the terminology employed in these provisions was the result of accident or an unawareness that the acquisition of assets could be as inimical to competition as stock acquisition, a review of the legislative history of the original Clayton Act fails to support such views. [22] The possibility of asset acquisition was discussed, [23] but was not considered ****1518** important ***314** to an Act then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock. [24]

It was, however, not long before the Federal Trade Commission recognized deficiencies in the Act as first enacted. Its Annual Reports frequently suggested amendments, principally along two lines: first, to ‘plug the loophole’ exempting asset acquisitions from coverage under the Act, and second, to require companies proposing a merger to give the Commission prior notification of their plans. [25] The Final Report of the Temporary National Economic Committee also recommended changes focusing on these two proposals. [26] Hearings were held on some bills incorporating either or both of these changes but, prior to the amendments adopted in 1950, none reached the floor of Congress of plenary consideration. Although the bill that was eventually to become amended s 7 was confined to embracing within the Act's terms the ***315** acquisition of assets as well as stock, in the course of the hearings conducted in both the Eightieth and Eighty-first Congresses, a more far-reaching examination of the purposes and provisions of s 7 was undertaken. A review of the legislative history of these amendments provides no unmistakably clear indication of the precise standards the Congress wished the Federal Trade Commission and the courts to apply in judging the legality of particular mergers. However, sufficient expressions of a consistent point of view may be found in the hearings, committee reports of both the House and Senate and in floor debate to provide those charged with enforcing the Act with a usable frame of reference within which to evaluate any given merger.

The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers. [27] Other considerations cited in support of the bill were ****1519** the desirability ***316** of retaining ‘local control’ over industry and the protection of small businesses. [28] Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.

What were some of the factors, relevant to a judgment as to the validity of a given merger, specifically discussed by Congress in redrafting s 7?

First, there is no doubt that Congress did wish to ‘plug the loophole’ and to include within the coverage of the Act the acquisition of assets no less than the acquisition of stock. [29]

***317** Second, by the deletion of the ‘acquiring-acquired’ language in the original text, [30] it hoped to make plain that s 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country. [31]

****1520** Third, it is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power ***318** to brake this force at its outset and before it gathered momentum. [32]

Fourth, and closely related to the third, Congress rejected, as inappropriate to the problem it sought to remedy, the application to s 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original s 7. [33]

****1521** ***319** Fifth, at the same time that it sought to create an effective tool for preventing all mergers having demonstrable anti-competitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. [34] ***320** The deletion of the word ‘community’ in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant ‘section’ of the country. [35] Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.

Sixth, Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anti-competitive ***321** effects of a merger were to be judged. Nor did it adopt a definition of the word ‘substantially,’ whether in quantitative terms of sales or assets or market shares or in designated qualitative terms, by which a merger's effects on competition were to be measured. [36]

****1522** Seventh, while providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may ‘substantially’ lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular ***322** industry. [37] That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account. [38]

***323** Eighth, Congress used the words ‘may be substantially to lessen competition’ (emphasis supplied), to indicate that its concern was with probabilities, not certainties. [39] Statutes existed ****1523** for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.

It is against this background that we return to the case before us.

IV.

THE VERTICAL ASPECTS OF THE MERGER

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Economic arrangements between companies standing in a supplier-customer relationship are characterized as 'vertical.' The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, ***324** by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition,' Standard Oil Co. of California v. United States, 337 U.S. 293, 314, 69 S.Ct. 1051, 1062, 93 L.Ed. 1371, which 'deprive(s) * * * rivals of a fair opportunity to compete.'[40] H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8. Every extended vertical arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement. However, the Clayton Act does not render unlawful all such vertical arrangements, but forbids only those whose effect 'may be substantially to lessen competition, or to tend to create a monopoly' 'in any line of commerce in any section of the country.' Thus, as we have previously noted,

'(d)etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected.'[41]

The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').

***325** The Product Market.

The outer boundaries of a product market are determined by the reasonable interchangeability of use or ****1524** the cross-elasticity of demand between the product itself and substitutes for it.[42] However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593—595, 57 S.Ct. 872, 877, 1 L.Ed.2d 1057. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[43] Because s 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.[44]

***326** Applying these considerations to the present case, we conclude that the record supports the District Court's finding that the relevant lines of commerce are men's, women's, and children's shoes. These product lines are recognized by the public; each line is manufactured in separate plants; each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and each is, of course, directed toward a distinct class of customers.

Appellant, however, contends that the District Court's definitions fail to recognize sufficiently 'price/quality' and 'age/sex' distinctions in shoes. Brown argues that the predominantly medium-priced shoes which it manufactures occupy a product market different from the predominantly low-priced shoes which Kinney sells. But agreement with that argument would be equivalent to holding that medium-priced shoes do not compete with low-priced shoes. We think the District Court properly found the facts to be otherwise. It would be unrealistic to accept Brown's contention that, for example, men's shoes selling below $8.99 are in a different product market from those selling above.$9.00.

This is not to say, however, that 'price/quality' differences, where they exist, are unimportant in analyzing a merger; they may be of importance in determining the likely effect of a merger. But the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in

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fact, competition exists. Thus we agree with the District Court that in this case a further division of product lines based ****1525** on 'price/quality' differences would be 'unrealistic.'

***327** Brown's contention that the District Court's product market definitions should have recognized further 'age/sex' distinctions raises a different problem. Brown's sharpest criticism is directed at the District Court's finding that children's shoes constituted a single line of commerce. Brown argues, for example, that 'a little boy does not wear a little girl's black patent leather pump' and that '(a) male baby cannot wear a growing boy's shoes.' Thus Brown argues that 'infants' and babies" shoes, 'misses' and children's' shoes and 'youths' and boys" shoes should each have been considered a separate line of commerce. Assuming, arguendo, that little boys' shoes, for example, do have sufficient peculiar characteristics to constitute one of the markets to be used in analyzing the effects of this merger, we do not think that in this case the District Court was required to employ finer 'age/sex' distinctions then those recognized by its classifications of 'men's,' 'women's,' and 'children's' shoes. Further division does not aid us in analyzing the effects of this merger. Brown manufactures about the same percentage of the Nation's children's shoes (5.8%) as it does of the Nation's youths' and boys' shoes (6.5%), of the Nation's misses' and children's shoes (6.0%) and of the Nation's infants' and babies' shoes (4.9%). Similarly, Kinney sells about the same percentage of the Nation's children's shoes (2%) as it does of the Nation's youths' and boys' shoes (3.1%), of the Nation's misses' and children's shoes (1.9%), and of the Nation's infants' and babies' shoes (1.5%). Appellant can point to no advantage it would enjoy were finer divisions than those chosen by the District Court employed. Brown manufactures significant, comparable quantities of virtually every type of nonrubber men's, women's, and children's shoes, and Kinney sells such quantities of virtually every type of men's, women's, and children's shoes. Thus, whether considered separately or together, the picture of this ***328** merger is the same. We, therefore, agree with the District Court's conclusion that in the setting of this case to subdivide the shoe market further on the basis of 'age/sex' distinctions would be 'impractical' and 'unwarranted.'

The Geographic Market.

We agree with the parties and the District Court that insofar as the vertical aspect of this merger is concerned, the relevant geographic market is the entire Nation. The relationships of product value, bulk, weight and consumer demand enable manufacturers to distribute their shoes on a nationwide basis, as Brown and Kinney, in fact, do. The anticompetitive effects of the merger are to be measured within this range of distribution.

The Probable Effect of the Merger.

Once the area of effective competition affected by a vertical arrangement has been defined, an analysis must be made to determine if the effect of the arrangement 'may be substantially to lessen competition, or to tend to create a monopoly' in this market.

Since the diminution of the vigor of competition which may stem from a vertical arrangement results primarily from a foreclosure of a share of the market otherwise open to competitors, an important consideration in determining whether the effect of a vertical arrangement 'may be substantially to lessen competition, or to tend to create a monopoly' is the size of the share of the market foreclosed. However, this factor will seldom be determinative. If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the ****1526** Sherman Act.[45] And the legislative history of s 7 indicates clearly that the ***329** tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act.[46] On the other hand, foreclosure of a de minimis share of the market will not tend 'substantially to lessen competition.'

Between these extremes, in cases such as the one before us, in which the foreclosure is neither of monopoly nor de minimis proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive. In such cases, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe.[47]

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A most important such factor to examine is the very nature and purpose of the arrangement.[48] Congress not only indicated that 'the tests of illegality (under s 7) are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act,'[49] but also chose for s 7 language virtually identical to that of s 3 of the Clayton Act, 15 U.S.C. s 14, 15 U.S.C.A. s 14, which had been interpreted by this Court to require an examination of the interdependence of the market share foreclosed by, and the economic purpose of, the vertical arrangement. Thus, for example, if a particular vertical arrangement, considered under s 3, appears to be a limited term exclusive-dealing contract, ***330** the market foreclosure must generally be significantly greater than if the arrangement is a tying contract before the arrangement will be held to have violated the Act. Compare Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580, and Standard Oil Co. of California v. United States, supra, with International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20.[50] The reason for this is readily discernible. The usual tying contract forces the customer to take a product or brand he does not necessarily want in order to secure one which he does desire. Because such an arrangement is inherently anticompetitive, we have held that its use by an established company is likely 'substantially to lessen competition' although only a relatively small amount of commerce is affected. International Salt Co. v. United States, supra. Thus, unless the tying device is employed by a small company in an attempt to break into a market, cf. Harley-Davidson Motor Co., 50 F.T.C. 1047, 1066, the use of a tying device can rarely[51] be harmonized with the strictures of the antitrust laws, which are intended primarily to ****1527** preserve and stimulate competition. See Standard Oil Co. of California v. United States, supra, 337 U.S. at 305—306, 69 S.Ct. 1058. On the other hand, requirement contracts are frequently negotiated at the behest of the customer who has chosen the particular supplier and his product upon the basis of competitive merit. See, e.g., Tampa Electric Co. v. Nashville Coal Co., supra. Of course, the fact that requirement contracts are not inherently anticompetitive will not save a particular agreement if, in fact, it is likely 'substantially to lessen competition, or to tend to create a monopoly.' E.g., Standard Oil Co. of California v. United States, supra. Yet a requirement contract may escape censure if only a ***331** small share of the market is involved, if the purpose of the agreement is to insure to the customer a sufficient supply of a commodity vital to the customer's trade or to insure to the supplier a market for his output and if there is no trend toward concentration in the industry. Tampa Electric Co. v. Nashville Coal Co., supra. Similar considerations are pertinent to a judgment under s 7 of the Act.

The importance which Congress attached to economic purpose is further demonstrated by the Senate and House Reports on H.R. 2734, which evince an intention to preserve the 'failing company' doctrine of International Shoe Co. v. Federal Trade Comm., 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431.[52] Similarly, Congress foresaw that the merger of two large companies or a large and a small company might violate the Clayton Act while the merger of two small companies might not, although the share of the market foreclosed be identical, if the purpose of the small companies is to enable them in combination to compete with larger corporations dominating the market.[53]

The present merger involved neither small companies nor failing companies. In 1955, the date of this merger, Brown was the fourth largest manufacturer in the shoe industry with sales of approximately 26 million pairs of shoes and assets of over $72,000,000 while Kinney had sales of about 8 million pairs of shoes and assets of about $18,000,000. Not only was Brown one of the leading manufacturers of men's, women's, and children's shoes, but Kinney, with over 350 retail outlets, owned and operated the largest independent chain of family shoe stores in the Nation. Thus, in this industry, no merger between ***332** a manufacturer and an independent retailer could involve a larger potential market foreclosure. Moreover, it is apparent both from past behavior of Brown and from the testimony of Brown's President,[54] that Brown would use its ownership of Kinney to force Brown shoes into Kinney stores. Thus, in operation this vertical arrangement would be quite analogous to one involving a tying clause.[55]

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Another important factor to consider is the trend toward concentration in the industry. [56] It is true, of course, that the statute prohibits a given merger only if the effect of that merger ****1528** may be substantially to lessen competition. [57] But the very wording of s 7 requires a prognosis of the probable future effect of the merger. [58]

The existence of a trend toward vertical integration, which the District Court found, is well substantiated by the record. Moreover, the court found a tendency of the acquiring manufacturers to become increasingly important sources of supply for their acquired outlets. The necessary corollary of these trends is the foreclosure of independent manufacturers from markets otherwise open to them. And because these trends are not the product of accident but are rather the result of deliberate policies of Brown and other leading shoe manufacturers, account must be taken of these facts in order to predict the probable ***333** future consequences of this merger. It is against this background of continuing concentration that the present merger must be viewed.

Brown argues, however, that the shoe industry is at present composed of a large number of manufacturers and retailers, and that the industry is dynamically competitive. But remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly. See Pillsbury Mills, Inc., 50 F.T.C. 555, 573. It is the probable effect of the merger upon the future as well as the present which the Clayton Act commands the courts and the Commission to examine. [59]

Moreover, as we have remarked above, not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress. [60] Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure. The Senate Report, quoting with approval from the Federal Trade Commission's 1948 report on the merger movement, states explicitly that amended s 7 is addressed, inter alia, to the following problem:

‘Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of ***334** power are individually so minute as to make it difficult to use the Sherman Act tests against them * * *.

‘Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply.’ S.Rep. No. 1775, 81st Cong., 2d Sess. 5, U.S.Code Cong. and Adm.News 1950, p. 4297. [61] And see H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8.

****1529** The District Court's findings, and the record facts, many of them set forth in Part I of this opinion, convince us that the shoe industry is being subjected to just such a cumulative series of vertical mergers which, if left unchecked, will be likely ‘substantially to lessen competition.’

We reach this conclusion because the trend toward vertical integration in the shoe industry, when combined with Brown's avowed policy of forcing its own shoes upon its retail subsidiaries, may foreclose competition from a substantial share of the markets for men's, women's, and children's shoes, without producing any countervailing competitive, economic, or social advantages.

V.

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THE HORIZONTAL ASPECTS OF THE MERGER.

An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as 'horizontal.' The effect on competition of such an arrangement depends, of course, upon its character and scope. Thus, its validity in the face of the antitrust laws will depend upon such factors as: the relative size and number of the ***335** parties to the arrangement; whether it allocates shares of the market among the parties; whether it fixes prices at which the parties will sell their product; or whether it absorbs or insulates competitors.[62] Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated. Section 7 of the Clayton Act, prior to its amendment, focused upon this aspect of horizontal combinations by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired companies.[63] The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition generally in an economically significant market.

Thus, again, the proper definition of the market is a 'necessary predicate' to an examination of the competition that may be affected by the horizontal aspects of the merger. The acquisition of Kinney by Brown resulted in a horizontal combination at both the manufacturing and retailing levels of their businesses. Although the District Court found that the merger of Brown's and Kinney's manufacturing facilities was economically too insignificant to come within the prohibitions of the Clayton Act, the Government has not appealed from this portion of the lower court's decision. Therefore, we have no occasion to express our views with respect to that finding. On the other hand, appellant does contest the District Court's finding that the merger of the companies' retail outlets may tend substantially to lessen competition.

***336** The Product Market.

Shoes are sold in the United States in retail shoe stores and in shoe departments of general stores. These outlets sell: (1) men's shoes, (2) women's shoes, (3) women's or children's shoes, or (4) men's, women's or children's shoes. Prior to the merger, both Brown and Kinney sold their shoes in competition ****1530** with one another through the enumerated kinds of outlets characteristic of the industry.

In Part IV of this opinion we hold that the District Court correctly defined men's, women's, and children's shoes as the relevant lines of commerce in which to analyze the vertical aspects of the merger. For the reasons there stated we also hold that the same lines of commerce are appropriate for considering the horizontal aspects of the merger.

The Geographic Market.

The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. See S.Rep.No.1775, 81st Cong., 2d Sess. 5—6; United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S.Ct. 872, 877, 1 L.Ed.2d 1057. Moreover, just as a product submarket may have s 7 significance as the proper 'line of commerce,' so may a geographic submarket be considered the appropriate 'section of the country.' Erie Sand & Gravel Co. v. Federal Trade Comm., 291 F.2d 279, 283 (C.A.3d Cir.); United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 595—603 (D.C.S.D.N.Y.). Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities'[64] of the industry and be economically ***337** significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area. United States v. Columbia Pictures Corp., 189 F.Supp. 153, 193—194 (D.C.S.D.N.Y.); United States v. Maryland & Virginia Milk Producers Ass'n, 167 F.Supp. 799 (D.C.D.C.), affirmed, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed. 880. The fact that two merging firms have competed

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directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place their merger outside the scope of s 7. That section speaks of 'any * * * section of the country,' and if anticompetitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed. [65]

The parties do not dispute the findings of the District Court that the Nation as a whole is the relevant geographic market for measuring the anticompetitive effects of the merger viewed vertically or of the horizontal merger of Brown's and Kinney's manufacturing facilities. As to the retail level, however, they disagree.

The District Court found that the effects of this aspect of the merger must be analyzed in every city with a population exceeding 10,000 and its immediate contiguous surrounding territory in which both Brown and Kinney sold shoes at retail through stores they either owned or controlled. [66] By this definition ****1531** of the geographic market, ***338** less than one-half of all the cities in which either Brown or Kinney sold shoes through such outlets are represented. The appellant recognizes that if the District Court's characterization of the relevant market is proper, the number of markets in which both Brown and Kinney have outlets is sufficiently numerous so that the validity of the entire merger is properly judged by testing its effects in those markets. However, it is appellant's contention that the areas of effective competition in shoe retailing were improperly defined by the District Court. It claims that such areas should, in some cases, be defined so as to include only the central business districts of large cities, and in others, so as to encompass the 'standard metropolitan areas' within which smaller communities are found. It argues that any test failing to distinguish between these competitive situations is improper.

We believe, however, that the record fully supports the District Court's findings that shoe stores in the outskirts of cities compete effectively with stores in central ***339** downtown areas, and that while there is undoubtedly some commercial intercourse between smaller communities within a single 'standard metropolitan area,' the most intense and important competition in retail sales will be confined to stores within the particular communities in such an area and their immediate environs. [67]

We therefore agree that the District Court properly defined the relevant geographic markets in which to analyze this merger as those cities with a population exceeding 10,000 and their environs in which both Brown and Kinney retailed shoes through their own outlets. Such markets are large enough to include the downtown shops and suburban shopping centers in areas contiguous to the city, which are the important competitive factors, and yet are small enough to exclude stores beyond the immediate environs of the city, which are of little competitive significance.

The Probable Effect of the Merger.

Having delineated the product and geographic markets within which the effects of this merger are to be measured, we turn to an examination of the District Court's finding that as a result of the merger competition in the retailing of men's, women's and children's shoes may be lessened substantially in those cities in which both Brown and Kinney stores are located. We note, initially, that appellant challenges this finding on a number of grounds other than those discussed above and on grounds independent of the critical question of whether competition may, in fact, be lessened. ****1532** Thus, Brown objects that the District Court did not examine the competitive picture in each line of commerce and each section of the country it had defined as appropriate. It says the Court erred in failing to enter findings with respect to each relevant city assessing ***340** the anticompetitive effect of the merger on the retail sale, of, for example, men's shoes in Council Bluffs, men's shoes in Texas City, women's shoes in Texas City and children's shoes in St. Paul. Even assuming a representative sample could properly be used, Brown also objects that the District Court's detailed analysis of competition in shoe retailing was limited to a single city —St. Louis—a city in which Kinney did not operate. The appellant says this analysis could not be sufficiently representative to establish a standard image of the shoe trade which could be applied to each of the more than 100 cities in which Brown and Kinney sold shoes, particularly as some of those cities were much smaller than St. Louis, others were larger, some were in different climates and others were in areas having different median per capita incomes.

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However, we believe the record is adequate to support the findings of the District Court. While it is true that the court concentrated its attention on the structure of competition in the city in which it sat and as to which detailed evidence was most readily available, it also heard witnesses from no less than 40 other cities in which the parties to the merger operated. The court was careful to point out that it was on the basis of all the evidence that it reached its conclusions concerning the boundaries of the relevant markets and the merger's effects on competition within them. We recognize that variations of size climate and wealth as enumerated by Brown exist in the relevant markets. However, we agree with the court below that the markets with respect to which evidence was received provide a fair sampling of all the areas in which the impact of this merger is to be measured. The appellant has not shown how the variables it has mentioned could affect the structure of competition within any particular market so as to require a change in the conclusions drawn by the District Court. Each competitor within a given market is equally affected by these factors, even though the city in which he does business ***341** may differ from St. Louis in size, climate or wealth. Thus, we believe the District Court properly reached its conclusions on the basis of the evidence available to it. There is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts, if the basic issues of the case may be determined through study of a fair sample. [68]

In the case before us, not only was a fair sample used to demonstrate the soundness of the District Court's conclusions, but evidence of record fully substantiates those findings as to each relevant market. An analysis of undisputed statistics of sales of shoes in the cities in which both Brown and Kinney all shoes at retail, separated into the appropriate lines of commerce, provides a persuasive factual foundation upon which the required prognosis of the merger's effects may be built. Although Brown objects to some details in the ****1533** Government's computation used in drafting these exhibits, appellant cannot deny the correctness of the more general picture they reveal. [69] We have appended the exhibits to this opinion. ***342** They show, for example, that during 1955 in 32 separate cities, ranging in size and location from Topeka, Kansas, to Batavia, New York, and Hobbs, New Mexico, the combined ***343** share of Brown and Kinney sales of women's shoes (by unit volume) exceeded 20%. [70] In 31 cities—some the same as those used in measuring the effect of the merger in the women's line—the combined share of children's shoes sales exceeded 20%; in 6 cities their share exceeded 40%. In Dodge City, Kansas, their combined share of the market for women's shoes was over 57%; their share of the children's shoe market in that city was 49%. In the 7 cities in which Brown's and Kinney's combined shares of the market for women's shoes were greatest (ranging from 33% to 57%) each of the parties alone, prior to the merger, had captured substantial portions ****1534** of those markets (ranging from 13% to 34%); the merger intensified this existing concentration. In 118 separate cities the combined shares of the market of Brown and Kinney in the sale of one of the relevant lines of commerce exceeded 5%. In 47 cities, their share exceeded 5% in all three lines.

The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market. [71] In an industry as fragmented as shoe retailing, the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving ***344** 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition. Testimony in the record from numerous independent retailers, based on their actual experience in the market, demonstrates that a strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations and that the large chains can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories. A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

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Other factors to be considered in evaluating the probable effects of a merger in the relevant market lend additional ***345** support to the District Court's conclusion that this merger may substantially lessen competition. One such factor is the history of tendency toward concentration in the industry. [72] As we ****1535** have previously pointed out, the shoe industry has, in recent years, been a prime example of such a trend. Most combinations have been between manufacturers and retailers, as each of the larger producers has sought to capture an increasing number of assured outlets for its wares. Although these mergers have been primarily vertical in their aim and effect, to the extent that they have brought ever greater numbers of retail outlets within fewer and fewer hands, they have had an additional important impact on the horizontal plane. By the merger in this case, the largest single group of retail stores still independent of one of the large manufacturers was absorbed into an already substantial aggregation of more or less controlled retail outlets. As a result of this merger, Brown moved into second place nationally in terms of retail stores directly owned. Including the stores on its franchise plan, the merger placed under Brown's control almost 1,600 shoe outlets, or about 7.2% of the Nation's retail 'shoe stores' as defined by the Census Bureau, [73] and 2.3% of the Nation's total retail ***346** shoe outlets. [74] We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time. In the light of the trends in this industry we agree with the Government and the court below that this is an appropriate place at which to call a halt.

At the same time appellant has presented no mitigating factors, such as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position, nor a demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets. On the basis of the record before us, we believe the Government sustained its burden of proof. We hold that the District Court was correct in concluding that this merger may tend to lessen competition substantially in the retail sale of men's, women's, and children's shoes in the overwhelming majority of those cities and their environs in which both Brown and Kinney sell through owned or controlled outlets.

The judgment is affirmed.

Affirmed.

Mr. Justice FRANKFURTER took no part in the decision of this case.

Mr. Justice WHITE took no part in the consideration or decision of this case.

***347** ****1536** APPENDIX A

Sales of women's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets	Combined Brown-Kinney share

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			(%) *	(%) *
Dodge City, Kans..	31,400	23.3	34.4	57.7
Texas City, Tex...	32,300	27.8	20.7	48.5
Council Bluffs, Iowa...	68,200	27.3	15.4	42.7
Marshalltown, Iowa...	72,600	21.8	13.4	35.2
Uniontown, Pa..	144,900	16.3	18.8	35.1
Ardmore, Okla..	62,600	14.4	20.3	34.7
Keokuk, Iowa...	34,600	18.4	14.8	33.2
Ottumwa, Iowa...	67,200	28.2	4.3	32.5
Pine Bluff, Ark...	63,100	21.6	9.4	31.0
Lawton, Okla..	95,200	20.2	9.8	30.0
Borger, Tex...	50,100	15.5	13.8	29.3
Roswell, N. Mexico..	80,900	11.7	15.8	27.5
Topeka, Kans..	224,000	11.7	15.8	27.5
Coatesville, Pa..	46,200	17.2	10.0	27.2
Hobbs, N. Mexico...	50,800	22.2	5.0	27.2
Iowa City, Iowa..	72,200	15.3	10.7	26.0
Dubuque, Iowa..	119,000	14.3	11.5	25.8
Carlisle, Pa...	55,500	17.5	5.9	23.4
Texarkana, Ark...	65,800	15.9	7.5	23.4
Fort Dodge, Iowa..	104,000	10.8	12.5	23.3
Steubenville, Ohio...	207,200	14.9	8.1	23.0
Mason City, Iowa..	102,400	14.4	8.3	22.7
Marion, Ohio..	91,600	6.7	15.7	22.4
Pueblo, Colo...	152,400	14.1	7.5	21.6
Hibbing, Minn..	44,600	18.1	3.4	21.5
Fargo, N. Dak...	162,800	15.3	6.2	21.5

Franklin, Pa.	32,100	14.4	7.1	21.5
Corpus Christi, Tex.	331,500	2.4	19.0	21.4
Batavia, N. Y.	75,300	13.2	8.1	21.3
McAllen, Tex.	90,200	13.0	8.3	21.3
Concord, N. H.	57,300	15.6	4.7	20.3
Sioux City, Iowa	222,000	7.7	12.3	20.0
Muskogee, Okla.	68,100	7.6	12.2	19.8
Rochester, Minn.	130,100	11.2	8.6	19.8
Bartlesville, Okla.	63,100	15.8	3.9	19.7
Berwyn, Ill.	95,900	17.8	1.9	19.7
Clarksburg, W. Va.	134,600	15.5	3.9	19.4
Davenport, Iowa	230,300	6.4	12.8	19.2
Freeport, Ill.	88,000	10.7	8.3	19.0
Grand Forks, N. Dak.	121,100	12.8	6.1	18.9
Muskegon, Mich.	172,000	4.0	14.9	18.9
Baton Rouge, La.	398,100	3.8	14.9	18.7
Des Moines, Iowa	562,800	4.9	13.8	18.7
Springfield, Mo.	210,400	3.7	14.9	18.6
Laredo, Tex.	166,200	15.3	3.2	18.5
St. Cloud, Minn.	88,400	9.6	8.9	18.5
Fort Smith, Ark.	165,200	11.8	6.5	18.3
Kingsport, Tenn.	106,200	13.0	5.1	18.1
Gulfport, Miss.	99,700	14.2	3.7	17.9
Cortland N. Y.	55,300	12.2	5.5	17.7
Fremont, Nebr.	56,100	11.8	5.6	17.4
Manitowoc, Wis.	60,800	13.9	3.5	17.4
Salina, Kans.	102,800	13.8	3.3	17.1
Muncie, Ind.	158,000	7.9	9.0	16.9
Portsmouth, Ohio	141,200	9.2	7.2	16.4

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Reading, Pa.	417,200	6.0	10.4	16.4
Greensburg, Pa.	117,800	8.0	7.9	15.9
Little Rock, Ark.	468,100	2.7	13.2	15.9
Flint, Mich.	628,300	2.7	13.1	15.8
Wichita, Kans.	666,600	7.5	8.3	15.8
Lubbock, Tex.	305,500	3.9	11.7	15.6
Kingston, N. Y.	112,100	11.6	3.9	15.5
Emporia, Kans.	44,300	14.3	0.8	15.1
Johnson City, Tenn.	75,800	12.0	3.1	15.1
Odessa, Tex.	167,700	8.1	7.0	15.1
Bloomington, Ill.	129,600	6.2	8.6	14.8
Elgin, Ill.	126,900	6.7	8.0	14.7
Enid, Okla.	140,400	10.7	4.0	14.7
Burlington, Iowa	74,500	10.7	3.9	14.6
South Bend, Ind.	434,500	1.6	13.0	14.6
Galesburg, Ill.	95,600	12.4	2.1	14.5
Abilene, Tex.	184,300	12.4	2.0	14.4
Meridian, Miss.	120,000	3.7	10.6	14.3
Toledo, Ohio	821,800	1.3	12.6	13.9
Tulsa, Okla.	749,000	7.0	6.9	13.9
Colorado Springs, Colo.	225,600	7.5	6.1	13.6
Williamsport, Pa.	153,400	4.1	9.2	13.3
Mankato, Minn.	99,900	7.9	5.3	13.2
Green Bay, Wis.	220,000	7.5	5.2	12.7
Waterloo, Iowa	224,100	10.2	2.3	12.5
Sioux Falls, S. Dak.	172,000	7.4	4.9	12.3
Glens Falls, N. Y.	115,300	7.6	4.6	12.2
Kansas City, Kans.	181,300	8.6	3.6	12.2
Oklahoma City, Okla.	839,500	1.8	10.4	12.2

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Hutchinson, Kans.	156,400	9.0	2.4	11.4
Kenosha, Wis.	107,700	7.0	4.3	11.3
Pottsville, Pa.	147,000	6.0	5.3	11.3
San Angelo, Tex.	113,800	6.5	4.6	11.1
Wheeling, W. Va.	311,600	6.9	3.9	10.8
Ithaca, N. Y.	82,300	5.8	4.7	10.5
Zanesville, Ohio	138,800	9.0	1.5	10.5
Mobile, Ala.	473,100	1.0	9.4	10.4
York, Pa.	344,200	5.1	4.9	10.0
Gary, Ind.	414,400	4.3	5.3	9.6
Decatur, Ill.	221,800	3.9	5.5	9.4
Amarillo, Tex.	334,100	5.6	3.2	8.8
Minneapolis, Minn.	1,909,900	5.3	3.1	8.4
Forth Worth, Tex.	1,092,100	1.4	6.9	8.3
Waco, Tex.	170,400	5.4	2.9	8.3
Altoona, Pa.	241,000	4.8	3.3	8.1
Lancaster, Pa.	316,400	3.9	4.2	8.1
Rockford, Ill.	377,400	5.0	3.1	8.1
Saginaw, Mich.	326,300	2.1	5.6	7.7
Grand Rapids, Mich.	650,300	5.8	1.6	7.4
Jacksonville, Fla.	739,200	0.6	6.7	7.3
Columbus, Ga.	308,300	3.4	3.5	6.9
Evansville, Ind.	486,600	3.1	3.6	6.7
St. Paul, Minn.	1,013,200	3.1	3.5	6.6
Montgomery, Ala.	437,100	1.7	4.7	6.4
Peoria, Ill.	469,300	3.6	2.8	6.4
Springfield, Ill.	304,400	5.1	1.3	6.4
Milwaukee, Wis.	1,984,900	5.9	0.3	6.2
San Antonio, Tex.	1,476,000	1.0	4.7	5.7

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Cedar Rapids, Iowa	256,600	3.9	1.2	5.1

***350 **1538** APPENDIX B

Sales of children's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or control- led outlets (%) *	Combined Brown- Kinney share (%) *
Coatesville, Pa	20,900	20.8	31.0	51.8
Dodge City, Kans	14,200	35.5	13.5	49.0
Council Bluffs, Iowa	30,900	36.6	6.5	43.1
Ardmore, Okla	28,400	20.7	21.0	41.7
Pueblo, Colo	69,100	25.4	15.8	41.2
Borger, Tex	22,700	24.8	16.1	40.9
Berwyn, Ill	43,500	31.2	3.4	34.6
Batavia, N. Y.	34,100	14.0	19.3	33.3
Ottumwa, Iowa	30,500	30.4	2.5	32.9
Carlisle, Pa	25,200	21.4	11.3	32.7
Manitowoc, Wis	27,600	19.2	12.1	31.3
Lawton, Okla	43,200	18.3	12.6	30.9
Franklin, Pa	14,500	14.4	14.9	29.3
Gulfport, Miss	45,200	24.5	4.5	29.0
Freemont, Nebr	25,400	14.3	14.6	28.9
Bartlesville, Okla	28,600	20.7	7.8	28.5
Concord, N. H.	26,000	16.3	11.8	28.1
Uniontown, Pa	65,700	18.9	8.3	27.2

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Mashalltown, Iowa..	32,900	22.8	4.2	27.0
Cortland, N. Y...	25,100	13.8	12.4	26.2
Kingsport, Tenn...	48,100	14.8	10.6	25.4
McAllen, Tex..	40,000	17.0	7.5	24.5
Topeka, Kans...	101,600	15.7	7.2	22.9
Texarkana, Ark..	29,800	19.2	3.6	22.8
Johnson City, Tenn..	34,300	13.0	9.4	22.4
Dubuque, Iowa..	53,900	17.6	4.5	22.1
Emporia, Kans...	20,100	14.5	7.4	21.9
Iowa City, Iowa...	32,700	15.8	5.8	21.6
Muskogee, Okla..	30,900	10.7	10.9	21.6
Salina, Kans..	46,600	12.5	8.7	21.2
Mason City, Iowa..	46,400	16.8	3.4	20.2
Enid, Okla...	63,700	12.1	6.9	19.0
Kingston, N. Y..	50,800	12.8	5.1	17.9
Rochester, Minn..	59,100	7.5	9.9	17.4
Ithaca, N. Y...	37,300	5.5	11.8	17.3
Hutchinson, Kans..	70,900	10.9	6.0	16.9
Baton Rouge, La...	180,400	8.0	8.6	16.6
Grand Forks, N. Dak...	54,900	12.7	3.4	16.1
Sioux City, Iowa..	100,600	9.8	5.9	15.7
Altoona, Pa..	109,300	12.5	2.9	15.4
Elgin, Ill..	57,500	13.1	2.3	15.4
Meridian, Miss..	54,400	6.7	8.7	15.4
Wichita, Kans..	302,200	9.6	5.6	15.2
Colorado Springs, Colo..	102,300	8.0	7.1	15.1
Fort Smith, Ark...	74,900	12.1	3.0	15.1
Fort Dodge, Iowa..	47,100	12.5	2.4	14.9
Zanesville, Ohio..	62,900	9.7	4.8	14.5

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Muskegon, Mich.	78,000	7.4	6.6	14.0
Steubenville, Ohio	93,900	11.4	2.4	13.8
Tulsa, Okla	339,500	8.6	5.2	13.8
Corpus Christi, Tex	150,300	4.4	8.8	13.2
Davenport, Iowa	104,400	8.4	4.8	13.2
Fargo. N. Dak	73,800	9.0	3.8	12.8
Wheeling W. Va	141,200	8.7	4.1	12.8
Amarillo, Tex	151,400	8.5	4.2	12.7
Little Rock, Ark	212,200	3.0	9.5	12.5
South Bend, Ind	197,000	2.9	9.4	12.3
Greensburg, Pa	53,400	8.9	3.0	11.9
Des Moines, Iowa	225,100	6.5	5.1	11.6
Glens Falls, N. Y.	52,300	10.2	1.2	11.4
Green Bay, Wis	99,700	7.3	3.8	11.1
Decatur, Ill	100,500	6.3	4.4	10.7
Fort Worth, Tex	495,100	3.3	7.4	10.7
Mobile, Ala	198,100	4.5	6.2	10.7
Gary, Ind	187,800	7.0	3.6	10.6
Bloomington, Ill	58,800	6.5	4.0	10.5
Springfield, Mo	95,400	3.1	6.5	9.6
Williamsport, Pa	69,600	5.0	4.5	9.5
Waco, Tex	77,200	6.3	3.2	9.5
Lubbock, Tex	138,500	6.4	2.8	9.2
Pottsville, Pa	66,600	5.9	3.3	9.2
Milwaukee, Wis	899,800	8.3	0.4	8.7
Lancaster, Pa	143,400	6.2	2.3	8.5
Tampa, Fla	251,600	4.5	4.0	8.5
Oklahoma City, Okla	380,600	2.5	5.8	8.3
Mankato, Minn	45,300	6.8	1.1	7.9

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Minneapolis, Minn.	865,800	6.7	1.2	7.9
Peoria, Ill.	212,700	6.7	1.0	7.7
Columbus, Ga.	139,700	6.4	1.2	7.6
Reading, Pa.	189,100	4.4	3.1	7.5
Toledo, Ohio	372,500	1.5	5.3	6.8
Jacksonville, Fla.	335,100	2.0	4.5	6.5
Springfield, Ill.	558,500	5.7	0.7	6.4
Montgomery, Ala.	164,500	3.3	2.9	6.2
Brownsville, Tex.	100,500	4.3	1.8	6.1
Saginaw, Mich.	147,900	3.5	2.5	6.0
St. Paul, Minn.	459,300	2.7	2.5	5.2
Detroit, Mich.	2,483,900	4.4	0.6	5.0

***352 **1540** APPENDIX C

Sales of men's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%) *	Combined Brown-Kinney share (%) *
Dodge City, Kans.	12,000	16.4	8.4	24.8
Ardmore, Okla.	23,900	8.1	15.5	23.6
Batavia, N. Y.	28.700	8.9	11.3	20.2
Lawton, Okla.	36,300	11.3	8.2	19.5
Borger, Tex.	19,100	11.5	7.8	19.3
Pueblo, Colo.	58,100	8.6	10.3	18.9
Carlisle, Pa.	21,200	14.3	4.2	18.5
Freemont, Nebr.	21,400	8.0	10.4	18.4

Coatesville, Pa.	17,600	9.3	8.2	17.5
Manitowoc, Wis.	23,200	10.1	7.3	17.4
Franklin, Pa.	12,200	10.5	5.3	15.8
Council Bluffs, Iowa	26,000	14.0	1.1	15.1
Concord, N. H.	21,900	11.0	3.7	14.7
Texarkana, Ark.	25,100	12.1	2.6	14.7
Corpus Christi, Tex.	126,500	2.0	12.3	14.3
Muskogee, Okla.	26,000	6.5	7.6	14.1
Emporia, Kans.	16,900	7.8	5.7	13.5
Kingsport, Tenn.	40,500	7.2	5.9	13.1
Bartlesville, Okla.	24,100	8.9	4.1	13.0
Cortland, N. Y.	21,100	7.6	5.2	12.8
Dubuque, Iowa	45,400	10.2	2.1	12.3
McAllen, Tex.	34,400	8.4	3.5	11.9
Berwyn, Ill.	36,600	9.1	2.6	11.7
Salina, Kans.	39,200	7.2	3.9	11.1
Kingston, N. Y.	42,800	6.9	3.7	10.6
Elgin, Ill.	48,400	10.1	0.4	10.5
Enid, Okla.	53,600	5.9	4.6	10.5
Uniontown, Pa.	55,300	7.3	2.9	10.2
Rochester, Minn.	49,600	4.3	5.5	9.8
Fort Smith, Ark.	63,000	5.2	4.5	9.7
Topeka, Kans.	85,500	9.0	0.5	9.5
Hutchinson, Kans.	59,700	5.1	3.7	8.8
Johnson City, Tenn.	28,900	7.7	1.0	8.7
Davenport, Iowa	87,900	6.0	1.7	7.7
Ithaca, N. Y.	31,400	3.5	4.2	7.7
Zanesville, Ohio	53,000	5.2	2.1	7.3
Muskegon, Mich.	65,600	5.1	1.7	6.8

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Steubenville, Ohio	79,000	5.7	1.1	6.8
Springfield, Mo	80,300	3.6	2.8	6.4
Amarillo, Tex	127,400	4.6	1.3	5.9
Asheville, N. C	80,900	2.9	2.9	5.8
Green Bay, Wis	83,900	4.0	1.6	5.6
Waco, Tex	65,000	2.6	3.0	5.6
Greensburg, Pa	44,900	4.4	1.0	5.4
Peoria, Ill	179,000	4.7	0.7	5.4
Reading, Pa	159,200	2.7	2.6	5.3
Wichita, Kans	254,300	4.3	0.9	5.2
Colorado Springs, Colo	86,100	4.4	0.7	5.1

*354 **1541 APPENDIX D

Comparison of Brown-Kinney percentage of industry shoe sales for selected cities, and counties or standard metropolitan areas

(Appellant's percentages of 1954 dollar sales adjusted to include sales of Brown franchise and Wohl plan stores)

City	City percentage [1]	County of SMA percentage [2] Name	SMA	County
Texas City, Tex	35.8	Galveston, Tex	12.2	....
Coatesville, Pa	32.9	Philadelphia, Pa	1.9	....
Ottumwa, Iowa	27.3	Wapello County		26.5
Uniontown, Pa	27.2	Fayette County		12.4
Texarkana, Ark	25.3	Miller County		23.9
Marshalltown, Iowa	24.9	Marshall County		22.6
Council Bluffs, Iowa	24.2	Omaha, Nebr	7.9	....
Corpus Christi, Tex	24.0	Corpus Christi, Tex	22.6	....
Ardmore, Okla	23.4	Carter County		20.4

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Iowa City, Iowa	18.9	Johnson County		16.6
Muskogee, Okla	17.7	Muskogee County		16.5
Steubenville, Ohio	17.5	Wheeling-Steubenville	8.7	....
Grand Forks, N. Dak	17.1	Grand Forks County		14.4
Mason City, Iowa	16.6	Cerro Gordo County		15.6
Topeka, Kans	16.4	Topeka, Kans	16.1	....
Baton Rouge, La	16.0	Baton Rouge, La	15.9	....
Rochester, Minn	15.9	Rochester, Minn	15.4	....
Dubuque, Iowa	15.4	Dubuque, Iowa	13.9	....
Fort Smith, Ark	15.4	Fort Smith, Ark	14.7	....
Little Rock, Ark	15.2	Little Rock & North Little Rock, Ark	13.2	....
Fort Dodge, Iowa	14.8	Webster County		14.3
Springfield, Mo	14.3	Springfield, Mo	13.3	....
Berwyn, Ill	14.1	Chicago, Ill	2.5	....
Davenport, Iowa	14.1	Davenport, Moline, Rock Island	12.2	....
Fargo, N. Dak	13.9	Cass County		13.5
Altoona, Pa	13.1	Altoona, Pa	10.6	....
Muskegon, Mich	13.1	Muskegon County		12.0
Reading, Pa	12.2	Reading, Pa	10.7	....
South Bend, Ind	11.9	South Bend, Ind	11.1	....
Greensburg, Pa	11.3	Pittsburgh, Pa	2.5	....
Bloomington, Ill	11.0	McLean County		9.8
Kansas City, Kans	10.7	Kansas City, Mo	3.1	....
Colorado Springs, Colo	10.6	El Paso County		10.5
Elgin, Ill	10.5	Chicago, Ill	2.5	....
Oklahoma City, Okla	10.0	Oklahoma City, Okla	10.1	....

***355** Mr. Justice CLARK, concurring.

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I agree that so long as the Expediting Act, 15 U.S.C. s 29, 15 U.S.C.A. s 29, is on the books we have no alternative but to accept jurisdiction in this case. The Act declares that appeals in civil antitrust cases in which the United States is complainant lie only to this Court. It thus deprives the parties of an intermediate appeal and this Court of the benefit of consideration by a Court of Appeals. Under our system a party should be entitled to at least one appellate review, and since the sole opportunity in cases under the Expediting Act is in this Court we usually note jurisdiction. A fair consideration of the issues requires us to carry out the ****1542** function of a Court of Appeals by examining the whole record and resolving all questions, whether or not they are substantial. This is a great burden on the Court and seldom results in much expedition, as in this case where 2 1/2 years have passed since the District Court's decision.

On the merits the case presents the question of whether, under s 7 of the Clayton Act, the acquisition by Brown of the Kinney retail stores may substantially lessen competition in shoes on a national basis or in any section of the country.[*] To me s 7 is definite and clear. It prohibits acquisitions, either of stock or assets, where competition in any line of commerce in any section of the country may be substantially lessened. The test as stated in the Senate Report on the bill is whether there is 'a reasonable probability' that competition may be lessened.

An analysis of the record indicates (1) that Brown, which makes all types of shoes, is the fourth largest manufacturer in the country; (2) that Kinney likewise manufacturers some shoes but deals primarily in retailing, having almost 400 stores that handle a substantial volume ***356** of sales; (3) that its acquisition would give Brown a total of some 1,600 retail outlets, making it the second largest retailer in the Nation; (4) that Kinney's stores are on both a national and local basis strategically placed from a retail market standpoint in suburban areas or towns of over 10,000 population; (5) that Kinney's suppliers are small shoe manufacturers; (6) that Brown's earlier acquisitions, seven in number in five years, indicate a pattern to increase the sale of Brown shoes through the acquisition of independent outlets, resulting in the loss of sales by small competing manufacturers; (7) that statistics on these outlets indicate that Brown, after acquisition, has materially increased its shipments of Brown shoes to them, some as much as 50%; and (8) that the acquisition would have a direct effect on the small manufacturers who previously enjoyed the Kinney requirements market.

It would appear that the relevant line of commerce would be shoes of all types. This is emphasized by the nature of Brown's manufacturing activity and its plan to integrate the Kinney stores into its operations. The competition affected thereby would be in the line handled by these stores which is the full line of shoes manufactured by Brown. This conclusion is more in keeping with the record as I read it and at the same time avoids the charge of splintering the product line. Likewise, the location of the Kinney stores points more to a national market in shoes than a number of regional markets staked by artificial municipal boundaries. Brown's business is on a national scale and its policy of integration of manufacturing and retailing is on that basis. I would conclude, therefore, that it would be more reasonable to define the line of commerce as shoes—those sold in the ordinary retail store—and the market as the entire country.

***357** On this record but one conclusion can follow, i.e., that the acquisition by Brown of the 400 Kinney stores for the purposes of integrating their operation into its manufacturing activity created a 'reasonable probability' that competition in the manufacture and sale of shoes on a national basis might be substantially lessened. I would therefore affirm.

Mr. Justice HARLAN, dissenting in part and concurring in part.

I would dismiss this appeal for lack of jurisdiction, believing that the case in its present posture is prematurely here because the judgment sought to be reviewed is not yet final. Since the Court, however, holds that the case is properly before us, I consider it appropriate, after noting my dissent to this holding, to express my views on the merits because ****1543** the issues are of great importance. On that aspect, I concur in the judgment of the Court but do not join its opinion, which I consider to go far beyond what is necessary to decide the case.

JURISDICTION.

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The Court's authority to entertain this appeal depends on s 2 of the Expediting Act of 1903. That statute, in its present form, provides (15 U.S.C. s 29, 15 U.S.C.A. s 29):
'In every civil action brought in any district court of the United States under any of said (anti-trust) Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.' (Emphasis added.)

The Act was passed by a Congress which thereby 'sought * * * to insure speedy disposition of suits in equity brought by the United States under the Anti-Trust ***358** Act.' United States v. California Cooperative Canneries, 279 U.S. 553, 558, 49 S.Ct. 423, 425, 73 L.Ed. 838. This major policy consideration emerges clearly from the otherwise meager legislative history of the Act. See H.R.Rep.No.3020, 57th Cong., 2d Sess. (1903); 36 Cong.Rec. 1679, 1744, 1747. It was in keeping with this purpose that 'Congress limited the right of review to an appeal from the decree which disposed of all matters * * * and * * * precluded the possibility of an appeal to either (the Supreme Court or the Court of Appeals) * * * from an interlocutory decree.' United States v. California Cooperative Canneries, supra. For it was entirely consistent with its desire to expedite these cases for Congress to have eliminated the time-consuming delays occasioned by interlocutory appeals either to intermediate courts or to this Court.

By taking jurisdiction over this appeal at the present time, despite the fact that, even if affirmed, this case would doubtless reappear on the Court's docket if the terms of the District Court's divestiture decree are unsatisfactory to the appellant or to the Government, the Court is paving the way for dual appeals in all government anti-trust cases where intricate divestiture judgments are involved. Whether or not such a procedure is advisable from the standpoint of judicial administration or practical business considerations—and I think such questions by no means free from doubt—I believe that it is contrary to the provisions and purposes of the Expediting Act, and that the construction now given the Act does violence to the accepted meaning of 'final judgment' in the federal judicial system.

The judgment from which this appeal is taken directs the appellant to 'relinquish and dispose of the stock, share capital and assets' of the G. R. Kinney Company and enjoins further interlocking interests between the two corporations. It does not specify how the divestiture is to be carried out, but directs appellant to file 'a proposed ***359** plan to carry into effect the divestiture order' and grants to Government 30 days following such filing in which to submit 'oppositions or suggestions thereto.' When considered in light of the District Court's opinion, this reservation emerges as much more than a mere retention of jurisdiction for the purpose of ministerially executing a definite and precise final judgment. See, e.g., Ray v. Law, 3 Cranch 179, 2 L.Ed. 404; French v. Shoemaker, 12 Wall. 86, 98, 20 L.Ed. 270. In light of this Court's remarks in United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 607—608, 77 S.Ct. 872, 884, 1 L.Ed.2d 1057 the District Court concluded that the particular form which the divestiture order was to take was a matter which 'could have far-reaching effects and consequences,' 179 F.Supp. 721, at 741, and that it would be appropriate for the court to conduct hearings on the manner in which the Kinney stock ****1544** ought to be disposed of by the appellant. Hence it is not farfetched to assume that particular terms of the remedy ordered by the District Court will be contested, and that this Court may well be asked to examine the details relating to the anticipated divestiture. E.g., United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318.

The exacting obligation with respect to the terms of antitrust decrees cast upon this Court by the Expediting Act was commented upon only last Term. In United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318, it was noted that it was the Court's practice, 'particularly in cases of a direct appeal from the decree of a single judge, * * * to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violation proved.' 366 U.S., at 323, 81 S.Ct. at 1248; see International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 253, 79 S.Ct. 245, 251, 3 L.Ed.2d 270. In the present case the Court and the parties know nothing more of 'this most significant phase of the case,' United States v. United States Gypsum Co., 340 U.S. 76, 89, 71 S.Ct. 160, 169, 95 L.Ed. 89, than that Brown will generally be ***360** required to divest itself of any interest in Kinney. Exactly how this separation is to be accomplished has

not yet been determined, and there is no way of knowing now whether both parties to the suit will find the decree satisfactory or whether one or both will seek further review in this Court.

Despite the opportunity thus created for separate reviews of these kinds of cases at their 'merits' and 'relief' stages, the Court holds that the judgment now in effect has 'sufficient indicia of finality' (ante, 370 U.S., p. 308, 82 S.Ct., p. 1514) to render it appealable now, notwithstanding that the terms of the ordered divestiture have not yet been fixed. This conclusion is based upon three discrete considerations, none of which, in my opinion, serves to overcome the 'final judgment' requirement of the Expediting Act, as that term has hitherto been understood in federal law. [1]

First. The Court suggests that any further proceedings to be conducted in the District Court are 'sufficiently independent of, and subordinate to, the issues presented by this appeal' to permit them to be considered and reviewed separately. But this judicially created exception to the embracing principle of finality has never heretofore been utilized by this Court to permit separate review of a District Court's decision on the underlying merits of a claim when the details of the relief that is to be awarded are yet uncertain. The present case does not present the possibility, as did Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, and Forgay v. Conrad, 6 How. 201, 12 L.Ed. 404, that a delay in appellate review would result in irreparable ***361** harm, equivalent in effect to a denial of any review on the point at issue. See 337 U.S., at 546, 69 S.Ct. 1225; 6 How., at 204, 12 L.Ed. 404. Nor is this a case in which the complaint's prayers for relief are so diversified that the resolution of one branch of the case 'is independent of, and unaffected by, another litigation with which it happens to be entangled.' Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092; see Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362, 372—373, 34 S.Ct. 627, 629, 58 L.Ed. 1001; Forgay v. Conrad, supra.

****1545** If the appellant were compelled to await the entry of a particularized divestiture order before being granted appellate review, it would suffer no irremediable loss; indeed, in this case the merger was allowed to proceed pendente lite, so any delay, to the extent that it could affect the parties, would benefit the appellant. Nor can it well be suggested that the particular conditions under which the divestiture is to be executed are matters that are only fortuitously 'entangled' with the merits of the complaint. Despite the seemingly mandatory tone of the 'divestiture' judgment now before us, the plain fact remains that it is by its own terms inoperative to a substantial extent until further proceedings are held in the District Court. Unlike the cases relied upon by the Court, therefore, this case comes up on appeal before the appellant knows exactly what it has been ordered to do or not to do. This is surely not the type of judgment 'which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911; see City of Covington v. Covington First National Bank, 185 U.S. 270, 277, 22 S.Ct. 645, 648, 46 L.Ed. 906.

Second. The Court finds significant the 'character of the decree still to be entered in this suit.' Ante, 370 U.S., p. 309, 82 S.Ct., p. 1515. Since the order of full divestiture requires 'careful, and often extended, negotiation and formulation,' ante, 370 U.S., p. 309, 82 S.Ct., p. 1515, it is suggested that a delay in carrying out its terms might render them impractical or unenforceable. Apart ***362** from the fact that this policy consideration is more appropriately addressed to the Congress than to this Court, it appears to me to call for a result directly contrary to that reached by the Court. For if the terms of the divestiture are indeed so difficult to formulate and so interrelated with market conditions, it is most unlikely that the decree to be issued by the District Court will turn out to be satisfactory to both parties. Consequently, on the Courts' own reasoning, a second appearance of this case on our docket is not an imaginative possibility but a reasonable likelihood. In stating that the divestiture portion of this judgment 'is disputed here on an 'all or nothing' basis,' and that 'it is ripe for review now, and will, thereafter, be foreclosed,' ante, 370 U.S., p. 309, 82 S.Ct., p. 1515, the Court can hardly mean that either the appellant or the Government will be precluded from seeking review of the divestiture terms if it deems them unsatisfactory. Indeed, neither side on this appeal has addressed itself to the propriety of the divestiture remedy, as such, that is independently of the question whether the merger itself runs afoul of the Clayton Act.

Moreover, if it is delay between formulation of the decree and its execution that is thought to be damaging, what reason is there to believe that this delay or its hazards will be any greater if the entire case is brought up here once than if review is separately

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sought from the divestiture decree once its terms have been settled? Nor can it be maintained that if the merits are now affirmed then an appeal on the question of relief is improbable. For insofar as complex 'negotiation and formulation' is a factor, the probability of an appeal is equally likely in either instance.

Third. The Court's final reason for holding this judgment appealable is that similar judgments have often been reviewed here in the past with no issue ever having been raised regarding jurisdiction. But the cases are ***363** legion which have echoed the answer given by Chief Justice Marshall to a contention that the Court was bound on a jurisdictional point by its consideration on the merits of a case in which the jurisdictional question had gone unnoticed: 'No question was made, in that case, as to the jurisdiction. It passed sub silentio, and the court does not consider itself as bound by that case.' ****1546** United States v. More, 3 Cranch 159, 172, 2 L.Ed. 397; see Snow v. United States, 118 U.S. 346, 354, 6 S.Ct. 1059, 1063, 30 L.Ed. 207; Cross v. Burke, 146 U.S. 82, 87, 13 S.Ct. 22, 23, 36 L.Ed. 896; Louisville Trust Co. v. Knott, 191 U.S. 225, 236, 24 S.Ct. 119, 123, 48 L.Ed. 159; New v. Oklahoma, 195 U.S. 252, 256, 25 S.Ct. 68, 70, 49 L.Ed. 182; United States ex rel. Arant v. Lane, 245 U.S. 166, 170, 38 S.Ct. 94, 96, 62 L.Ed. 223; Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 379, 69 S.Ct. 606, 612, 93 L.Ed. 741; United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 38, 73 S.Ct. 67, 69, 97 L.Ed. 54. The fact that the Court may, in the past, have overlooked the lack of finality in some of the judgments that came here for review in similar posture to this one does not now free it from the requirements of the Expediting Act. Nor does the fact that none of the cases reviewed in what now appears to have been an interlocutory stage was ever appealed again justify disregard of the statute. This history might point to the desirability of an amendment to the Expediting Act, but it does not make into a 'final judgment' a decree which reserves for future determination the terms of the precise relief to be afforded.

The Court suggests that a 'pragmatic approach' to finality is called for in light of the policies of the Federal Rules of Civil Procedure, which direct the 'just, speedy, and inexpensive determination of every action.' Ante, 370 U.S., p. 306, 82 S.Ct., p. 1513. But this misconceives the nature of the issue that is presented. Whether this judgment is final and appealable is not a question turning on the Federal Rules of Civil Procedure or on any balance of policies by this Court. Congress has seen fit to make this Court, for reasons which are less than obvious, the sole appellate tribunal for civil antitrust suits instituted by the United ***364** States. In so doing, it has chosen to limit this Court's reviewing power to 'final judgments.' Whether the first of these legislative determinations, made in 1903, when appeal as of right to this Court was the rule rather than the exception, should survive the expansion in the Court's docket and the development, pursuant to the Judiciary Act of 1925, of this Court's discretionary certiorari jurisdiction, may never have been given adequate consideration by the Congress. [2]

At this period of mounting dockets there is certainly much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony any exhibits to determine whether a single district judge's findings of fact are supportable. The legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law. And under modern conditions it may well be doubted whether direct review of such cases by this Court truly serves the purpose of expedition which underlay the original passage of the Expediting Act. I venture to predict that a critical reappraisal of the problem would lead to the conclusion that 'expedition' and also, over-all, more satisfactory appellate review would be achieved in ***365** these cases were primary appellate jurisdiction returned to the Court of Appeals, leaving this Court free to exercise its certiorari ****1547** power with respect to particular cases deemed deserving of further review. As things now stand this Court must deal with all government civil antitrust cases, often either at the unnecessary expenditure of its own time or at the risk of inadequate appellate review if a summary disposition of the appeal is made. Further, such a jurisdictional change would bid fair to satisfy the very 'policy' arguments suggested by the Court in this case. For the Courts of Appeals, whose dockets are generally less crowded than those of this Court, would then be authorized to hear appeals from orders such as the one here in question. Since this order grants an injunction against interlocking interests between Brown and Kinney, it would come within 28 U.S.C. s 1292(a)(1), 28 U.S.C.A. s 1292(a)(1) were this not a case 'where a direct review may be had in the Supreme Court.'

So long, however, as the present Expediting Act continues to commend itself to Congress this Court is bound by its limitations, and since for the reasons already given the decree appealed cannot, in my opinion, be properly considered a 'final judgment,' I think the appeal, at this juncture, should have been dismissed.

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THE MERITS.

Since the Court nonetheless holds that the judgment is appealable in its present form, and since the underlying questions are far-reaching, I consider it a duty to express my view on the merits. On this aspect of the case I join the disposition which affirms the judgment of the District Court, though I am not prepared to subscribe to all that is said or implied in the opinion of this Court.

The question presented by this case can be stated in narrow and concise terms: Are the District Court's conclusions that the effect of the Brown-Kinney merger may ***366** be, in the language of s 7 of the Clayton Act, 'substantially to lessen competition, or to tend to create a monopoly' in 'any line of commerce in any section of the country' sustainable? In other words, does the indefinite and general language in s 7 manifest a congressional purpose to proscribe a combination of this sort? Brown contends that in finding the merger illegal the District Court lumped together what are in fact discrete 'lines of commerce,' that it failed to define an appropriate 'section of the country,' and that when the case is properly viewed any lessening of competition that may be caused by the merger is not 'substantial.' For reasons stated below, I think that each of these contentions is untenable.

The dispositive considerations are, I think, found in the 'vertical' effects of the merger, that is, the effects reasonably to be foreseen from combining Brown's manufacturing facilities with Kinney's retail outlets. In my opinion the District Court's conclusions as to such effects are supported by the record, and suffice to condemn the merger under s 7, without regard to what might be deemed to be the 'horizontal' effects of the transaction.

1. 'Line of Commerce.'—In considering both the horizontal and vertical aspects of this merger, the District Court analyzed the probable impact on competition in terms of three relevant 'lines of commerce'—men's shoes, women's shoes, and children's shoes. It rejected Brown's claim that shoes of different construction or of different price range constituted distinct lines of commerce. Whatever merit there might be to Brown's contention that the product market should be more narrowly defined when it is viewed from the vantage point of the ultimate consumer (whose pocketbook, for example, may limit his purchase to a definite price range), the same is surely not true of the shoe manufacturer. Although the record contains evidence tending to prove that a shoe manufacturing ***367** plant may be managed more economically if its production is limited to only one type and grade of shoe, the history of Brown's own factories reveals that a single plant may ****1548** be used in successive years, or even at the same time, for the manufacture of varying grades of shoes and may, without undue difficulty, be shifted from the producion of children's shoes to men's or women's shoes, or vice versa.

Because of this flexibility of manufacture, the product market with respect to the merger between Brown's manufacturing facilities and Kinney's retail outlets might more accurately be defined as the complete wearing-apparel shoe market, combining in one the three components which the District Court treated as separate lines of commerce. Such an analysis, taking into account the interchangeability of production, would seem a more realistic gauge of the possible anticompetitive effects in the shoe manufacturing industry of a merger between a shoe manufacturer and a retailer than the District Court's compartmentalization in terms of the buying public. For if a manufacturer of women's shoes is able, albeit at some expense, to convert his plant to the production of men's shoes, the possibility of such a shift should be considered in deciding whether the market for either men's shoes or women's shoes can be monopolized or whether a particular merger substantially lessens competition among manufacturers of either product. See Adelman, Economic Aspects of the Bethlehem Opinion, 45 Va.L.Rev. 684, 689—691; cf. United States v. Columbia Steel Co., 334 U.S. 495, 510—511, 68 S.Ct. 1107, 1115, 92 L.Ed. 1533; but see United States v. Bethlehem Steel Corp., D.C., 168 F.Supp. 576. 592.

The fact that s 7 speaks of the lessening of competition 'in any line of commerce' (emphasis added) does not, of course, mean that the product market on which the effect of the merger is considered may be defined as narrowly ***368** or as broadly as the Government chooses to define it.[3] The duty rests with the District Court, and ultimately with this Court, to determine what is the appropriate market on an appraisal of the relevant economic considerations. Discovering the product market is 'a necessary predicate to a finding of a violation of the Clayton Act,' United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S.Ct. 872, 877, 1 L.Ed.2d 1057, and the breadth of the statutory language provides no license for an abdication of this

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necessary function. In light of the production flexibility demonstrated by the undisputed facts in this case, I think the line of commerce by which the vertical aspects of the Brown-Kinney merger should be judged is the wearing-apparel shoe industry generally.

2. 'Section of the Country.'—This merger involves nationwide concerns which sell and purchase shoes in various localities throughout the country, so that it appears that the most suitable geographical market for appraising the alleged anticompetitive effects of the vertical combination is the Nation as a whole. This finding of the District Court (limited to the vertical aspect of the merger) is not contested by Brown and is properly accepted here. One caveat is in order, however. In judging the anticompetitive effect of the merger on the national market, it must be recognized that any decline in competition that might result need not have a uniform effect throughout the entire country. It is sufficient if ***369** the record proves that as a result of the merger competition will generally be lessened, though its most ****1549** serious impact may be felt in certain localities.

3. 'Substantially to Lessen Competition.'—The remaining question is whether the merger of Brown's manufacturing facilities with Kinney's retail outlets 'may * * * substantially lessen competition' or 'tend to create a monopoly' in the nationwide market in which shoe manufacturers sell to shoe retailers. The findings of the District Court, supported by the evidence, when taken together with undisputed facts appearing in the record, justify the conclusion that a substantial lessening of competition in the relevant market is a 'reasonable probability.' S.Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950), U.S.Code Cong. and Adm.News 1950, p. 4298.

On the date of the merger Kinney's retail stores numbered 352, and this figure had increased to more than 400 by the time of the trial. Nearly all these stores sell men's, women's, and children's shoes and are located in the downtown areas of cities of at least 10,000 population. In 116 of these cities, Kinney's combined pairage sale of shoes for 1955 exceeded 10% of all shoes sold in the city during the year. Its total retail shoe sales during the year constituted 1.2% of the national total in terms of dollar volume and 1.6% in terms of pairage. Of these shoes, only 20% were supplied by the Kinney manufacturing plants, the remainder coming from some 197 other sources. [4]

Prior to 1955 Kinney had bought none of its outside-source shoes from Brown, and its records for 1955 reveal that the year's purchases were made from a diverse number of independent shoe manufacturers. There were 66 suppliers (including Brown) in that year each of whose total sales to Kinney exceeded $50,000 and only three of ***370** these (Brown, Endicott-Johnson Co., and Georgia Shoe Manufacturing Co.) were large companies whose output placed them among the 25 most productive nonrubber shoe manufacturers in the United States. Consequently, it appears that Kinney was a substantial purchaser of the shoes produced by many small independent shoe manufacturers throughout the country. In fact, the record affirmatively shows that at least five of Kinney's suppliers, three of which are located in the State of New York, one in Pennsylvania, and one in New Hampshire, each relied upon Kinney to purchase more than 40% of its total production in 1955.

That the merger between Brown's shoe production plants and Kinney's retail outlets will tend to foreclose some of the large market which smaller shoe manufacturers found in sales to Kinney hardly seems open to doubt. This conclusion is supported by the following facts which emerge indisputably from the record: (1) In the shoe industry, as in many others, the purchase of a retail chain by a manufacturer results in an increased flow of the purchasing manufacturer's shoes to the retail store. Hence independent shoe manufacturers find it more difficult to sell their shoes to an acquired retail chain than to an independent one. (2) The result of Brown's earlier acquisition of two retail chains was, in each instance, a substantial increase in the quantity of Brown shoe purchases by the previously independent chains. [5] ***371** (3) The history of many of ****1550** Brown's plants proves that they may be readily adapted to the production of the grade and style of shoes customarily sold in Kinney stores. [6] (4) Although Brown supplied none of Kinney's requirements before the merger, it was supplying almost 8% of these requirements just two years thereafter.

The dollar volume of Kinney's outside shoe purchases in 1955 was between 16 and 17 million dollars, and this amount had increased to 19.4 million by 1957. While Kinney was making only about 1.2% of the total retail dollar sales in the United States in 1955, that percentage can hardly be deemed an accurate reflection of its proportion of nationwide shoe purchases by retailers since the retail-sales figure is based on a computation that includes all retail stores, whether or not they were vertically

integrated or otherwise affiliated. In terms of available markets for independent shoe manufacturers, the percentage of Kinney's purchases must have been substantially larger—though the precise figure is unavailable on the record before us. [7]

If the controlling test were, as it may be under the similar language of s 3 of the Clayton Act, one of 'quantitative ***372** substantiality,' compare Standard Oil Co. of California v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371, with Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580, the probable foreclosure of independent manufacturers from this substantial share of the available retail shoe market would be enough to render the vertical aspect of this merger unlawful under s 7. But since the merger can be shown to have an injurious effect on competition among manufacturers and among retailers, it is unnecessary to consider whether the Standard Stations formula is applicable.

The vertical affiliation between this shoe manufacturer and a primarily retail organization is surely not, as the dissenters thought the contractual tie in Standard Stations to be, 'a device for waging competition' rather than 'a device for suppressing competition.' 337 U.S., at 323, 69 S.Ct. at 1063. Since Brown is able by reason of this merger to turn an independent purchaser into a captive market for its shoes it inevitably diminishes the available market for which shoe manufacturers compete. If Brown shoes replace those which had been previously produced by others, the displaced manufacturers have no choice but to enter some other market or go out of business. Since all manufacturers, including Brown, had competed for Kinney's patronage when it was unaffiliated, Brown's merger with Kinney potentially withdraws a share of the market previously available to the independent shoe manufacturers.

Not only may this merger, judged from a vertical standpoint, affect manufacturers who compete with Brown; it may also adversely affect competition on the retailing level. With a large manufacturer such as Brown behind it, the ****1551** Kinney chain would have a great competitive advantage over the retail stores with which it vies for consumer patronage. As a manufacturer-owned outlet, the Kinney store would doubtless be able to sell its shoes at a ***373** lower profit margin and outlast an independent competitor. The merger would also effectively prevent the retail competitor from dealing in Brown shoes, since these might be offered at lower prices in Kinney stores than elsewhere. [8]

Brown contends that even if these anticompetitive effects are probable, they touch upon an insignificant share of the market and are not, therefore, 'substantial' within the meaning of s 7. Our decision in Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580, is cited as authority for the proposition that a foreclosure of about 1% of the relevant market is necessarily insubstantial. But the opinion in Tampa Electric carefully noted that 'substantiality in a given case' depends on a variety of factors. 365 U.S., at 329, 81 S.Ct. 629. Two of the considerations that were mentioned were 'the relative strength of the parties' and 'the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.' Ibid. When, as here, the foreclosure of what may be considered a small percentage of retailers' purchases may be caused by the combination of the country's third largest seller of shoes with the country's largest family-style shoe store chain, and when the volume of the latter's purchases from independent manufacturers is various part of the country is large enough to render it probable that these suppliers, if displaced, will have to fall by the wayside, it cannot, in my opinion, be said that the effect on the shoe industry is 'remote' or 'insubstantial.'

I reach this result without considering the findings of the District Court respecting the trend in the shoe industry towards 'oligopoly' and vertical integration. The ***374** statistics in the record fall short of convincing me that any such trend exists. [9] I consider the District Court's judgment warranted apart from these findings.

Accordingly, bowing to the Court's decision that the case is properly before us, I join the judgment of affirmance.

All Citations

370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510

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Footnotes

1 Of these over 1,230 outlets under Brown's control at the time of the filing of the complaint, Brown owned and operated over 470, while over 570 were independently owned stores operating under the Brown 'Franchise Program' and over 190 were independently owned outlets operating under the 'Wohl Plan.' A store operating under the Franchise Program agrees not to carry competing lines of shoes of other manufacturers in return for certain aid from Brown; a store under the Wohl Plan similarly agrees to concentrate its purchases on lines which Brown sells through Wohl in return for credit and merchandising aid. See note 66, infra. In addition, Brown shoes were sold through numerous retailers operating entirely independently of Brown.

2 'The general concept adopted in defining a standard metropolitan area (is) that of an integrated economic area with a large volume of daily travel and communication between a central city of 50,000 inhabitants or more and the outlying parts of the area. * * * Each area (except in New England) consists of one or more entire counties. In New England, metropolitan areas have been defined on a town basis rather than a county basis.' II U.S. Bureau of the Census, United States Census of Business: 1954, p. 3.

3 See note 1, supra.

4 U.S. Bureau of Census, Facts for Industry, Production, by Kind of Footwear: 1956 and 1955, Table 1, Production Series M31A—06, introduced as Defendant's Exhibit MM. The term 'nonrubber shoes' includes leather shoes, sandals and play shoes, but excludes canvas-upper, rubber-soled shoes, athletic shoes and slippers. Ibid.

5 These figures are based on the 1954 Census of Business. For that enumeration, the Census Bureau classification 'shoe stores' included separately operated leased shoe departments of general stores, as distinguished from the shoe departments of general stores operated only as sections of the latter's general business. U.S. Bureau of Census, Retail Trade, Single Units and Multiunits, BC58—RS3, p. I. As described, infra, Brown operated numerous leased shoe departments in general stores which would be included in the Census Bureau's total of 'shoe stores.'

6 U.S. Bureau of the Census, 1958 Census of Manufacturers, MC 58(2)—31A—6. By 1958, the number of independent manufacturers had decreased by another 10% to 872. Ibid.

7 Kinney's pairage sales of men's, women's, and children's shoes were extracted from exhibits submitted to the Government in response to its interrogatories. See GX 6, R. 48—53. These statistics are virtually identical to those cited in appellant's brief, with but one exception. In its internal operations, appellant classifies certain shoes as 'growing girls" shoes while the cited figures follow the Census Bureau's treatment of such shoes as 'women's' shoes.

8 As stated in the testimony of Clark R. Gamble, President of Brown Shoe Company:

'It was our feeling, in addition to getting a distribution into the field of prices which we were not covering, it was also the feeling that as Kinney moved into the shopping centers in these free standing stores, they were going into a higher income neighborhood and they would probably find the necessity of up-grading and adding additional lines to their very successful operation that they had been doing and it would give us an opportunity we hoped to be able to sell them in that category. Besides that, it was a very successful operation and would give us a good diversified investment to stabilize our earnings.' T. 1323.

9 Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree. United States v. California Cooperative Canneries, 279 U.S. 553, 558, 49 S.Ct. 423, 424, 73 L.Ed. 838.

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10 After probable jurisdiction had been noted, a joint motion of the parties to postpone oral argument on the appeal to the present Term of the Court was granted. 363 U.S. 825, 80 S.Ct. 1595, 4 L.Ed.2d 1521.

11 Section 22, 1 Stat. 84, in its present form, 28 U.S.C. s 1291, 28 U.S.C.A. s 1291.

12 Cf. 28 U.S.C. s 1292, 28 U.S.C.A. s 1292; Fed.Rules Civ.Proc. rule 54(b), 28 U.S.C.A.; 28 U.S.C. s 1651, 28 U.S.C.A. s 1651; Ex parte United States, 226 U.S. 420, 33 S.Ct. 170, 57 L.Ed. 281; United States v. United States District Court, 334 U.S. 258, 68 S.Ct. 1035, 92 L.Ed. 1351; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988.

13 Fed.Rules Civ.Proc. rule 1, 28 U.S.C.A.

14 See, e.g., United States v. Reading Co., 226 F. 229, 286 (D.C.E.D.Pa.), 1 Decrees & Judgments in Civil Federal Antitrust Cases (hereinafter cited 'D. & J.') 575, 576—577, affirmed in pertinent part, 253 U.S. 26, 40 S.Ct. 425, 64 L.Ed. 760; United States v. National Lead Co., 63 F.Supp. 513, 534—535 (D.C.S.D.N.Y.), 4 D. & J. 2846, 2851, affirmed, 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077; United States v. Timken Roller Bearing Co., 83 F.Supp. 284, 318 (D.C.N.D.Ohio) (relevant portions of the decree reprinted at 341 U.S. 593, 602 n. 1, 71 S.Ct. 971, 976, 95 L.Ed. 1199), modified, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199; United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 352—353, 354 (D.C.D.Mass.), affirmed, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910; United States v. Maryland & Virginia Milk Producers Ass'n, 167 F.Supp. 799, 809 (D.C.D.C.), affirmed, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880. The Court has also approved the practice of District Courts of retaining jurisdiction in such cases for future modifications of their decrees, a practice which has also not been considered inconsistent with the finality of the original decrees. See Associated Press v. United States, 326 U.S. 1, 22—23, 65 S.Ct. 1416, 1425, 89 L.Ed. 2013; Lorain Journal Co. v. United States, 342 U.S. 143, 157, 72 S.Ct. 181, 188, 96 L.Ed. 162. But cf. United States v. Schine Chain Theatres, 63 F.Supp. 229, 241—242 (D.C.W.D.N.Y.), 2 D. & J. 1815, modified, 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245; United States v. Paramount Pictures, 70 F.Supp. 53, 72, 75 (D.C.S.D.N.Y.), 2 D. & J. 1682, modified, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, revised in accordance with this Court's mandate, D.C., 85 F.Supp. 881, 898—901, 2 D. & J. 1690, affirmed sub nom. Loew's, Inc. v. United States, 339 U.S. 974, 70 S.Ct. 1032, 94 L.Ed. 1380, in which review did await the entry of specific and detailed provisions for disposition of the defendants' assets.

15 Cf. Forgay v. Conrad, 6 How. 201, 12 L.Ed. 404; Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362, 34 S.Ct. 627, 58 L.Ed. 1001; Radio Station WOW v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528. The details of the divestiture which the District Court will approve cannot affect the outcome of the basic litigation in this case, as the details of an eminent domain settlement might moot the claims of the condemnee in that type of suit. See Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 S.Ct. 972, 92 L.Ed. 1212; Grays Harbor Logging Co. v. Coats-Fordney Logging Co., 243 U.S. 251, 37 S.Ct. 295, 61 L.Ed. 702.

16 The Court has, of course, occasionally reviewed varying facets of single antitrust cases on separate appeals. However, such cases are distinguishable from the situation at bar. Thus, one group includes cases in which the Government first sought appellate review from dismissals of its complaints, whereafter the Court considered the orders entered on remand. E.g., United States v. Terminal R. Ass'n of St. Louis, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810; 236 U.S. 194, 35

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S.Ct. 408, 59 L.Ed. 535; United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057; 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318. Another group includes cases in which the Government appealed from what it considered to be inadequate decrees, in which the Court later considered the further relief ordered on remand. E.g., United States v. Reading Co., 253 U.S. 26, 40 S.Ct. 425, 64 L.Ed. 760, later considered sub nom. Continental Insurance Co. v. United States, 259 U.S. 156, 42 S.Ct. 540, 66 L.Ed. 871; United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, later considered sub nom. Loew's, Inc. v. United States, 339 U.S. 974, 70 S.Ct. 1032, 94 L.Ed. 1380. And appeals in which the details of a divestiture were made a primary issue have followed the entry of such orders upon the filing of consent decrees, in which the underlying requirements of divestiture were never previously presented. E.g., Swift & Co. v. United States, 276 U.S. 311, 48 S.Ct. 311, 72 L.Ed. 587; United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999; Chrysler Corp. v. United States, 316 U.S. 556, 62 S.Ct. 1146, 86 L.Ed. 1668; Ford Motor Co. v. United States, 335 U.S. 303, 69 S.Ct. 93, 93 L.Ed. 24. Cf. International Harvester Co. of New Jersey v. United States, 248 U.S. 587, 39 S.Ct. 5, 63 L.Ed. 434; 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302.

17 Cf. Jerrold Electronics Corp. v. United States, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806, affirming 187 F.Supp. 545, 563—567 (D.C.E.D.Pa.).

18 Material in italics was added by the amendments; material in brackets was deleted. 'No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition may be ~~[to]~~ substantially *to* lessen competition ~~[between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community]~~ , or *to* tend to create a monopoly ~~[of any line of commerce]~~ .' Other paragraphs of s 7 were also amended in details not relevant to this case. The only other cases to reach this Court, in which the Government's complaints were based, in part, on amended s 7, were Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880, and Jerrold Electronics Corp. v. United States, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806. However, a detailed analysis of the scope and purposes of the 1950 amendments was unnecessary to our disposition of the issues raised in those cases.

19 S. 2277, 67th Cong., 1st Sess. (1921); H.R. 7371, S. 2549, 75th Cong., 1st Sess. (1937); H.R. 10176, S. 3345, 75th Cong., 2d Sess. (1938); H.R. 1517, S. 577, 78th Cong., 1st Sess. (1943); H.R. 2357, H.R. 4519, H.R. 4810, S. 615, 79th Cong., 1st Sess. (1945); H.R. 4519, H.R. 4810; H.R. 5535, 79th Cong., 2d Sess. (1946); H.R. 515, H.R. 3736, S. 104, 80th Cong., 1st Sess. (1947); H.R. 7024, 80th Cong., 2d Sess. (1948); H.R. 988, H.R. 1240, H.R. 2006, H.R. 2734, S. 56, 81st Cong., 1st Sess. (1949).

Public Hearings were held on H.R. 2357, 79th Cong., 1st Sess. (1945); S. 104, 80th Cong., 1st Sess. (1947); H.R. 515, 80th Cong., 1st Sess. (1947), and H.R. 2734, 81st Cong., 1st Sess. (1949—1950).

For reviews of the legislative history of the amendments, see Notes, 52 Col.L.Rev. 766 (1952); 46 Ill.L.Rev. 444 (1951); Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv.L.Rev. 226, 233—238 (1960); Handler and Robinson, A Decade of Administration of the Celler-Kefauver Antimerger Act, 61 Col.L.Rev. 629, 652—674 (1961); Martin, Mergers and the Clayton Act 221—310 (1959).

20 See Arrow-Hart & Hegeman Electric Co. v. Federal Trade Comm., 291 U.S. 587, 54 S.Ct. 532, 78 L.Ed. 1007; Federal Trade Comm. v. Western Meat Co., 272 U.S. 554, 47 S.Ct. 175, 71 L.Ed. 405. See also United States v. Celanese Corp., 91 F.Supp. 14 (D.C.S.D.N.Y.); 1 F.T.C. 541—542;1 F.T.C. 541—542; 33 Op.Atty.Gen. 225, 241.

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21 This was the manner in which the Federal Trade Commission had viewed the prohibitions of original s 7. See F.T.C.Ann.Rep. 6—7 (1929); Statement by General Counsel Kelley in Hearings before Subcommittee 3 of the House Committee on the Judiciary on H.R. 2734, 81st Cong., 1st Sess. (hereinafter cited as H.R. Hearings on H.R. 2734) 38. However, we have held, since the adoption of the 1950 amendments, that such a construction of s 7 was incorrect. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057.

22 For expressions of this questionable view of the background of the original Act see F.T.C., The Merger Movement: A Summary Report 2 (1948); testimony of then Representative Kefauver, in Hearings before Subcommittee 2 of the House Committee on the Judiciary on H.R. 515, 80th Cong., 1st Sess. (hereinafter cited as Hearings on H.R. 515) 4—5; remarks of Senator O'Mahoney, 96 Cong.Rec. 16443; H.R.Rep.No.1191, 81st Cong., 1st Sess. 4—5. For a critique of this understanding of the Act see United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 613—615, 77 S.Ct. 872, 887, 1 L.Ed.2d 1057 (dissent), and reviews cited in note 19, supra.

23 See 51 Cong.Rec. 14255, 14316, 14456—14457 (remarks of Senators Chilton, Cummins, Colt, Reed). An amendment offered during the Senate's floor debate by Senator Cummins would have precluded the acquisition by one corporation of the stock 'or any other means of control or participation in the control' of two or more other corporations carrying on business of the same kind or competitive in character. The amendment was not directed at asset acquisitions specifically and was, in any event, overwhelmingly defeated. 51 Cong.Rec. 14315, 14473—14476.

24 See 51 Cong.Rec. 9073—9074, 9271, 14226, 14254, 14316, 14420, 14465—14466 (remarks of Representatives Webb and Carlin and Senators Reed, Cummins and Poindexter); H.R.Rep.No.627, 63d Cong., 2d Sess. 17; S.Rep.No.698, 63d Cong., 2d Sess. 13.

25 See F.T.C.Ann.Rep. for 1928, 19; id. for 1929, at 6, 59; id. for 1930, at 50—51; id. for 1935, at 16, 48; id. for 1936, at 48; id. for 1937, at 15; id. for 1938, at 11, 19, 29; id. for 1939, at 14, 16; id. for 1940, at 12—13; id. for 1941, at 19—20; id. for 1942, at 9; id. for 1943, at 9; id. for 1944, at 8; id. for 1945, at 8—9; id. for 1946, at 12; id. for 1947, at 12; id. for 1948, at 11, 16. The Commission has continued unsuccessfully to urge adoption of the prior notification provision. See id. for 1958, at 7; id. for 1960, at 12.

26 Temporary National Economic Committee, Final Report and Recommendations, S.Doc.No.35, 77th Cong., 1st Sess. 38—40 (1941).

27 F.T.C., The Present Trend of Corporate Mergers and Acquisitions, reprinted in Hearings on H.R. 515, at 300—317; F.T.C., The Merger Movement: A Summary Report, passim; 95 Cong.Rec. 11500—11507; 96 Cong.Rec. 16433, 16444, 16457; S.Rep.No.1775, 81st Cong., 2d Sess. 3, U.S.Code Cong. and Adm.News 1950, p. 4293 et seq. The House Report on the amendments summarized its view of the situation:

'That the current merger movement (during the years 1940—1947) has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 5.2 billion dollars, or no loss than 5.5 percent of the total assets of all manufacturing corporations—a a significant segment of the economy to be swallowed up in such a short period of time.' H.R.Rep.No.1191, 81st Cong., 1st Sess. 3.

28 See, e.g., 95 Cong.Rec. 11486, 11489, 11494—11495, 11498; 96 CongRec. 16444, 16448, 16450, 16452, 16503 (remarks by the consponsors of the amendments, Representative Celler and Senator Kefauver, and by Representatives Bryson, Keating and Patman and Senators Murray and Aiken). Cf. United States v. Aluminum Co. of America, 148 F.2d 416, 429 (C.A.2d Cir., per Learned Hand, J.): 'Throughout the history of these (antitrust) statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.'

29 Virtually every member of congress who spoke in support of the amendments, indicated that this aspect of the legislation was its salient characteristic. Representative Kefauver, one of the Act's sponsors, testified, 'The bill is not complicated. It proposes simply to plug the loophole in sections 7 and 11 of the Clayton Act.' Hearings on H.R. 515, at 4. The Senate Report on the measure finally adopted summarized the 'Purpose' of the amendment with this single paragraph:

'The purpose of the proposed legislation is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder (sic) the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law.' S.Rep.No.1775, 81st Cong., 2d Sess. 2, U.S.Code Cong. and Adm.News 1950, p. 4294.

30 The deletion of the 'acquiring-acquired' test was the direct result of an amendment offered by the Federal Trade Commission. In presenting the proposed change, Commission Counsel Kelley made the following points: this Court's decisions had implied that the effect on competition between the parties to the merger was not the only test of the illegality of a stock merger; the Court had applied Sherman Act tests to Clayton Act cases and thus judged the effect of a merger on the industry as a whole; this incorporation of Sherman Act tests, with the accompanying 'rule of reason,' was inadequate for reaching some mergers which the Commission felt were not in the public interest; and the new amendment proposed a middle ground between what appeared to be an overly restrictive test insofar as mergers between competitors were concerned, and what appeared to the Commission to be an overly lenient test insofar as all other mergers were concerned. Congressman Kefauver supported this amendment and the Commission's proposal was then incorporated into the bill which was eventually adopted by the Congress. See Hearings on H.R. 515, at 23, 117—119, 238—240, 259; Hearings before a Subcommittee of the Senate Judiciary Committee on H.R. 2734, 81st Cong., 1st Sess. (hereinafter cited as S. Hearings on H.R. 2734) 147.

31 That s 7 was intended to apply to all mergers—horizontal, vertical or conglomerate—was specifically reiterated by the House Report on the final bill. H.R.Rep. No. 1191, 81st Cong., 1st Sess. 11. And see note 21, supra.

32 That s 7 of the Clayton Act was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act was explicitly stated in the Senate Report on the original Act. S.Rep. No. 698, 63d Cong., 2d Sess. 1. See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 589, 77 S.Ct. 872, 875, 1 L.Ed.2d 1057. This theme was reiterated in congressional consideration of the amendments adopted in 1950, and found expression in the final House and Senate Reports on the measure. H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8 ('Acquisitions of stock or assets have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition.'); S.Rep. No. 1775, 81st Cong., 2d Sess. 4—5, U.S.Code Cong. and Adm.News, 1950, p. 4296 ('The intent here * * * is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.'). And see F.T.C., The Merger Movement: A Summary Report 6—7.

33 The Report of the House Judiciary Committee on H.R. 515 recommended the adoption of tests more stringent than those in the Sherman Act, 15 U.S.C.A. ss 1—7, 15 note. H.R.Rep. No. 596, 80th Cong., 1st Sess. 7. A vigorous minority thought no new legislation was needed. Id., at 11—18. Between the issuance of this Report and the Committee's subsequent consideration of H.R. 2734, this Court had decided United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533, which some understood to indicate that existing law might be inadequate to prevent mergers that had substantially lessened competition in a section of the country, but which, nevertheless, had not risen to the level of those restraints of trade or monopoly prohibited by the Sherman Act. See 96 Cong.Rec. 16502 (remarks of Senator Kefauver); H.R.Rep. No. 1191, 81st Cong., 1st Sess. 10—11. Numerous other statements by Congressmen and Senators and by representatives of the Federal Trade Commission, the Department of Justice and the President's Council of Economic Advisors were made to the Congress suggesting that a standard of illegality stricter than that imposed by

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the Sherman Act was needed. See, e.g., H.R. Hearings on H.R. 2734, at 13, 29, 41, 117; S. Hearings on H.R. 2734, at 22, 23, 47, 66, 319. The House Judiciary Committee's 1949 Report supported this concept unanimously although five of the nine members who had dissented two years earlier in H.R. Rep. No. 596 were still serving on the Committee. H.R.Rep. No. 1191, 81st Cong., 1st Sess. 7—8. The Senate Report was explicit: 'The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here * * * is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding. * * * (The) various additions and deletions—some strengthening and others weakening the bill—are not conflicting in purpose and effect. They merely are different steps toward the same objective, namely, that of framing a bill which, though dropping portions of the so-called Clayton Act test that have no economic significance (the reference would appear to be primarily to the 'acquiring-acquired' standard of the original Act), reaches far beyond the Sherman Act.' S.Rep. No. 1775, 81st Cong., 2d Sess. 4—5, U.S.Code Cong. and Adm.News 1950, p. 4296.

34 As to small company mergers, see H.R. Hearings on H.R. 2734, at 41, 117; S. Hearings on H.R. 2734, at 6, 51; 95 Cong.Rec. 11486, 11488, 11506; 96 Cong.Rec. 16436; H.R.Rep. No. 1191, 81st Cong., 1st Sess. 6—8; S.Rep. No. 1775, 81st Cong., 2d Sess. 4. As to mergers with failing companies, see S.Hearings on H.R. 2734, at 115, 134—135, 198; 96 Cong.Rec. 16435, 16444; H.R.Rep. No. 1191, supra, at 6; S.Rep. No. 1775, supra, at 7.

35 The Federal Trade Commission's amendment, see note 30, supra, included the phrase 'where * * * in any section, community, or trade area, there is reasonable probability that the effect of such acquisition may be to substantially lessen competition.' Congressman Kefauver urged deletion of the word 'community' on the ground that it might suggest, for example, that a merger between two small filling stations in a section of a city was proscribed. Hearings on H.R. 515, at 260. And see also 96 Cong.Rec. 16453. The fear of literal prohibition of all but de minimis mergers through the use of the word 'community' was also cited by the Senate Report as the basis for its retention solely of the word 'section.' S.Rep. No. 1775, 81st Cong., 2d Sess. 4. The reference to 'trade area' was deleted as redundant, when it became clear that the 'section' of the country to which the Act was to apply, referred not to a definite geographic area of the country, but rather the geographic area of effective competition in the relevant line of commerce. See S. Hearings on H.R. 2734, at 38—52, 66—84, 101—102, 132, 133, 144, 145; H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8; S.Rep. No. 1775, 81st Cong., 2d Sess. 4, 5—6. The senate Report cited with approval the definition of the market employed by the Court in Standard Oil Co. of California v. United States, 337 U.S. 293, 299 n. 5, 69 S.Ct. 1051, 1055, 93 L.Ed. 1371.

36 The House Report on H.R. 2734 stated that two tests of illegality were included in the proposed Act: whether the merger substantially lessened competition or tended to create a monopoly. It stated that such effects could be perceived through findings, for example, that a whole or material part of the competitive activity of an enterprise, which had been a substantial factor in competition, had been eliminated; that the relative size of the acquiring corporation had increased to such a point that its advantage over competitors threatened to be 'decisive'; that an 'undue' number of competing enterprises had been eliminated; or that buyers and sellers in the relevant market had established relationships depriving their rivals of a fair opportunity to compete. H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8. Each of these standards, couched in general language, reflects a conscious avoidance of exclusively mathematical tests even though the case of Standard Oil Co. of California v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371, said to have created a 'quantitative substantiality' test for suits arising under s 3 of the Clayton Act, was decided while Congress was considering H.R. 2734. Some discussion of the applicability of this test to s 7 cases ensued, see, e.g., S. Hearings on H.R. 2734, at 31—32, 169—172; S.Rep. No. 1775, 81st Cong., 2d Sess. 21; 96 Cong.Rec. 16443, but this aspect of the Standard Oil decision was neither specifically endorsed nor impugned by the bills supporters. However, the House Judiciary Committee's Report, issued two months after Standard Oil had been decided, remarked that the tests of illegality under the new Act were intended to be 'similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.' H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8.

37 A number of the supporters of the amendments voiced their concern that passage of the bill would amount to locking the barn door after most of the horses had been stolen, but urged approval of the measure to prevent the theft of those

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still in the barn. Which was to say that, if particular industries had not yet been subject to the congressionally perceived trend toward concentration, adoption of the amendments was urged as a way of preventing the trend from reaching those industries as yet unaffected. See, e.g., 95 Cong.Rec. 11489, 11494, 11498 (remarks of Representatives Keating, Yates, Patman); 96 Cong.Rec. 16444 (remarks of Senators O'Mahoney, Murray).

38 Subsequent to the adoption of the 1950 amendments, both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger. See, e.g., Pillsbury Mills, Inc., 50 F.T.C. 555; United States v. Bethlehem Steel Corp., 168 F.Supp. 576 (D.C.S.D.N.Y.); United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (D.C.E.D.Pa.), aff'd, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806. And see U.S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 126 (1955).

39 In the course of both the Committee hearings and floor debate, attention was occasionally focused on the issue of whether ‘possible,’ ‘probable’ or ‘certain’ anticompetitive effects of a proposed merger would have to be proven to establish a violation of the Act. Language was quoted from prior decisions of the Court in antitrust cases in which each of these interpretations of the word ‘may’ was suggested as appropriate. H.R.Hearings on H.R. 2734, at 74; S. Hearings on H.R. 2734, at 32, 33, 160—168; 96 Cong.Rec. 16453, 16502. The final Senate Report on the question was explicit on the point:

‘The use of these words (‘may be’) means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed (sic) effect * * *. The words ‘may be’ have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.' S.Rep.No.1775, 81st Cong., 2d Sess. 6, U.S.Code Cong. and Adm.News 1950, p. 4298. See also 51 Cong.Rec. 14464 (remarks of Senator Reed).

40 In addition, a vertical merger may disrupt and injure competition when those independent customers of the supplier who are in competition with the merging customer, are forced either to stop handling the supplier's lines, thereby jeopardizing the goodwill they have developed, or to retain the supplier's lines, thereby forcing them into competition with their own supplier. See United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 613 (D.C.S.D.N.Y.). See also GX 13, R. 215, a letter from Sam Sullivan, an independent shoe retailer, to Clark Gamble, President of Brown Shoe Co.

41 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S.Ct. 872, 877, 1 L.Ed.2d 1057.

42 The cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed. Cf. United States v. Columbia Steel Co., 334 U.S. 495, 510—511, 68 S.Ct. 1107, 1115, 92 L.Ed. 1533; United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 592 (D.C.S.D.N.Y.). However, the District Court made but limited findings concerning the feasibility of interchanging equipment in the manufacture of nonrubber footwear. At the same time, the record supports the court's conclusion that individual plants generally produced shoes in only one of the product lines the court tound relevant.

43 See generally Bock, Mergers and Markets, An Economic Analysis of Case Law 25—35 (1960).

44 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 592, 595, 77 S.Ct. 872, 876, 1 L.Ed.2d 1057; A. G. Spalding & Bros. Inc. v. Federal Trade Comm., 301 F.2d 585, 603 (C.A.3d Cir.); American Crystal Sugar Co. v.

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Cuban-American Sugar Co., 259 F.2d 524, 527 (C.A.2d Cir.); United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 603 (D.C.S.D.N.Y.). See also note 39, supra.

45 15 U.S.C. ss 1 and 2, 15 U.S.C.A. ss 1, 2. See S.Rep.No.1775, 81st Cong., 2d Sess. 4—5.

46 See note 33, supra.

47 See note 38, supra, and note 55, infra, and the accompanying text.

48 Although it is 'unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote a merger,' H.R.Rep.No.1191, 81st Cong., 1st Sess. 8, evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger. Swift & Co. v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518; United States v. Maryland & Virginia Milk Producers Ass'n, 167 F.Supp. 799, 804 (D.C.D.C.), aff'd, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880.

49 See H.R.Rep.No.1191, 81st Cong., 1st Sess. 8.

50 See also Comment, 59 Mich.L.Rev. 1236, 1239-1240 (1961).

51 Compare Standard Oil Co. of California v. United States, 337 U.S. 293, 306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371, with Federal Trade Comm. v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746.

52 H.R.Rep.No.1191, 81st Cong., 1st Sess. 6; S.Rep.No.1775, 81st Cong., 2d Sess. 7, U.S.Code Cong. and Adm.News 1950, p. 4299.

53 See note 34, supra. Compare Harley-Davidson Co., 50 F.T.C. 1047, 1066, and U.S.Atty.Gen.Nat.Comm. to Study the Antitrust Laws, Report 143 (1955).

54 See note 8, supra.

55 Moreover, ownership integration is a more permanent and irreversible tie than is contract integration. See Kessler and Stern, Competition, Contract, and Vertical Integration, 69 Yale L.J. 1, 78 (1959).

56 See generally Pillsbury Mills, Inc., 50 F.T.C. 555, 572—573; United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 606 (D.C.S.D.N.Y.); Stigler, Mergers and Preventive Antitrust Policy, 104 U. of Pa.L.Rev. 176, 180 (1955); U.S.Atty.Gen.Nat. Comm. to Study the Antitrust Laws, Report 124 (1955).

57 See Handler and Robinson, A Decade of Administration of the Celler-Kefauver Antimerger Act, 61 Col.L.Rev. 629, 668 (1961).

58 See note 39, supra, and accompanying text.

59 United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 589, 597, 77 S.Ct. 872, 879, 1 L.Ed.2d 1057.

60 See note 28, supra and accompanying text.

61 See also Stigler, Mergers and Preventive Antitrust Policy, 104 U. of Pa.L.Rev. 176, 180 (1955).

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62 See, e.g., United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700; Sugar Institute, Inc. v. United States, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859; United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199.

63 See note 30, supra.

64 American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387, 398 (D.C.S.D.N.Y.), aff'd, 259 F.2d 524 (C.A.2d Cir.); S.Rep. No. 1775, 81st Cong., 2d Sess. 5—6.

65 The illustrate: If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger in those markets in which competition might be adversely affected. On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed. Cf. United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (D.C.E.D.Pa.), aff'd, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806.

66 In describing the geographic market in which Brown and Kinney competed, the District Court included cities in which Brown ‘Franchise Plan’ and ‘Wohl Plan’ stores were located. Although such stores were not owned or directly controlled by Brown, did not sell Brown products exclusively and did not finance inventory through Brown, we believe there was adequate evidence before the District Court to support its finding that such stores were ‘Brown stores.’ To such stores Brown provided substantial assistance in the form of merchandising and advertising aids, reports on market and management research, loans, group life and fire insurance and centralized purchase of rubber footwear from manufacturers on Brown's credit. For these services, Brown required the retailer to deal almost exclusively in Brown's products in the price scale at which Brown shoes sold. Further, Brown reserved the power to terminate such franchise agreements on 30 days' notice. Since the retailer was required, under this plan, to invest his own resources and develop his good will to a substantial extent in the sale of Brown products, the flow of which Brown could readily terminate, Brown was able to exercise sufficient control over these stores and departments to warrant their characterization as ‘Brown’ outlets for the purpose of measuring the share and effect of Brown's competition at the retail level. Cf. Standard Oil Co. of California v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371.

67 The District Court limited its findings to cities having a population of at least 10,000 persons, since Kinney operated only in such areas.

68 See Standard Oil Co. of California v. United States, 337 U.S. 293, 313, 69 S.Ct. 1051, 1061, 93 L.Ed. 1371; U.S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 126 (1955): ‘While sufficient data to support a conclusion is required, sufficient data to give the enforcement agencies, the courts and business certainty as to competitive consequences would nullify the words ‘Where the effect may be’ in the Clayton Act and convert them into ‘Where the effect is.“ And the Committee of the Judicial Conference of the United States on Procedure in Antitrust and Other Protracted Cases has also emphasized the need for limiting the mass of possibly relevant evidence in cases of this type in order to avoid confusion and its concomitant increased possibility of error. 13 F.R.D. 62, 64.

69 Brown objects, for example, to the fact that these exhibits are drafted on the basis of the cities concerning which census information was available, rather than on the basis of the cities and their environs—as the relevant markets were defined by the District Court. However, the record shows that the statistics of shoe sales in cities by and large conform to statistics of shoe sales in counties in which those cities are the principal metropolitan area. See Appendix D, infra. Thus, we find no error in a conclusion drawn as to a slightly larger market from the available record of sales in cities alone. Brown also objects to the use of pairage sales, rather than dollar volume, as the basis for defining the size, and measuring Brown's shares, of the market. However, since Brown and Kinney sold shoes primarily in the low and medium price ranges, and

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in the light of the conceded spread in shoe prices, we agree that sales measured by pairage provide a more accurate picture of the Brown-Kinney shares of the market than do sales measured in dollars. Detailed statistics of shoe sales were available only in terms of dollar volume, however, and Brown objects to the method by which the Government has converted those figures into those reflecting sales in terms of pairage. The Government's conversion was, with some exceptions, based on national median income and national averages of shoe prices and the ratio of men, women and children in the population. The District Court accepted expert testimony offered by the Government to the effect that shoe price and population age, sex and income variations in the relevant cities produced, at most, a 6% error in the converted statistics, and that his error was as likely to favor Brown (by increasing the universe of sales against which Brown's shares were to be measured) as it was to disfavor it. We find no error in the District Court's acceptance of the Government's evidence as to the propriety of the accounting methods its experts employed. Lastly, Brown objects that the statistics concerning its own pairage sales were improperly derived since they included sales by its wholesale distributors to the retail outlets on its franchise plans in the same category as sales to ultimate consumers by its owned retail stores. Again, while recognizing a possible margin of error in statistics combining sales at two levels of distribution, we believe they provide an adequate basis upon which to gauge Brown sales through outlets it controlled. Particularly as the franchise stores were required to finance their own inventory, does it seem reasonable to conclude that most of their purchases from Brown's distributors were eventually resold. In summary, although appellant may point to technical flaws in the compilation of these statistics, we recognize that in cases of this type precision in detail is less important than the accuracy of the broad picture presented. We believe the picture as presented by the Government in this case is adequate for making the determination required by s 7: whether this merger may tend to lessen competition substantially in the relevant markets.

70 Although the sum of the parties' pre-existing shares of the market will normally equal their combined share of the immediate post-merger market, we recognize that this share need not remain stable in the future. Nevertheless, such statistics provide a graphic picture of the immediate impact of a merger, and, as such, also provide a meaningful base upon which to build conclusions of the probable future effects of the merger.

71 See United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 595—596, 77 S.Ct. 872, 878, 1 L.Ed.2d 1057; A. G. Spalding & Bros. Inc. v. Federal Trade Comm., 301 F.2d 585, 612—615 (C.A.3d Cir.); United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 603—611 (D.C.S.D.N.Y.). Cf. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv.L.Rev. 226, 279, 308—311 (1960).

72 See note 38, supra. A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions. Section 7 was enacted to prevent even small mergers that added to concentration in an industry. See S.Rep. No. 1775, 81st Cong., 2d Sess. 5. Cf. United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 566 (D.C.E.D.Pa.) aff'd, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806; United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 606 (D.C.S.D.N.Y.).

73 See note 5, supra.

74 Although statistics concerning the degree of concentration and the rank of Brown-Kinney in terms of controlled retail stores in each of the relevant product and geographic markets would have been more helpful in analyzing the results of this merger, neither side has presented such statistics. The figures in the record, based on national rank, are nevertheless, useful in depicting the trends in the industry.

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* The percentages in these columns reflect sales of Brown brand shoes through Brown owned or controlled outlets.

Source:GX 9, 214, R.60-70, 1223-1227;DX RR, DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

* The percentages in these columns reflect sales of Brown brand shoes through Brown owned or controlled outlets, with the single exception of Manitowoc, Wis., in which case they reflect the sale of Brown brand shoes through all outlets, regardless of ownership or control, and are, therefore, marginally too high.

Source: GX 9, 214, R. 60-70, 1228-1232; DX RR, DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

* The percentages in these columns reflect sales of Brown brand shoes through Brown owned or controlled outlets, with the single exception of Concord, N. H., in which case they reflect the sale of Brown brand shoes through all outlets, regardless of ownership or control, and are, therefore, marginally too high.

Source: GX 9, 214, R. 60-70, 1219-1222; DX RR,DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

1 Based on dollar values from DX DDDD-1, DDDD-2, NNNN, UUUUUU, R. 4939-5299, R. 5300-5652, 5780-5818, 7155-7313; GX 241D, R. 2014-2365.

2 Total area dollar estimates of footwear sales from GX 242, R. 2807-2819. and DX UUUUUU, R. 7155-7313. Area dollar sales of footwear by Brown and Kinney owned or controlled outlets from DDDD-1, DDDD-2, NNNN, UUUUUU, R. 4939-5299, 5300-5652, 5780-5818, 7155-7313; GX 241D, R. 2014-2365.

* Since the judgment below can be supported on this theory, there is no need to inquire into any tendency to create a monopoly.

1 ‘A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause save to superintend, ministerially, the execution of the decree.’ City of Louisa v. Levi, 6 Cir., 140 F.2d 512, 514. See, e.g., Grant v. Phoenix Mutual Life Ins. Co., 106 U.S. 429, 1 S.Ct. 414, 27 L.Ed. 237; Taylor v. Board of Education, 2 Cir., 288 F.2d 600.

2 For example, the report which accompanied the 1925 Act to the floor of the Senate said of the cases in which direct appeal from a District Court to the Supreme Court was retained: ‘As is well known, there are certain cases which, under the present law, may be taken directly from the district court to the Supreme Court. Without entering into a description of these four classes of cases, it is sufficient to say that under the existing law these are cases which must be heard by three judges, one of whom is a circuit judge.’ S.Rep.No.362, 68th Cong., 1st Sess. 3 (1924). (Emphasis added.) This generalization was obviously erroneous since the Expediting Act provided for direct review in this Court of government antitrust cases decided by a single district judge.

3 As the Court noted in United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 393, 76 S.Ct. 994, 1006, 100 L.Ed. 1264, ‘one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product.’ If the Government were permitted to choose its ‘line of commerce’ it could presumably draw the market narrowly in a case that turns on the existence vel non of monopoly power and draw it broadly when the question is whether both parties to a merger are within the same competitive market.

4 The schedule in the record of Kinney's outside shoe suppliers for the calendar year 1955 lists 319 vendors, but 122 of these supplied less than $1,000 worth of goods during the year.

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5 In 1951 Brown purchased the Wohl Shoe Company, which operated leased shoe departments in department stores throughout the country. Before its acquisition of Wohl, Brown had supplied 12.8% of Wohl's shoe requirements; by 1957, it was supplying 33.6% of Wohl's needs.

In 1953, Brown purchased a partial interest in a small chain of retail stores in Los Angeles known as Wetherby-Kayser. Before this purchase, Brown had supplied 10.4% of Wetherby's shoes; within one year this percentage increased to almost 50%.

6 In addition, it appears from the record that shortly after the merger was effected, Kinney abandoned its earlier policy of selling only Kinney-brand shoes (80% of which were ‘made up’ for it by its manufacturers) and began selling a considerable number of Brown's branded and advertised shoes. Along with the indications in the record that Kinney was beginning also to sell higher-priced shoes in its suburban outlets, this suggests that Brown could supply much of Kinney's needs with only a minimal additional capital investment.

7 The existence of such gaps in the record make a fair assessment of the effects of this merger more difficult than it would otherwise be. One of the reasons why I would not consider the horizontal aspect of this merger is my conviction that the data supplied by the Government is entirely inadequate for a proper evaluation of the impact of the horizontal merger on competition.

8 The change in Kinney policy whereby it now carries shoes bearing the Brown brand (see note 6, supra) tends to make retailer competition still more difficult.

9 In terms of bare numbers, the quantity of retail outlets owned or controlled by the major manufacturers has undoubtedly been increasing since 1947. But much of the data in the record is incomplete in this regard because it is based on varying standards. Thus, while the Government argues that the increase in percentage of national retail sales by shoe chains owning 101 or more outlets from 20.9% in 1948 to 25.5% in 1954 proves the trend toward ‘oligopoly,’ the apellant's statistics, founded upon retail sales by all outlets (including general merchandise and clothing stores), show that retail sales by chains of 11 or more stood at a constant 19.5% of national dollar volume in both 1948 and 1954. Moreover, the apparent decline in the proportional share of the country's shoe needs supplied by the largest manufacturers between 1947 and 1955 belies any claim that shoe production is becoming ‘oligopolistic.’ Whereas the largest four manufacturers supplied 25.9% of the Nation's needs in 1947, the largest eight supplied 31.4%, and the largest 15 supplied 36.2%, in 1955 the equivalent percentages were 22%, 27%, and 32.5%.

There is no suggestion in the record as to whether earlier purchases of retail chains by shoe manufacturers reduced the number of independent manufacturers or otherwise harmed competition. Consequently, while the record does establish that manufacturers have been increasing the number of their retail outlets, it is entirely silent on the effects of this vertical expansion.

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110 S.Ct. 1853
Supreme Court of the United States

CALIFORNIA, Petitioner
v.
AMERICAN STORES COMPANY et al.

No. 89–258.
|
Argued Jan. 16, 1990.
|
Decided April 30, 1990.

Synopsis

Grocery retailer named as defendant in antitrust action by State of California arising out of merger of supermarket chains appealed from orders of the United States District Court for the Central District of California, David V. Kenyon, J., 697 F.Supp. 1125, denying its motion to dismiss action and granting State's motion for preliminary injunction. The Court of Appeals, for the Ninth Circuit, 872 F.2d 837, affirmed in part and reversed and remanded in part. After grant of certiorari, the Supreme Court, Justice Stevens, held that: (1) divestiture is form of "injunctive relief" authorized by Clayton Act section entitling any person to obtain injunctive relief against threatened loss or damage by violation of antitrust laws, but (2) private litigant must prove threatened loss or damage to his own interests to have standing to obtain divestiture relief under the Clayton Act section, and equitable defenses may protect consummated transactions from belated attacks by private parties when it would not be too late for Government to vindicate public interest.

Reversed and remanded.

Justice Kennedy filed concurring opinion.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Preliminary Injunction.

****1854 *271** *Syllabus* *

Shortly after respondent American Stores Co., the fourth largest supermarket chain in California, acquired all of the outstanding stock of the largest chain, the State filed suit in the District Court alleging, *inter alia,* that the merger constituted an anticompetitive acquisition violative of § 7 of the Clayton Act and would harm consumers throughout the State. The court granted the State a preliminary injunction requiring American to operate the acquired stores separately pending resolution of the suit. Although agreeing that the State had proved a likelihood of success on the merits and the probability of irreparable harm, the Court of Appeals set aside the injunction on the ground that the relief granted exceeded the District Court's authority under § 16 of the Act to order "injunctive relief." The court relied on an earlier decision in which it had concluded on the basis of its reading of excerpts from subcommittee hearings that § 16's draftsmen did not intend to authorize the remedies of "dissolution" or "divestiture" in private litigants' actions. Thus, held the court, the "indirect divestiture" effected by the preliminary injunction was impermissible.

Held: Divestiture is a form of "injunctive relief" authorized by § 16. Pp. 1857–1867.

(a) The plain text of § 16—which entitles "[a]ny person ... to ... have injunctive relief ... against threatened loss or damage ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage

is granted by courts of equity"—authorizes divestiture decrees to remedy § 7 violations. On its face, the simple grant of authority to "have injunctive relief" would seem to encompass that remedy just as plainly as the comparable language in § 15 of the Act, which authorizes the district courts to "prevent and restrain violations" in antitrust actions brought by the United States, and under which divestiture is the preferred remedy for illegal mergers. Moreover, § 16 states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek or a court may order, but, rather, evidences Congress' intent that traditional equitable principles govern the grant of such relief. The section's "threatened loss or damage" phrase does not negate the court's power to order divestiture. Assuming, as did ****1855** the lower courts, that the merger in question violated the ***272** antitrust laws, and that the conduct of the merged enterprise threatens economic harm to consumers, such relief would prohibit that conduct from causing that harm. Nor does the section's "threatened conduct that will cause loss or damage" phrase limit the court's power to the granting of relief against anticompetitive "conduct," as opposed to "structural relief," or to the issuance of prohibitory, rather than mandatory, injunctions. That phrase is simply a part of the general reference to the standards that should be applied in fashioning injunctive relief. Section 16, construed to authorize a private divestiture remedy, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger. Pp. 1857–1861.

(b) The legislative history does not require that § 16 be construed narrowly. American's reliance on the subcommittee hearing excerpts cited by the Court of Appeals and on *Graves v. Cambria Steel Co.,* 298 F. 761 (1924)—each of which contains statements indicating that private suits for *dissolution* do not lie under § 16—is misplaced. At the time of the Act's framing, dissolution was a vague and ill-defined concept that encompassed the drastic remedy of corporate termination as well as divestiture. Thus, the fact that Congress may have excluded the more severe sanction does not imply that the equitable formulation of § 16 cannot permit divestiture. Since the inferences that American draws simply are not confirmed by anything else in the legislative history or contemporaneous judicial interpretation, § 16 must be taken at its word when it endorses the "conditions and principles" governing injunctive relief in equity courts. There being nothing in the section that restricts courts' equitable jurisdiction, the provision should be construed generously and flexibly to enable a chancellor to impose the most effective, usual, and straightforward remedy to rescind an unlawful stock purchase. Pp. 1861–1866.

(c) Simply because a district court has the power to order divestiture in appropriate § 16 cases does not mean that it should do so in every situation in which the Government would be entitled to such relief under § 15. A private litigant must establish standing by proving "threatened loss or damage" to his own interests, and his suit may be barred by equitable defenses such as laches or "unclean hands." Pp. 1866–1867.

872 F.2d 837, (CA 9 1989), reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post,* p. 1867.

Attorneys and Law Firms

H. Chester Horn, Jr., Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs ***273** were *John K. Van de Kamp,* Attorney General, *Andrea Sheridan Ordin,* Chief Assistant Attorney General, *Michael J. Strumwasser,* Special Assistant Attorney General, *Sanford N. Gruskin,* Assistant Attorney General, and *Lawrence R. Tapper* and *Ernest Martinez,* Deputy Attorneys General.

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Briefs of *amici curiae* urging affirmance were filed for the Business Roundtable by *Thomas B. Leary* and *Janet L. McDavid;* for the California Retailers Association et al. by *Theodore B. Olson, James R. Martin, Phillip H. Rudolph,* and *Adrian A. Kragen;* and for the United Food and Commercial Workers International Union et al. by *George R. Murphy, Nicholas W. Clark, Robert W. Gilbert, Laurence D. Steinsapir,* and *D. William Heine.*

Opinion

***274** Justice STEVENS delivered the opinion of the Court.

By merging with a major competitor, American Stores Co. (American) more than doubled the number of supermarkets that it owns in California. The State sued, claiming that the merger violates the federal antitrust laws and will harm consumers in 62 California cities. The complaint prayed for a preliminary injunction requiring American to operate the acquired stores separately until the case is decided, and then to divest itself of all of the acquired assets located in California. The District Court granted a preliminary injunction preventing American from integrating the operations of the two companies. The Court of Appeals for the Ninth Circuit agreed with the District Court's conclusion that California had made ***275** an adequate showing of probable success on the merits, but held that the relief granted by the District Court exceeded its authority under § 16 of the Clayton Act, 38 Stat. 737, as amended, 15 U.S.C. § 26. In its view, the "injunctive ****1856** relief ... against threatened loss or damage" authorized by § 16 does not encompass divestiture, and therefore the "indirect divestiture" effected by the preliminary injunction was impermissible. 872 F.2d 837 (1989). We granted certiorari to resolve a conflict in the Circuits over whether divestiture is a form of injunctive relief within the meaning of § 16. 493 U.S. 916, 110 S.Ct. 275, 107 L.Ed.2d 256 (1989). We conclude that it is.

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I

American operates over 1,500 retail grocery stores in 40 States. Prior to the merger, its 252 stores in California made it the fourth largest supermarket chain in that State. Lucky Stores, Inc. (Lucky), which operated in seven Western and Midwestern States, was the largest, with 340 stores. The second and third largest, Von's Companies and Safeway Stores, were merged in December 1987. 697 F.Supp. 1125, 1127 (CD Cal.1988); Pet. for Cert. 3.

On March 21, 1988, American notified the Federal Trade Commission (FTC) that it intended to acquire all of Lucky's outstanding stock for a price of $2.5 billion. [1] The FTC conducted an investigation and negotiated a settlement with American. On May 31, it simultaneously filed both a complaint alleging that the merger violated § 7 of the Clayton Act and a proposed consent order disposing of the § 7 charges subject to certain conditions. Among those conditions was a requirement that American comply with a "Hold Separate Agreement" preventing it from integrating the two companies' assets and operations until after it had divested itself of ***276** several designated supermarkets. [2] American accepted the terms of the FTC's consent order. In early June, it acquired and paid for Lucky's stock and consummated a Delaware "short form merger." 872 F.2d, at 840; Brief for Respondents 2. Thus, as a matter of legal form American and Lucky were merged into a single corporate entity on June 9, 1988, but as a matter of practical fact their business operations have not yet been combined.

On August 31, 1988, the FTC gave its final approval to the merger. The next day California filed this action in the United States District Court for the Central District of California. The complaint alleged that the merger violated § 1 of the Sherman Act, 15 U.S.C. § 1, and § 7 of the Clayton Act, 15 U.S.C. § 18, and that the acquisition, "if consummated," would cause considerable loss and damage to the State: Competition and potential competition "in many relevant geographic markets will be eliminated," App. 61, and "the prices of food and non-food products might be increased." *Id.,* at 62. In its prayer for relief, California sought, *inter alia,* (1) a preliminary injunction "requiring American to hold and operate separately from American all of Lucky's California assets and businesses pending final adjudication of the merits"; (2) "such injunctive relief, including rescission ... as is necessary and appropriate to prevent the effects" alleged in the complaint; and (3) "an injunction requiring American to divest itself of all of Lucky's assets and businesses in the State of California." *Id.,* at 65, 66–67.

***277** The District Court granted California's motion for a temporary restraining order and, after considering extensive statistical evidence, entered a preliminary injunction. Without reaching the Sherman Act claim, the ****1857** court concluded that the State had proved a prima facie violation of § 7 of the Clayton Act. On the question of relief, the District Court found that the State had made an adequate showing "that Californians will be irreparably harmed if the proposed merger is completed," 697 F.Supp., at 1134, and that the harm the State would suffer if the merger was not enjoined "far outweighs" the harm that American will suffer as the result of an injunction. *Id.,* at 1135. The court also rejected American's argument that the requested relief was foreclosed by a prior decision of the Court of Appeals for the Ninth Circuit holding that divestiture is not a remedy authorized by § 16 of the Clayton Act. American contended that the proposed injunction was "tantamount to divestiture" since the merger of the two companies had already been completed, but the District Court disagreed. It held that since the FTC's Hold Separate Agreement was still in effect, the transaction was not a completed merger. [3]

American filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1). The Court of Appeals for the Ninth Circuit first held that the District Court had not abused its discretion in finding that California had proved a likelihood of success on the merits and the probability of irreparable harm. Nevertheless, on the authority of its earlier decision in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.,* 518 F.2d 913 (1975) (*ITT*), ***278** it set aside the injunction. The Court of Appeals reasoned that its own prior decisions established both that " 'divestiture is not an available remedy in private actions under § 16 of the Clayton Act,' " and that "section 16 does not permit indirect divestiture, that is, an injunction which

on its face does not order divestiture but which has the same effect. *IT & T,* 518 F.2d at 924." 872 F.2d, at 844. The Court of Appeals applied this rule to conclude that the injunction issued by the District Court was legally impermissible. Observing that under the injunction "these stores must operate as if Lucky had never been acquired by American Stores at all," the Court of Appeals held that "[s]uch an injunction requires indirect divestiture." *Id.,* at 845. Finally, the Court of Appeals added that the District Court had "compounded its misapprehension of the law of divestiture" by misunderstanding "the legal status of the merger." Specifically, the District Court erred by concluding that the "FTC's consent order" undid "the legal effect of this merger" which "had already taken place" according to Delaware corporation law. *Ibid.*

On California's application, Justice O'CONNOR entered a stay continuing the District Court's injunction pending further review by this Court. 492 U.S. 1301, 110 S.Ct. 1, 106 L.Ed.2d 616 (1989). We then granted certiorari to resolve the conflict between this decision and the earlier holding of the Court of Appeals for the First Circuit in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.,* 754 F.2d 404 (1985). We now reverse.

II

In its *IT & T* opinion, the Court of Appeals for the Ninth Circuit reasoned that the term "injunctive relief" as used in § 16 is ambiguous and that it is necessary to review the statute's legislative history to determine whether it includes divestiture. Then, based on its reading of a colloquy during a hearing before a subcommittee of the Judiciary Committee of the House of Representatives, it concluded that the draftsmen of the bill did not intend to authorize the remedies of ***279** "dissolution" or "divestiture" in actions ****1858** brought by private litigants. 518 F.2d, at 921–922. The Court of Appeals for the First Circuit has rejected that reasoning. It found instead that a fair reading of the statutory text, buttressed by recognized canons of construction,[4] required a construction of the words "injunctive relief" broad enough to encompass divestiture. Moreover, it doubted whether the references to "dissolution" in the legislative history referred to "divestiture," and did not consider this evidence sufficiently probative, in any event, to justify a restrictive reading of the Act that seemed inconsistent with its basic policy. 754 F.2d, at 415–428.

American endorses the analysis of the Court of Appeals for the Ninth Circuit, but places greater reliance on two additional arguments. First, it argues that there is a significant difference between the text of § 15 of the Act, which authorizes equitable relief in actions brought by the United States, and the text of § 16, which applies to other parties. Specifically, it argues that the former is broad enough to encourage "structural relief" whereas the latter is limited to relief against anticompetitive "conduct." Second, reading § 16 in its historical context, American argues that it reflects a well-accepted distinction between prohibitory injunctions (which are authorized) and mandatory injunctions (which, American argues, are not).

American's argument directs us to two provisions in the statutory text, and that is the natural place to begin our analysis. Section 15 grants the federal district courts jurisdiction "to prevent and restrain violations of this Act" when ***280** United States attorneys "institute proceedings in equity to prevent and restrain such violations" through petitions "praying that such violation shall be enjoined or otherwise prohibited."[5] Section 16 entitles "[a]ny person, firm, corporation, or association ... to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."[6]

It is agreed that the general language of § 15, which provides that antitrust violations "shall be enjoined or otherwise prohibited," is broad enough to authorize divestiture. Indeed, in Government actions divestiture is the preferred ***281** remedy for an illegal merger ****1859** or acquisition. As we wrote in the *Du Pont* case:

> "Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 329–331, 81 S.Ct. 1243, 1251–1253, 6 L.Ed.2d 318 (1961) (footnotes omitted).

On its face, the simple grant of authority in § 16 to "have injunctive relief" would seem to encompass divestiture just as plainly as the comparable language in § 15. Certainly § 16's reference to "injunctive relief ... against threatened loss or damage" differs from § 15's grant of jurisdiction to "prevent and restrain violations," but it obviously does not follow that one grant encompasses remedies excluded from the other. [7] Indeed, we think it could plausibly be argued that § 16's terms are the more expansive. In any event, however, as the Court of Appeals for the First Circuit correctly observed, § 16 "states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order.... Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." ***282** 754 F.2d, at 416. We agree that the plain text of § 16 authorizes divestiture decrees to remedy § 7 violations.

American rests its contrary argument upon two phrases in § 16 that arguably narrow its scope. The entitlement "to sue for and have injunctive relief" affords relief "against threatened loss or damage by a violation of the antitrust laws." Moreover, the right to such relief exists "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity...."

In this case, however, the requirement of "threatened loss or damage" is unquestionably satisfied. The allegations of the complaint, the findings of the District Court, and the opinion of the Court of Appeals all assume that even if the merger is a completed violation of law, the threatened harm to California consumers persists. If divestiture is an appropriate means of preventing that harm, the statutory reference to "threatened loss or damage" surely does not negate the court's power to grant such relief. [8]

The second phrase, which refers to "threatened conduct that will cause loss or damage," is not drafted as a limitation on the power to grant relief, but rather is a part of the general reference to the standards that should be applied in fashioning injunctive relief. It is surely not the equivalent of a directive stating that unlawful conduct may be prohibited but structural relief may not be mandated. Indeed, as the Ninth Circuit's analysis of the issue demonstrates, the distinction between conduct and structure —or between prohibitory and mandatory relief— ****1860** is illusory in a case of this kind. Thus, in the *IT & T* case the court recognized that an injunction prohibiting ***283** the parent company from voting the stock of the subsidiary should not be treated differently from a mandatory order of divestiture. [9] And in this case the court treated the Hold Separate Agreement as a form of "indirect divestiture." In both cases the injunctive relief would unquestionably prohibit "conduct" by the defendants. American's textual arguments—which rely on a distinction between mandatory and prohibitive relief—do not explain why such remedies would not be appropriate. [10]

If we assume that the merger violated the antitrust laws, and if we agree with the District Court's finding that the conduct of the merged enterprise threatens economic harm to California consumers, the literal text of § 16 is plainly sufficient to authorize injunctive relief, including an order of divestiture, that will prohibit that conduct from causing that harm. This interpretation is consistent with our precedents, which have upheld injunctions issued pursuant to § 16 regardless of whether they were mandatory or prohibitory in character. See *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 129–133, 89 S.Ct. 1562, 1579–1581, 23 L.Ed.2d 129 (1969) (reinstating injunction that required defendants to withdraw from patent pools); see also *Silver v. New York Stock Exchange,* 373 U.S. 341, 345, 365, 83 S.Ct. 1246, 1250, 1261, 10 L.Ed.2d 389 (1963) (reinstating judgment

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for defendants in suit to compel ***284** installation of wire services). We have recognized when construing § 16 that it was enacted "not merely to provide private relief, but ... to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.,* 395 U.S., at 130–131, 89 S.Ct., at 1580. We have accordingly applied the section "with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' " *Ibid.,* quoting *Hecht Co. v. Bowles,* 321 U.S. 321, 329–330, 64 S.Ct. 587, 591–592, 88 L.Ed. 754 (1944).

Finally, by construing § 16 to encompass divestiture decrees we are better able than is American to harmonize the section with its statutory context. The Act's other provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers. Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect "*may be* substantially to lessen competition." Clayton Act § 7, 38 Stat. 731, 15 U.S.C. § 18 (emphasis supplied). See *Brown Shoe Co. v. United States,* 370 U.S. 294, 323, 82 S.Ct. 1502, 1522, 8 L.Ed.2d 510 (1962). In addition, § 5 of the Act provided that during the pendency of a Government action, the statute of limitations for private actions would be tolled. The section also permitted plaintiffs to use the final judgment in a Government antitrust suit as prima facie evidence of liability in a later civil suit. Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition. See ****1861** *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311, 318, 85 S.Ct. 1473, 1477, 14 L.Ed.2d 405 (1965). Congress also made express its view that divestiture was the most suitable remedy in a suit for relief from a § 7 violation: In § 11 of the Act, Congress directed the FTC to issue orders requiring that a violator of § 7 "cease and desist from the violation," and, specifically, that the violator ***285** "divest itself of the stock held" in violation of the Act. [11] Section 16, construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.

III

Although we do not believe the statutory language is ambiguous, we nonetheless consider the legislative history that persuaded the Ninth Circuit to place a narrow construction on § 16. To understand that history, however, it is necessary to place the statute in its historical perspective.

The Sherman Act became law just a century ago. It matured some 15 years later, when, under the administration of Theodore Roosevelt, the Sherman Act "was finally being used against trusts of the dimension that had called it into ***286** being, and with enough energy to justify the boast that the President was using a Big Stick." W. Letwin, Law and Economic Policy in America 240 (1965). Two of the most famous prosecutions concluded in 1911, with decisions from this Court endorsing the "Rule of Reason" as the principal guide to the construction of the Sherman Act's general language. *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619; *United States v. American Tobacco Co.,* 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911). In consequence of the violations found in those two cases, wide-ranging injunctions were entered requiring the separation of the "oil trust" and the "tobacco trust" into a number of independent, but still significant, companies. The relief granted received mixed reviews. In some quarters, the cases were hailed as great triumphs over the forces of monopoly; in others, they were regarded as Pyrrhic victories. [12]

****1862** Concern about the adequacy of the Sherman Act's prohibition against combinations in restraint of trade prompted President Wilson to make a special address to Congress in 1914 recommending that the antitrust laws be strengthened. 2 The New Democracy, The Public Papers of Woodrow Wilson 81–89 (R. Baker & W. Dodd eds. 1926). Congressman Clayton, the Chairman of the House Judiciary Committee, promptly appointed a subcommittee to prepare the legislation. The bill drafted by the subcommittee contained most of the provisions that were eventually enacted into the law now known as the Clayton Act.

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The statute reenacted certain provisions of the Sherman Act and added new provisions of both a substantive and procedural character. Letwin, ***287** Law and Economic Policy in America, at 272–273; 2 A. Link, Wilson: The New Freedom 426 (1956). Thus, § 4 of the Sherman Act, which authorizes equitable relief in actions brought by the United States, was reenacted as § 15 of the Clayton Act, while § 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions. Section 7 of the Clayton Act made stock acquisitions of competing companies more vulnerable, and §§ 4 and 5 gave special procedural advantages to private litigants. The reform project had broad social significance, and it is obvious that the Act as a whole is fairly characterized as important remedial legislation.

Some proponents of reform, however, were critical of the bill for not going further. Thus, for example, proposals that were never enacted would have expressly authorized private individuals to bring suit for the dissolution of corporations adjudged to have violated the law and for appointment of receivers to wind up the corporation's affairs. [13] Samuel Untermyer, a New York lawyer who urged Congress to give private plaintiffs express authority to seek dissolution decrees, stated his views in a colloquy with Congressman John Floyd during a hearing on the bill before the House Judiciary Committee. Floyd told Untermyer that "We did not intend by section 13 to give the individual the same power to bring a suit to dissolve the corporation that the Government has," and added that the committee Members ***288** had discussed the matter very thoroughly. Untermyer replied that "the very relief that the man needs nine times out of ten is the dissolution of the corporation, because ... it may not be doing any specific act of illegality, but its very existence, in violation of law, is the thing that is injuring him." Hearings on Trust Legislation before the House Committee on the Judiciary, 63d Cong., 2d Sess., 842–846 (1914) (House Hearings).

Two weeks later, Louis Brandeis, testifying on behalf of the administration before the same committee, was asked whether he favored a proposal "to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the Government now has and which it is its duty to perform." Brandeis responded that the proposal was not sound and added:

> "It seems to me that the right to change the status [of the combination], which is the right of dissolution, is a right which ought to be exercised only by the Government, although the right for full redress for grievances and protection against future ****1863** wrongs is a right which every individual ought to enjoy.
>
> "Now, all of this procedure ought to be made so as to facilitate, so far as possible, the enforcement of the law in aid, on the one hand, of the Government, and in aid, on the other hand, of the individual. But that fundamental principle is correct, that the Government ought to have the right, and the sole right, to determine whether the circumstances are such as to call for a dissolution of an alleged trust." *Id.,* at 649–650.

American relies on these exchanges to support two slightly different arguments. First, it suggests that the committee recognized a distinction between relief directed at conduct and relief that is designed to change a company's status or structure. Second, it suggests that Congressman Floyd's statements permit an inference that the Congress as a whole rejected the possibility of a private dissolution remedy, and ***289** thereby rejected divestiture as well, because divestiture is a species of dissolution. Neither suggestion is persuasive.

We have already concluded that the suggested distinction between divestiture and injunctions that prohibit future conduct is illusory. These excerpts, moreover, from the legislative history provide even less support for such a categorical distinction than does the text of § 16 itself.

The flaw in American's second suggestion is its assumption that the dissolution proposals submitted to Congress contemplated nothing more extreme than divestiture. Dissolution could be considerably more awesome. As the New York Court of Appeals ominously declared before affirming a decree against the North River Sugar Refining Company, dissolution was a "judgment ... of corporate death," which "represent[ed] the extreme rigor of the law." [14] This meaning is evident from the text of the Senate amendment proposing private dissolution suits, which provided for a receiver to administer the doomed corporation's assets. [15]

***290** The concept of dissolution, of course, also encompassed remedies comparable to divestiture, or to our present-day understanding of dissolution. [16] It was one thing to ****1864** dissolve a ***291** pool, trust, combination, or merger, and quite another to atomize, or to revoke the charter of, a large corporation. [17] In the early part of this century, however, new forms of corporate organization were arising at a pace that outstripped the vocabulary used to describe them. [18] Concern about monopoly and competition dominated domestic politics, but people disagreed about what these things were, and about why, and to what extent, they were good or bad. [19] Men like McReynolds, Wilson's Attorney General, and Brandeis, the President's chief adviser on antitrust policy, could concur upon the need for forceful antitrust legislation and prosecution while finding themselves parted —as their later battles on this Court made clear—by a vast gulf in their understandings of economic theory and marketplace ethics. [20] Absent ***292** agreement on the terms of debate, dissolution could mean the corporate death sentence, or the decrees of the *Standard Oil* and *American Tobacco* cases, or something else. [21] So long as this ambiguity persisted, dissolution had to be considered a public remedy, one that encompassed a power peculiarly suited to transgressions so “material and serious” as to “harm or menace the public welfare” in a manner transcending the ****1865** “quarrels of private litigants.” [22] For those like Brandeis, who viewed dissolution as desirable only if treated not as a moral penalty but rather as a necessary economic remedy, [23] it would be imprudent to allow private parties to control a weapon potentially so lethal. Although it may now be second nature to conceive of dissolution in economic terms compatible with the policy Brandeis championed, [24] this view was anything but uncontroversial when the Act was drafted. [25]

Once the historical importance of the distinction between dissolution and divestiture is understood, American's argument from the legislative history becomes singularly unpersuasive. The rejection of a proposed remedy that would terminate the corporate existence of American and appoint a ***293** receiver to supervise the disposition of its assets is surely not the equivalent of the rejection of a remedy that would merely rescind a purchase of stock or assets. Dissolution was too vague and illdefined a remedy to be either incorporated into or excluded from § 16 as such; Congress instead sensibly avoided the problematic word and spoke in terms of equitable relief drawn to redress damage or loss which a private party might suffer by consequence of the Act's violation. [26] That divestiture was encompassed within the concept of dissolution as understood at the time of the Clayton Act's framing does not imply that the equitable formulation of § 16 cannot permit divestiture while excluding more severe sanctions that also traveled under the name “dissolution.”

For similar reasons, we need not consider how much weight might otherwise be due to *Graves v. Cambria Steel Co.,* 298 F. 761 (NY 1924), a brief District Court decision by Judge Learned Hand upon which American relies heavily. [27] The suit appears to have been brought by dissatisfied shareholders of a target corporation who wished to dissolve the new merged entity. The plaintiffs sought relief ***294** under § 16 of the Clayton ****1866** Act. Judge Hand remarked that the suit “is really a suit for the dissolution of a monopoly pro tanto. I cannot suppose that any one would argue that a private suit for dissolution would lie under section 16 of the Clayton Act.” 298 F., at 762. Not only does Hand, like Floyd, Untermyer, and Brandeis before him, refer to dissolution rather than divestiture, but, moreover, the state corporation law overtones of the inchoate complaint make it possible that the suit implicated the more drastic forms of dissolution.

The inferences that American draws from its excerpts from the subcommittee hearings simply are not confirmed by anything that has been called to our attention in the Committee Reports, the floor debates, the Conference Report, or contemporaneous judicial interpretations. [28] Indeed, a fair reading of the entire legislative history supports the conclusion that § 16 means exactly what it says when it endorses the “conditions and principles” governing injunctive relief in courts of equity: that the provision should be construed generously and flexibly pursuant to principles of equity. See ***295** *CIA. Petrolera Caribe, Inc.,* 754 F.2d, at 418–427. As the Court stated in *Hecht Co. v. Bowles,* 321 U.S., at 329, 64 S.Ct., at 592:

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

More recently, in *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 313, 102 S.Ct. 1798, 1804, 72 L.Ed.2d 91 (1982), we observed that when Congress endows the federal courts with equitable jurisdiction, Congress acts aware of this longstanding tradition of flexibility. " 'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.' " *Ibid.,* quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed. 1332 (1946). These principles unquestionably support a construction of the statute that will enable a chancellor to impose the most effective, usual and straightforward remedy to rescind an unlawful purchase of stock or assets. The fact that the term "divestiture" is used to describe what is typically nothing more than the familiar remedy of rescission does not place the remedy beyond the normal reach of the chancellor.

IV

Our conclusion that a district court has the power to order divestiture in appropriate cases brought under § 16 of the Clayton Act does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief under § 15. In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief. See *Du Pont,* 366 U.S., at 319–321, 81 S.Ct., at 1246–1247; see also ****1867** *Virginian R. Co. v. Railway Employees,* 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved"); *United States v. San Francisco,* 310 U.S. 16, 30–31, 60 S.Ct. 749, 756–757, 84 L.Ed. 1050 (1940) ***296** authorizing issuance of injunction at Government's request without balancing of the equities). A private litigant, however, must have standing—in the words of § 16, he must prove "threatened loss or damage" to his own interests in order to obtain relief. See *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). Moreover, equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.

Such questions, however, are not presented in this case. We are merely confronted with the naked question whether the District Court had the power to divest American of any part of its ownership interests in the acquired Lucky Stores, either by forbidding the exercise of the owner's normal right to integrate the operations of the two previously separate companies, or by requiring it to sell certain assets located in California. We hold that such a remedy is a form of "injunctive relief" within the meaning of § 16 of the Clayton Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, concurring.

In agreement with our holding that § 16 of the Clayton Act does authorize divestiture as a remedy for violations of § 7 of the Clayton Act, I join the Court's opinion. I write further to note that both the respondents and various interested labor unions, the latter as *amici curiae,* have argued for a different result on the basis of the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (Clayton Act § 7A, as added and amended), 15 U.S.C. § 18a. See Brief for Respondents 47–48; Brief for United Food and Commercial International Union et al. as *Amici Curiae* 7–15. Although I do not believe that § 7A is controlling as an interpretation of the earlierenacted ***297** § 16, it may be of vital relevance in determining whether to order divestiture in a particular case.

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Section 7A enables the Federal Government to review certain transactions that might violate § 7 before they occur. The provision, in brief, requires those contemplating an acquisition within its coverage to provide the Federal Trade Commission (FTC) with the information necessary for determining "whether such acquisition may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d)(1). During the mandatory waiting period that follows the submission of this information, see § 18a(b)(1), the agency may decide, as it did in this case, to negotiate a settlement intended to eliminate potential violations. See 16 CFR §§ 2.31–2.34 (1989). The procedure may resolve antitrust disputes in a manner making it easier for businesses and unions to predict the consequences of mergers and to conform their economic strategies in accordance with the probable outcome.

The respondents, and the unions in their brief as *amici,* argue that a State or private person should not have the power to sue for divestiture under § 16 following a settlement approved by the FTC. They maintain that the possibility of such actions will reduce the Federal Government's negotiating strength and destroy the predictability that Congress sought to provide when it enacted § 7A. It is plausible, in my view, that allowing suits under § 16 may have these effects in certain instances. But the respondents and unions have identified nothing in § 7A that contradicts the Court's interpretation of § 7 and § 16. Section 7A, indeed, may itself contain ****1868** language contrary to their position. See, *e.g.,* 15 U.S.C. § 18a(i)(1). Although Congress might desire at some point to enact a strict rule prohibiting divestiture after a negotiated settlement with the FTC, it has not done so yet.

The Court's opinion, however, does not render compliance with the Hart–Scott–Rodino Antitrust Improvements Act irrelevant to divestiture actions under § 16. The Act, for instance, may bear upon the issue of laches. By establishing a ***298** time period for review of merger proposals by the FTC, § 7A may lend a degree of objectivity to the laches determination. Here the State received the respondents' § 7A filings in mid-April 1988, see Brief for Petitioner 3, and so had formal notice of the parties' intentions well before completion of the merger or the settlement with the FTC. It elected not to act at that time, but now seeks a divestiture which, the facts suggest, would upset labor agreements and other matters influenced in important ways by the FTC proceeding. These considerations should bear upon the ultimate disposition of the case. As the Ninth Circuit stated:

> "California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney General chose not to do so. California must accept the consequences of his choice." 872 F.2d 837, 846 (1989).

With the understanding that these consequences may include the bar of laches, I join the Court's decision.

All Citations

495 U.S. 271, 110 S.Ct. 1853, 109 L.Ed.2d 240, 58 USLW 4529, 1990-1 Trade Cases P 69,003

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 See 15 U.S.C. § 18a (Hart–Scott–Rodino Antitrust Improvements Act of 1976).

2 Among other requirements, the Hold Separate Agreement obligated American to maintain separate books and records for the acquisition; to prevent any waste or deterioration of the acquired company's California operation; to refrain from replacing the company's executives; to assure that it is maintained as a viable competitor in California; to refrain from

selling or otherwise disposing of the acquired company's warehouse, distribution or manufacturing facilities, or any retail grocery stores in California; and to preserve separate purchasing for its retail grocery sales. 697 F.Supp. 1125, 1134 (CD Cal.1988).

3 The District Court observed that because the Hold Separate Agreement was still in effect, "this is *not* a completed merger. [American] and Lucky, pursuant to the Hold Separate Agreement, are performing numerous functions as separate entities. They retain their separate names and with them their respective corporate identities." The court stated that only by completing a "linguistic triathalon" could one conclude that an injunction stopping such a merger was "tantamount to divestiture." 697 F.Supp., at 1134.

4 The Court of Appeals observed:

"Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." *CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.,* 754 F.2d 404, 428 (1985).

5 The section provides in pertinent part:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises...." 15 U.S.C. § 25.

6 The section provides in pertinent part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss of damage is immediate, a preliminary injunction may issue...." 15 U.S.C. § 26.

7 That the two provisions do differ is not surprising at all, since § 15 was largely copied from § 4 of the Sherman Act, see 26 Stat. 209, ch. 647, 15 U.S.C. § 4, while § 16, which had to incorporate standing limits appropriate to private actions—see *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986)—had no counterpart in the Sherman Act.

8 Indeed, the evident import of Congress' reference to "*threatened* loss or damage" is not to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand their availability against harms that are as yet unrealized. See *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130, and n. 24, 89 S.Ct. 1562, 1580, and n. 24, 23 L.Ed.2d 129 (1969).

9 The District Court in the *IT & T* case had observed that " '[i]f it were necessary to strain terminology in order to accomplish the same result, a court could easily phrase a "negative injunction" in such terms as to enjoin the activities of a corporation to such a degree that divestiture would be the only economical choice available to that corporation.' "

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518 F.2d, at 924. The Court of Appeals admitted the force of this observation, agreeing with the District Court that the *Standard Oil* dissolution decree, *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 78, 31 S.Ct. 502, 523, 55 L.Ed. 619 (1911), served as an example of an " 'indirect' divestiture decre[e]." 518 F.2d, at 924.

10 Notably, the Court of Appeals for the Ninth Circuit did not rely on either of the textual arguments that American has advanced here. Had it done so, it would have been forced to acknowledge a distinction between direct divestiture and indirect divestiture.

11 In the context of construing the FTC's authority to issue such "cease and desist" orders, this Court—speaking through Justice McReynolds, who had served as President Wilson's chief antitrust enforcement officer at the time the Clayton Act was framed—had no difficulty finding that the continuing ownership of stock unlawfully acquired was itself a continuing violation of the Act:

"The order here questioned was entered when respondent actually held and owned the stock contrary to law. The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed." *FTC v. Western Meat Co.,* 272 U.S. 554, 559, 47 S.Ct. 175, 177, 71 L.Ed. 405 (1926).

The suggestion that continuing ownership of stock unlawfully acquired might constitute a "further violatio[n] of the Act" would cast some doubt upon the utility of American's distinction between mandatory and prohibitory injunctions even were we inclined to accept the relevance of that distinction. As we reject the distinction, we have, however, no cause to pursue this line of inquiry further.

12 The Taft Administration received the decisions warmly, but they provoked bitter criticism from the Democratic Party leadership. Antitrust policy was sharply debated during the 1912 Presidential campaign. See W. Letwin, Law and Economic Policy in America 266, 269 (1965). Upon becoming Woodrow Wilson's first Attorney General shortly thereafter, James McReynolds promised to deliver dissolutions "free from the fundamental defect in the plans adopted in the Standard Oil and Tobacco cases where the separate parts into which the business was divided were left under the control of the same stockholders." Annual Report of Attorney General, H.R.Doc. No. 460, 63d Cong., 2d Sess., 7 (1913).

13 An amendment passed by the Senate, but rejected by the House, provided:

"That whenever a corporation shall acquire or consolidate the ownership or control of the plants, franchises, or property of other corporations, co-partnerships, or individuals, so that it shall be adjudged to be a monopoly or combination in restraint of trade, the court rendering such judgment shall decree its dissolution and shall to that end appoint receivers to wind up its affairs and shall cause all of its assets to be sold in such manner and to such persons as will, in the opinion of the court, restore competition as fully and completely as it was before said corporation or combination began to be formed. The court shall reserve in its decree jurisdiction over said assets so sold for a sufficient time to satisfy the court that full and free competition is restored and assured." 51 Cong.Rec. 15863 (1914).

14 *People v. North River Sugar Refining Co.,* 121 N.Y. 582, 608, 24 N.E. 834 (1890). The New York attorney general had sought dissolution of the company for its participation in the sugar trust, relying upon two theories: that dissolution was appropriate because the company had violated the terms of its charter by entering the trust, and that dissolution was appropriate under the state antitrust laws. The Court of Appeals agreed that dissolution was appropriate on the first ground, and so declined to reach the second. *Id.,* at 626, 24 N.E., at 841.

Judge Finch, writing for a unanimous court, began the opinion by announcing: "The judgment sought against the defendant is one of corporate death." *Id.,* at 608, 24 N.E., at 834. He then said that although the "life of a corporation is

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indeed less than that of the humblest citizen," "destruction of the corporate life" may not be effected "without clear and abundant reason." *Ibid.* The ensuing opinion bristles with the rhetoric of moral condemnation; when characterizing the corporation's defense, for example, Judge Finch commented that the court had been asked "to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure." *Id.,* at 615, 24 N.E., at 837.

15 See n. 13, *supra.* Senator Reed, the sponsor of the Senate amendment which would have expressly authorized dissolution proceedings, stated that the statute's dissolution remedy should guarantee that "we shall have a real decree, that there shall be a real burial, and that we shall sod down the grave upon the monster that was created in defiance of law, but that we shall at the same time preserve its parts and restore them to competition and activity...." 51 Cong.Rec. 15864 (1914).

16 There is a common core to present-day and early 20th–century understandings of the distinction between dissolution and divestiture:

"As applied in both early and more recent antitrust cases, 'dissolution' refers to an antitrust judgment which dissolves or terminates an illegal combination or association—putting it out of business, so to speak. 'Divestiture' is used to refer to situations where the defendants are required to divest or dispossess themselves of specified property in physical facilities, securities, or other assets." Oppenheim, Divestiture as a Remedy Under the Federal Antitrust Laws, 19 Geo.Wash.L.Rev. 119, 120 (1950).

Nevertheless, for at least the past four decades dissolution and divestiture have been treated as interchangeable terms in antitrust law. See *United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 330, n. 11, 81 S.Ct. 1243, 1252, n. 11, 6 L.Ed.2d 318 (1961) (terms are to a "large degree interchangeable"); see also Oppenheim, 19 Geo.Wash.L.Rev., at 121 (recognizing technical distinction between terms, but treating them as interchangeable nonetheless).

During the first decades of this century, however, "dissolution" was the favored term for a remedy that put an end to an unlawful combination, and "divestiture" was rarely mentioned in the antitrust context. The early 20th–century treatise writers seem to have spoken exclusively in terms of dissolution. See, *e.g.,* W. Thornton, A Treatise on the Sherman Anti–Trust Act § 372 (1913). Not surprisingly, all of the legislative history cited by the parties to this case refers to dissolution, not to divestiture.

Yet even without using the term "divestiture," Congress could and did recognize the appropriateness of a divestiture remedy in merger cases: § 11 of the Clayton Act expressly authorizes the FTC to order a defendant corporation to "divest itself of the stock held ... contrary to the provisions of sectio[n] seven ... of this Act." 38 Stat. 735. Indeed, the term "divestiture" appears to have entered the antitrust vocabulary as a consequence of FTC proceedings against alleged violators of § 7 of the Act. See, *e.g., Arrow–Hart & Hegeman Electric Co. v. FTC,* 291 U.S. 587, 54 S.Ct. 532, 78 L.Ed. 1007 (1934); *FTC v. Western Meat Co.,* 272 U.S. 554, 47 S.Ct. 175, 71 L.Ed. 405 (1926). Use of the term in those cases is unsurprising, for the text of the Act suggested that "divestiture," rather than "dissolution," was the remedy being sought.

By 1944, Justice Douglas was using the two terms in close proximity, see *United States v. Crescent Amusement Co.,* 323 U.S. 173, 188–189, 65 S.Ct. 254, 261–262, 89 L.Ed. 160 (1944) (Sherman Act case), although it is at least arguable that his usage preserved the technical distinction that was to be generally elided less than a decade later. Cf. *Swift & Co. v. United States,* 276 U.S. 311, 319, 48 S.Ct. 311, 312, 72 L.Ed. 587 (1928) (referring to "divestiture of the instrumentalities" in a case raising both Sherman Act and Clayton Act claims). It would appear that, as the moral conception of dissolution lost favor and divestiture decrees became paradigmatic of dissolution remedies, the two concepts were collapsed into one another.

17 For discussion of the scope of various dissolution decrees entered pursuant to the federal antitrust laws, see Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size, 40 Colum.L.Rev. 615 (1940); Adams, Dissolution,

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Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 Ind.L.J. 1 (1951). See also 2 A. Link, Wilson: The New Freedom 417–423 (1956).

18 See, *e.g.,* H. Thorelli, The Federal Antitrust Policy 72–87 (1954). Thorelli observes that "[n]o general incorporation law before 1888 explicitly sanctioned intercorporate stockholdings; some state laws even explicitly forbade them in the absence of special permission by the legislature. Common law rules did not recognize such relationships between corporations." *Id.,* at 83. Perhaps because of the rapid pace of developments in corporate law, the politically charged "trust" concept came to embrace any large corporate combination as well as one specific device for creating such combinations. *Id.,* at 84–85. See also D. Martin, Mergers and the Clayton Act 15, 43 (1959).

19 See, *e.g.,* Thorelli, The Federal Antitrust Policy, at 108–163, 309–352.

20 See 2 Link, Wilson: The New Freedom, at 117, n. 83.

21 See *CIA. Petrolera Caribe, Inc.,* 754 F.2d, at 419–422.

22 *North River Sugar Refining Co.,* 121 N.Y., at 609, 24 N.E., at 835.

23 "[Brandeis] believed that anti-trust policy should be constructive rather than destructive: '... we should approach this subject from the point of view of regulation rather than of restriction; because industrial crime is not a cause, it is an effect—the effect of a bad system.' " A. Mason, Brandeis: A Free Man's Life 402 (1956) (footnote omitted).

24 Cf. *United States v. E.I. du Pont de Nemours & Co.,* 366 U.S., at 326, 81 S.Ct., at 1250, 6 L.Ed.2d 318 ("divestiture" is the "most drastic, but most effective, of antitrust remedies," yet it should be imposed only to "restore competition" and must not be "punitive"). See also Comment, The Personification of the Business Corporation in American Law, 54 U.Chi.L.Rev. 1441, 1478–1483 (1987) (discussing decline of moral conceptions of the corporation).

25 The notion that a proper remedy for violating the antitrust laws is complete dissolution of the wrongdoer persists in some state antitrust statutes that allow termination of a foreign corporation's right to do business within the State when the corporation is found guilty of violating the law. See, *e.g.,* Wis.Stat. § 133.12 (1987–1988).

26 Congress could, of course, have referred expressly to the divestiture remedy, as was done in § 11 of the Act, directing that the FTC shall require a violator of § 7 to "divest itself of the stock" unlawfully acquired. There was, however, no reason for Congress to itemize the various remedies which might be available in a § 16 suit. Moreover, while divestiture might be the appropriate remedy in every § 7 case prosecuted by the FTC, there is no reason to believe that the same would be true in private § 7 cases. There is thus nothing remarkable about the absence of any specific reference to divestiture in § 16.

27 American also seeks to buttress its position by citations to *Fleitmann v. Welsbach Co.,* 240 U.S. 27, 36 S.Ct. 233, 60 L.Ed. 505 (1916); *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921); *General Investment Co. v. Lake Shore & M.S.R. Co.,* 260 U.S. 261, 287, 43 S.Ct. 106, 117, 67 L.Ed. 244 (1922); *Continental Securities Co. v. Michigan Cent. R. Co.,* 16 F.2d 378 (CA6 1926), cert. denied, 274 U.S. 741, 47 S.Ct. 587, 71 L.Ed. 1320 (1927); and *Venner v. Pennsylvania Steel Co. of New Jersey,* 250 F. 292 (NJ 1918). Several of these cases seem to us to involve issues entirely distinct from those posed here, and, in any event, in none of these precedents do we find anything that casts any doubt upon the rule we announce today.

28 Professors Areeda and Turner have criticized the Court of Appeals for the Ninth Circuit on the ground that it did not correctly evaluate the legislative history of § 16 in *IT & T.* Areeda and Turner state that the "fragment of legislative history" relied upon by the Court of Appeals "cannot bear the weight the court placed upon it, when the reports of the relevant House and Senate committees were silent on the point, which also did not appear to have been mentioned on the House or Senate floor." They point out that "other courts have indicated, correctly, that divestiture is available in

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a private suit challenging unlawful mergers," and conclude that "divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff." 2 P. Areeda & D. Turner, Antitrust Law § 328b (1978) (footnotes omitted). Other commentators have likewise reasoned that § 16 affords private plaintiffs a divestiture remedy. See, *e.g.,* Peacock, Private Divestiture Suits Under Section 16 of the Clayton Act, 48 Tex.L.Rev. 54 (1969); Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 Minn.L.Rev. 267 (1964); Note, Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act, 84 Mich.L.Rev. 1579 (1986).

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109 S.Ct. 1661
Supreme Court of the United States

CALIFORNIA, et al., Appellants
v.
ARC AMERICA CORPORATION et al.

No. 87–1862
|
Argued Feb. 27, 1989.
|
Decided April 18, 1989.

Synopsis
The states of Alabama, Arizona, California and Minnesota brought class actions against various cement producers in appropriate federal courts alleging nationwide conspiracy to fix cement prices and seeking damages under both federal antitrust laws and state antitrust laws, which arguably allowed indirect purchasers to recover overcharges passed on to them. Actions were transferred to the United States District Court for the District of Arizona for coordinated pretrial proceedings, where actions were settled against several major defendants. The District Court, Manuel L. Real, Chief Judge, refused to allow payment of states' indirect purchaser claims out of settlement funds on ground that state indirect purchaser statutes had been preempted by federal law, and states appealed. The Court of Appeals for the Ninth Circuit, 817 F.2d 1435, affirmed. States appealed. The Supreme Court, Justice White, held that state indirect purchaser laws were not preempted by federal law, notwithstanding federal rule limiting federal antitrust recoveries to direct purchasers.

Reversed.

Justices Stevens and O'Connor, took no part in consideration or decision of case.

Order on remand, 940 F.2d 1583.

Procedural Posture(s): On Appeal.

****1661** *Syllabus* *

***93** *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707, held that, generally, only overcharged direct purchasers, and not subsequent indirect purchasers, are entitled to recover treble damages under § 4 of the Clayton Act for price fixing violative of § 1 of the Sherman Act. Appellant States—who are, at least in part, indirect purchasers of cement—brought class actions against various cement producers in the appropriate federal courts seeking treble damages under the federal antitrust laws for an alleged nationwide conspiracy to fix cement prices and damages for alleged violations of their respective state antitrust laws, which arguably allow indirect purchasers to recover for all overcharges passed on to them by direct purchasers. The cases were transferred to the District Court in Arizona for coordinated pretrial proceedings, and a settlement was reached with several major ****1662** defendants. When appellants sought payment out of the settlement fund for their state indirect purchaser claims, appellees, class members who are direct purchasers, objected. The court refused to allow the claims, ruling that the state statutes are pre-empted by federal law because they are clear attempts to frustrate Congress' purposes and objectives, as interpreted in *Illinois Brick.* The Court of Appeals affirmed, holding that, depending on how they were construed, the state statutes would either conflict directly with federal law under *Illinois Brick* or would impermissibly interfere with the

three federal antitrust policy goals that the court identified as having been defined by *Illinois Brick* and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231; avoiding unnecessarily complicated litigation; providing direct purchasers with incentives to bring private antitrust actions; and avoiding multiple liability of defendants.

Held: The rule limiting federal antitrust recoveries to direct purchasers does not prevent indirect purchasers from recovering damages flowing from state antitrust law violations. Pp. 1664–1667.

(a) The state indirect purchaser statutes are not pre-empted by the federal antitrust laws. There is no claim of express pre-emption or of congressional occupation of the field. The claim that the state laws are inconsistent with, and stand as an obstacle to, effectuating the congressional purposes identified in *Hanover Shoe* and *Illinois Brick* misunderstands these cases, which merely construed the federal antitrust laws ***94** and did not consider state-law or pre-emption standards or define the interrelationship between the federal and state law. Nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws. Pp. 1664–1666.

(b) In any event, the state indirect purchaser statutes do not interfere with accomplishing the federal-law purposes as identified in *Illinois Brick.* First, the state statutes will not engender unnecessarily complicated federal antitrust proceedings, since they cannot and do not purport to affect available federal-law remedies; since claims under them could be brought in state court, separately from federal direct purchaser actions; and since federal courts have discretion to decline to exercise pendent jurisdiction over burdensome state claims. Second, claims under the state statutes will not reduce the incentives of direct purchasers to bring private federal antitrust actions by reducing their potential recoveries. *Illinois Brick* was not concerned with the risk that a federal plaintiff might not be able to recover its entire damages award or might be offered less to settle. Rather, it was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute—§ 4 of the Clayton Act—would result in no one plaintiff having a sufficient incentive to sue under that statute. The state statutes at issue pose no similar risk. That direct purchasers' recoveries may be reduced because they will have to share the settlement fund with indirect purchasers is not due to the impermissible operation of the state statutes but is, rather, a function of the fact and form of the settlement, which was intended to dispose of all claimants, whether claiming under federal or state law and whether direct or indirect purchasers. Third, claims under the state statutes will not contravene any express federal policy condemning multiple liability for antitrust defendants, since *Illinois Brick* and similar cases simply construed § 4, and did not identify a federal policy against imposing state liability in addition to that imposed by federal law. Pp. 1666–1667.

817 F.2d 1435, (C.A.9 1987) reversed.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except STEVENS and O'CONNOR, JJ., who took no part in the consideration or decision of the case.

Attorneys and Law Firms

Thomas Greene, Supervising Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, Owen Lee ***95** Kwong, and H. Chester Horne, Jr., Deputy Attorney General, Don Siegelman, Attorney General of Alabama, and James B. Prude, Assistant Attorney General, Robert K. Corbin, Attorney General of Arizona, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Deputy Attorney General, and Kathleen M. Mahoney, Special Assistant Attorney General.

Roy T. Englert, Jr., argued the cause for the United States as amicus curiae urging reversal. With him on the briefs were Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Merrill, Deputy Assistant Attorney General Starling, Catherine G. O'Sullivan, and Marion L. Jetton.

Theodore B. Olson argued the cause for appellees. With him on the brief for appellee ARC America Corp. were Philip H. Rudolph, John J. Hanson, and John J. Waller, Jr. David J. Leonard and David H. Nix filed a brief for appellees Class Members Allied Concrete, Inc. et al.*

* Briefs of amici curiae urging reversal were filed for Thirty-five States et al. by J. Joseph Curran, Jr., Attorney General of Maryland, Michael F. Brockmeyer, and Ellen S. Cooper, Alan M. Barr, and Craig J. Hornig, Assistant Attorneys General, Grace Berg Schaible, Attorney General of Alaska, and Richard D. Monkman, John Steven Clark, Attorney General of Arkansas, Duane Woodard, Attorney General of Colorado, and Thomas P. McMahon, First Assistant Attorney General, Joseph I. Lieberman, Attorney General of Connecticut, and Robert M. Langer and Steven M. Rutstein, Assistant Attorneys General, Charles M. Oberly III, Attorney General of Delaware, and David G. Culley, Deputy Attorney General, Robert A. Butterworth, Attorney General of Florida, Warren Price III, Attorney General of Hawaii, and Robert A. Marks, Rod Kimura, and Ann Catherine Blank, Deputy Attorneys General, Neil F. Hartigan, Attorney General of Illinois, Linley E. Pearson, Attorney General of Indiana, and Frank A. Baldwin, Deputy Attorney General, Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Robert T. Stephan, Attorney General of Kansas, and David M. Cooper, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, James E. Tierney, Attorney General of Maine, Stephen L. Wessler, Deputy Attorney General, James M. Shannon, Attorney General of Massachusetts, and George Weber, Assistant Attorney General, Frank J. Kelley, Attorney General of Michigan, Michael C. Moore, Attorney General of Mississippi, and Robert E. Sanders, Special Assistant Attorney General, William L. Webster, Attorney General of Missouri, and Tom A. Glassberg, Assistant Attorney General, Mike Greely, Attorney General of Montana, and Joe Roberts, Assistant Attorney General, Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, Stephen E. Merrill, Attorney General of New Hampshire, and Terry L. Robertson, Senior Assistant Attorney General, W. Cary Edwards, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, Anthony J. Celebrezze, Jr., Attorney General of Ohio, and Doreen C. Johnson, Assistant Attorney General, Robert H. Henry, Attorney General of Oklahoma, and Jane Wheeler, Assistant Attorney General, James E. O'Neil, Attorney General of Rhode Island, and Robyn Y. Davis, Assistant Attorney General, Roger A. Tellinghuisen, Attorney General of South Dakota, W.J. Michael Cody, Attorney General of Tennessee, and Perry A. Craft, Deputy Attorney General, Jim Mattox, Attorney General of Texas, Mary F. Keller, Executive Assistant Attorney General, and Allene D. Evans, Assistant Attorney General, David L. Wilkinson, Attorney General of Utah, and Richard M. Hagstrom, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, and Allen L. Jackson, Assistant Attorney General, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, Charles G. Brown, Attorney General of West Virginia, C. William Ullrich, First Deputy Attorney General, and Dan Huck, Deputy Attorney General, Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General, and Joseph B. Meyer, Attorney General of Wyoming; for the Consumers Union of U.S., Inc., by Alan Mark Silbergeld; and for the National Conference of State Legislatures et al. by Benna Ruth Solomon, David J. Burman, and Thomas L. Boeder.

Briefs of amici curiae urging affirmance were filed for the Business Roundtable by Thomas B. Leary and Janet L. McDavid; for the Chamber of Commerce of the United States by Bert W. Rein, James M. Johnstone, and Stephen A. Bokat; and for the National Association of Manufacturers by Otis Pratt Pearsall, Philip H. Curtis, Ronald C. Redcay, Jan S. Amundson, and Quentin Riegel.

Robert K. Corbin, Attorney General, and Anthony B. Ching, Solicitor General, filed a brief for the State of Arizona as amicus curiae.

Opinion

***96** ****1663** Justice WHITE delivered the opinion of the Court.

In *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the State of Illinois brought suit on its own behalf and on behalf ***97** of a number of local governmental entities seeking treble damages under § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 15(a), [1] for an alleged conspiracy to fix the price of concrete block in violation

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of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1. The State and the local governments were all indirect purchasers of concrete block—that is, they did not purchase concrete block directly from the price-fixing defendants but rather purchased products or contracted for construction into which the concrete block was incorporated by a prior purchaser. The Court held that, with limited exceptions, [2] only overcharged direct purchasers, and not subsequent indirect purchasers, were persons "injured in [their] business or property" within the meaning of § 4, and that therefore the State of Illinois was not entitled to recover under federal law for the portion of the overcharge passed on to it.

Appellants in the present case, the States of Alabama, Arizona, California, and Minnesota, brought suit in the appropriate federal courts on their own behalf and on behalf of classes of all governmental entities within each State, excluding the Federal Government, seeking treble damages under § 4 of the Clayton Act for an alleged nationwide conspiracy to fix prices of cement in violation of § 1 of the Sherman Act. Appellants are, at least in part, indirect purchasers of cement, and so under *Illinois Brick,* like the State of Illinois in that ***98** case, would not be entitled to recover on their indirect purchaser claims under § 4 unless those claims fell within one of the exceptions. In their complaints, however, appellants also alleged violations of their respective state antitrust laws under which, as a matter of state law, indirect purchasers arguably are allowed to recover for all overcharges passed on to them by direct purchasers. [3] The claims under these ****1664** state indirect purchaser statutes are the focus of this case.

Numerous similar actions were filed by other plaintiffs in various District Courts, and the actions were transferred to the United States District Court for the District of Arizona for coordinated pretrial proceedings. *In re Cement and Concrete Antitrust Litigation,* 437 F.Supp. 750 (JPML 1977). The District Court certified the actions as class actions and established a number of plaintiff classes. Between July 1979 and October 1981, several major defendants settled ***99** with the various classes, resulting in a settlement fund in excess of $32 million. The settlements left distribution of the fund for later resolution, subject to approval of the District Court.

Appellants sought payment out of the settlement fund for their state indirect purchaser claims. Appellees, class members who are direct purchasers, objected. When the District Court approved a plan for distributing the settlement fund, it refused to allow the claims against the fund pursuant to state indirect purchaser statutes. According to the District Court, "[s]uch statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick,* and, accordingly, are pre-empted by federal law." App. to Juris. Statement A–31 (emphasis omitted).

The Ninth Circuit affirmed. *In re Cement and Concrete Antitrust Litigation,* 817 F.2d 1435 (1987). The Court of Appeals identified "three purposes or objectives of federal antitrust law in this context," as defined by *Illinois Brick* and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968): avoiding unnecessarily complicated litigation; providing direct purchasers with incentives to bring private antitrust actions; and avoiding multiple liability of defendants. 817 F.2d, at 1445. If state laws permitting indirect purchasers to recover were construed to restrict direct purchasers to suing only for the amount of any overcharge they have absorbed, the Court of Appeals was of the view that state law conflicted directly with federal law as construed in *Illinois Brick.* Alternatively, if state law permitted indirect purchasers to bring claims for damages in addition to the claims brought by direct purchasers, it would "impermissibly interfere with the three policy goals outlined in *Hanover Shoe* and *Illinois Brick.*" 817 F.2d, at 1445. The Court of Appeals therefore held that state indirect purchaser claims that did not satisfy any exception to *Illinois Brick* were pre-empted.

***100** Appellants appealed to this Court, invoking our jurisdiction under 28 U.S.C. § 1254(2). We noted probable jurisdiction, 488 U.S. 814, 109 S.Ct. 51, 102 L.Ed.2d 29 (1988), and we now reverse.

We should first make it clear exactly what the issue is before us. These cases alleged violations of both the Sherman Act and state antitrust Acts. The settlements, as we understand it, covered both the federal and the state law claims; the settlement fund

was intended to be distributed in complete satisfaction of those claims. Under federal law, no indirect purchaser is entitled to sue for damages for a Sherman Act violation, and there is no claim here that state law could provide a remedy for the federal violation that federal law forbids. Had these cases gone to trial and a Sherman Act violation been proved, only direct purchasers would have been entitled to damages for that violation, and there is no suggestion by the parties that the same rule should not apply to distributing that part of the fund that was meant to settle the Sherman Act claims. The issue before us is whether this rule limiting recoveries under the Sherman Act also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving ****1665** such purchasers a damages cause of action.

The path to be followed in pre-emption cases is laid out by our cases. It is accepted that Congress has the authority, in exercising its Article I powers, to pre-empt state law. In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 212–213, 103 S.Ct. 1713, 1726–27, 75 L.Ed.2d 752 (1983). Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–143, 83 S.Ct. 1210, 1217–18, 10 L.Ed.2d 248 (1963), or ***101** when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See, *e.g., Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984).

In this case, in addition, appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States. See *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 716, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714 (1985). When Congress legislates in a field traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, [4] it is plain that this is an area traditionally regulated by the States. Cf. *Florida Lime & Avocado Growers, supra,* 373 U.S., at 146, 83 S.Ct., at 1219 (regulation to "prevent the deception of consumers").

In light of these principles, the Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted. There is no claim that the federal antitrust laws expressly pre-empt state laws permitting indirect purchaser recovery. [5] Moreover, appellees concede that Congress has not pre-empted the field of antitrust law. Brief for Appellee ***102** ARC America Corp. 10, n. 5; Brief for Appellees Allied Concrete, Inc., et al. 4. Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. 21 Cong.Rec. 2457 (1890) (remarks of Sen. Sherman); see *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 632–635, 96 S.Ct. 3110, 3137–39, 49 L.Ed.2d 1141 (1976) (Stewart, J., dissenting). And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law. See *Watson v. Buck,* 313 U.S. 387, 403, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941); *Puerto Rico v. Shell Co.,* 302 U.S. 253, 259–260, 58 S.Ct. 167, 170–71, 82 L.Ed. 235 (1937); cf. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133–134, 98 S.Ct. 2207, 2217–18, 57 L.Ed.2d 91 (1978).

****1666** Appellees' only contention is that state laws permitting indirect purchaser recoveries pose an obstacle to the accomplishment of the purposes and objectives of Congress. State laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct. *Illinois Brick,* 431 U.S., at 746, 97 S.Ct., at 2074; *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 485–486, 97 S.Ct. 690, 695–96, 50 L.Ed.2d 701 (1977). The Court of Appeals concluded, however, that such laws are inconsistent with and stand

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as an obstacle to effectuating the congressional purposes and policies identified in *Hanover Shoe* and *Illinois Brick.* [6] In this respect, the Court of Appeals has misunderstood both *Hanover Shoe* and *Illinois Brick.*

Neither of those cases addressed the pre-emptive force of the federal antitrust laws. Neither case contains any discussion of state law or of the relevant standards for pre-emption of state law. As we made clear in *Illinois Brick,* the issue ***103** before the Court in both that case and in *Hanover Shoe* was strictly a question of statutory interpretation—what was the proper construction of § 4 of the Clayton Act. See, *e.g.,* 431 U.S., at 736, 97 S.Ct., at 2069.

It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law. As construed in *Illinois Brick,* § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.

The Court of Appeals also erred in concluding that state indirect purchaser statutes interfere with accomplishing the purposes of the federal law that were identified in *Illinois Brick.* First, the Court of Appeals concluded that state indirect purchaser statutes interfere with the congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims. But these state statutes cannot and do not purport to affect remedies available under federal law. Furthermore, state indirect purchaser actions will not necessarily be brought in federal court. 817 F.2d, at 1445. Unlike the federal indirect purchaser claims asserted in *Illinois Brick,* which would have been exclusively within the jurisdiction of the federal courts, 15 U.S.C. §§ 15(a), 26, claims under state indirect purchaser statutes could be brought in state courts, separately from federal actions brought by direct purchasers. Moreover, federal courts have the discretion to decline to exercise pendent jurisdiction over state indirect purchaser claims, even if those claims are brought in ***104** the first instance in federal court. See *Mine Workers v. Gibbs,* 383 U.S. 715, 725–726, 86 S.Ct. 1130, 1138–39, 16 L.Ed.2d 218 (1966). Since many state indirect purchaser actions would be heard in state courts, at least when the federal courts determined that hearing those claims would be overly burdensome, any complication of federal direct purchaser actions in federal court would be minimal.

Second, the Court of Appeals reasoned that allowing state indirect purchaser ****1667** claims could reduce the incentives of direct purchasers to bring antitrust actions by reducing their potential recoveries. The presence of indirect purchaser claims would reduce settlement offers to direct purchasers, the Court of Appeals believed, and if the total liability were to exhaust a defendant's assets, the direct purchasers would have to share the defendant's estate in bankruptcy with indirect purchasers. But the Court in *Illinois Brick* was not concerned with the risk that a plaintiff might not be able to recover its entire damages award or might be offered less to settle. Indeed, taken to its extreme, the Court of Appeals' logic would lead to the pre-emption of any state-law claims against antitrust defendants, even if wholly unrelated, because the presence of other litigation could threaten the defendants with bankruptcy and reduce their willingness to settle. *Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute—§ 4 of the Clayton Act—would result in no one plaintiff having a sufficient incentive to sue under that statute. State indirect purchaser statutes pose no similar risk to the enforcement of the federal law.

Appellees argue that because the defendants in these antitrust actions have settled and there is a limited settlement fund, the indirect purchasers' claims are pre-empted because those claims will likely reduce the amount that can be paid from the fund to direct purchasers. [7] But as we said earlier, ***105** the settlement covered both federal and state-law claims, and whatever amount is allocable to federal claims will be distributed only to direct purchasers. Indirect purchasers will participate only in distributing the funds available to claimants under state law. Even if the settlement fund is not to be divided between state and federal-law claimants, the settlement necessarily was intended to dispose of all claimants, whether claiming under federal

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or state law and whether direct or indirect purchasers. That direct purchasers may have to share with indirect purchasers is a function of the fact and form of settlement rather than the impermissible operation of state indirect purchaser statutes.

Third, the Court of Appeals concluded that state indirect purchaser claims might subject antitrust defendants to multiple liability, in contravention of the "express federal policy" condemning multiple liability. 817 F.2d, at 1446 (citing *Illinois Brick; Associated General Contractors of California, Inc. v. Carpenters,* 459 U.S. 519, 544, 103 S.Ct. 897, 911, 74 L.Ed.2d 723 (1983); and *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 474–475, 102 S.Ct. 2540, 2545–46, 73 L.Ed.2d 149 (1982)). But *Illinois Brick,* as well as *Associated General Contractors* and *Blue Shield,* all were cases construing § 4 of the Clayton Act; in none of those cases did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law. Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, see *Silkwood v. Kerr–McGee Corp.,* 464 U.S., at 257–258, 104 S.Ct., at 626–27; *California v. Zook,* 336 U.S. 725, 736, 69 S.Ct. 841, 847, 93 L.Ed. 1005 (1949), and no clear purpose of Congress indicates that we should decide otherwise in this case.

When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect ***106** purchaser statutes are pre-empted by federal law. The judgment of the Court of Appeals is therefore reversed.

So ordered.

****1668** Justice STEVENS and Justice O'CONNOR took no part in the consideration or decision of this case.

All Citations

490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86, 57 USLW 4425, 1989-1 Trade Cases P 68,537

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 4 provides as follows:

"[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a).

2 The Court noted two possible exceptions: when the direct purchaser and the indirect purchaser have entered into pre-existing cost-plus contracts, *Illinois Brick Co. v. Illinois,* 431 U.S., at 732, n. 12, 97 S.Ct., at 2067, n. 12, and when the direct purchaser is owned or controlled by the indirect purchaser, *id.,* at 736, n. 16, 97 S.Ct., at 2070, n. 16.

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3 The statutes of Alabama, California, and Minnesota expressly allow indirect purchasers to sue. See Ala.Code § 6–5–60(a) (1975) (allowing recovery by any person "injured or damaged ..., direct or indirect"); Cal.Bus. & Prof.Code Ann. § 16750(a) (West Supp.1989) (allowing recovery "regardless of whether such injured person dealt directly or indirectly with the defendant"); Minn.Stat. § 325D.57 (1988) (allowing recovery by any person "injured directly or indirectly"). A number of other jurisdictions have similar statutes. Colo.Rev.Stat. § 6–4–106 (Supp.1988); D.C.Code § 28–4509(a) (1981); Haw.Rev.Stat. § 480–14(c) (1985); Ill.Rev.Stat., ch. 38, ¶ 60–7(2) (1988); Kan.Stat.Ann. § 50–801(b) (Supp.1988); Md.Com.Law Code Ann. § 11–209 (1983); Mich.Comp.Laws Ann. § 445.778 (West Supp.1988); Miss.Code Ann. § 75–21–9 (1972); N.M.Stat.Ann. § 57–1–3(A) (1987); R.I.Gen. Laws § 6–36–12(g) (1985); S.D.Codified Laws § 37–1–33 (1986); Wis.Stat. § 133.18 (1987–1988).

The Arizona statute, Ariz.Rev.Stat.Ann. § 44–1408(A) (1987), generally follows the language of the Clayton Act, but it might be interpreted as a matter of state law as authorizing indirect purchasers to recover. This is appellants' position. See Brief for Appellants 19, n. 6; Juris. Statement 9. Appellees dispute this interpretation, Brief for Appellee ARC America Corp. 21, n. 14, and the District Court and the Court of Appeals did not pass on this question given their holdings that even if the statute was so interpreted it was pre-empted by federal law. We express no opinion on this question of Arizona law.

4 At the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws. Mosk, State Antitrust Enforcement and Coordination with Federal Enforcement, 21 A.B.A. Antitrust Section 358, 363 (1962). Moreover, the Sherman Act itself, in the words of Senator Sherman, "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." 21 Cong.Rec. 2456 (1890).

5 Cf. National Cooperative Research Act of 1984, 15 U.S.C. § 4303(c) (1982 ed., Supp. V); Export Trading Company Act of 1982, 15 U.S.C. §§ 4016, 4002(a)(7).

6 In one respect, the Court of Appeals was overly narrow in its description of the congressional purposes identified in *Illinois Brick.* In *Illinois Brick,* the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws, as the Court of Appeals asserted, but rather that at least some party have sufficient incentive to bring suit. Indeed, we implicitly recognized as much in noting that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them. See 431 U.S., at 732, n. 12, 97 S.Ct., at 2067, n. 12.

7 Contrary to the Court of Appeals' suggestion, 817 F.2d, at 1445, there is no contention here that the state indirect purchaser statutes themselves seek to limit the recovery direct purchasers can obtain under federal law.

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754 F.2d 404
United States Court of Appeals, First Circuit.

CIA. PETROLERA CARIBE, INC., Plaintiff, Appellant,
v.
ARCO CARIBBEAN, INC., et al., Defendants, Appellees.

No. 84–1194
|
Argued Sept. 6, 1984.
|
Decided Feb. 6, 1985.

Synopsis

Wholesale/retail gasoline seller brought antitrust action against several defendants arising out of an oil company's acquisition of a second company's assets in Puerto Rico. The United States District Court for the District of Puero Rico, Jaime Pieras, Jr., J., entered summary judgment in favor of defendants, and appeal was taken. The Court of Appeals, Bownes, Circuit Judge, held that: (1) District Court erroneously applied requirements of Clayton Act § 4 in determining seller's standing to request § 16 injunctive relief; (2) seller had standing; (3) District Court abused its discretion by allowing defendants' tardy submissions but declining to accept seller's where neither party showed cause for delay; (4) District Court improperly granted summary judgment on Sherman Act § 1 and § 2 claims and Clayton Act § 7 and § 8 claims; and (5) divestiture is not excluded per se from armory of equitable relief available to a district judge in § 16 cases.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

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Max K. Jamison, Santa Monica, Cal., with whom Alvaro R. Calderon, Jr., and Calderon, Rosa-Silva & Vargas, Hato Rey, P.R., were on brief, for defendants, appellees.

***406** Before COFFIN and BOWNES, Circuit Judges, and SELYA, [*] District judge.

Opinion

BOWNES, Circuit Judge.

In this antitrust action, plaintiff-appellant Cia. Petrolera Caribe, Inc. (Caribe) appeals entry of summary judgment in favor of defendants Arco Carribean, Inc. (Arco), U.S.A. Petroleum Corp. (USAP), Isla Petroleum Corporation (Isla), and Gasolinas de Puerto Rico (GPR). The complaint alleges that USAP's acquisition of Arco's Puerto Rican assets violated §§ 7 and 8 of the Clayton Act, 15 U.S.C. §§ 18, 19, and §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Although the complaint originally requested both damages and injunctive relief, Caribe abandoned the request for damages in the district court and asked only for an injunctive remedy, particularly divestiture, pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26.

Caribe challenges three rulings of law by the district court. It first claims that the district court erred in ruling that it lacked standing to bring the action because it had not been and would not be injured as a proximate result of the alleged antitrust violations. Second, Caribe contends that the court erred in holding that the specific injunctive remedy it sought—divestiture—

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is not available to a private litigant such as Caribe. Finally, plaintiff contends that disputed relevant and material facts rendered summary judgment inappropriate.

Caribe also forwards as error two procedural rulings: the district court's acceptance and reliance upon affidavits and a reply brief submitted by the defendants on their motion for summary judgment despite the court's refusal to accept plaintiff's affidavit or to allow it an opportunity to reply; and, the district court's refusal to allow oral argument on summary judgment.

We first discuss whether plaintiff has "standing" for maintaining this suit. Because we conclude that it does, we then review plaintiff's procedural claims. We next examine the propriety of awarding summary judgment on liability in favor of defendants, and conclude with a discussion of why we believe plaintiff's remedies include divestiture.

I. BACKGROUND

We recount the facts in the light most favorable to the plaintiff, against whom summary judgment was entered. Caribe is in the wholesale and retail gasoline business. It wholesales refined gasoline to a small chain of service stations in Puerto Rico it owns and operates. Defendant USAP is an oil company headquartered in the continental United States that bought the Puerto Rican assets of Arco Carribean, Inc., a subsidiary of the multinational oil company Atlantic Richfield, Inc. This acquisition constitutes the merger contested here. Prior to this acquisition, USAP's only participation in the Puerto Rican gasoline market was through its wholly owned subsidiary, GPR. GPR owns and operates a number of service stations in Puerto Rico. As part of the merger plan formulated by USAP, another wholly owned subsidiary, Isla, was created. Isla's purpose was to take title to the Puerto Rican assets of Arco Carribean and to continue the management and operation of the former Arco stations. After consummation of the merger in July 1981, Isla became the wholesaler of gasoline not only to the former Arco (now Isla) service stations but also to those operated by GPR. Neither GPR nor Isla markets gasoline outside Puerto Rico.

Caribe entered the gasoline market in Puerto Rico in 1979 and slowly but steadily expanded its operations. By mid-1981, it was operating twenty-four stations and was planning an additional eight. It appears that most of these stations served rural and less populous regions of Puerto Rico. At its highest point, Caribe's market share was 1.1%. Caribe claims that because of the merger, a trend toward greater concentration in the market has occurred, lessening competition and threatening the survival of the smaller companies ***407** including itself. It alleges that it will be "squeezed" out of the market by the oligopolist firms. It further claims that the increase in market share of the top five has increased their market power, and consequently their ability to dictate the conditions for doing business to the smaller companies. Caribe believes the inevitable result will be harm to consumers in the form of price hikes. Caribe asserts that the harm to itself resulting from this concentration of market power is affirmatively shown by its inability to expand beyond the hinterlands of Puerto Rico into the more populous metropolitan areas. It also claims that increased market concentration, in conjunction with other barriers to entry, effectively prevents the entrance of other competitors into the market.

Immediately preceding the merger, the Puerto Rican gasoline market also included seven multinational, vertically integrated companies: Texaco, Esso, Shell, Gulf, Mobil, Chevron and Arco. [1] The first four of these firms plus GPR controlled 77% of the market at the time of the merger but, after the merger, their proportion rose to a high of 83%. GPR's own market share rose from 5.29% to 9.33% after its merger with the former Arco subsidiary. Caribe's market share at that time was 0.4%.

II. STANDING UNDER § 16

Caribe's claims for injunctive relief are based on § 16 of the Clayton Act, 15 U.S.C. § 26, which reads in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws ... when and under the same conditions and principles as injunctive relief

> against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings....

The district court held, without more, that Caribe lacked standing "on all causes of action because it has not been, and will not be, damaged as a result of any conduct alleged in its complaint."

Although the complaint would never serve as a model for antitrust pleadings, it does specifically invoke § 16 of the Clayton Act in paragraph one. In Count I, paragraph 12b, it is alleged that the merger will "materially impair the competitive effectiveness of Plaintiff and others that were and are now competing with ARCO and the buyer." In Count II, paragraph 15, it is alleged that the objective of the merger was to "restrain[ ] and prevent[ ] plaintiff and others from exercising an essential and necessary part of their lawful trade or business in interstate trade or commerce." Paragraph 17 in Count II also alleges "plaintiff has lost customers, patronage and trade and has been prevented and detered [*sic*] from continuing and expanding and increasing its business as otherwise [*sic*] would have done." These bare bones allegations have been supplemented with additional facts through affidavits and depositions of record.

It appears that the district court erroneously applied the requirements of § 4 of the Clayton Act, 15 U.S.C. § 15, which authorizes treble damages for antitrust violations, to plaintiff's request for § 16 injunctive relief. In *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 260, 92 S.Ct. 885, 890, 31 L.Ed.2d 184 (1972), the Supreme Court noted an important difference between the requirements of § 16 and those of § 4. The Court pointed out that a § 4 claim requires an *injury* to "business or property" that § 16 omits. The Court noted that, by contrast, § 16 provides that "any individual *threatened with injury* by an antitrust violation may ... sue for injunctive relief against violations of the antitrust laws...." *Hawaii v. Standard Oil Co.,* 405 U.S. at 261, 92 S.Ct. at 890–91 (emphasis added). Plainly, Congress empowered ***408** a broader range of plaintiffs to bring § 16 actions because the standards to be met are less exacting than those under § 4; under § 16, a plaintiff need show only a threat of injury rather than an accrued injury.

The Court's remarks in *Hawaii* reaffirm its conclusions in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), a case more nearly on point. The Court took to task the court of appeals for vacating a portion of an injunction because it believed that

> Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U.S.C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and *authorizes injunctive relief upon the demonstration of "threatened" injury* ...; *he need only demonstrate a significant threat of injury* from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Id. at 130, 89 S.Ct. at 1580 (citations omitted; emphasis added). Although this was an enunciation of the standard a plaintiff must satisfy for an injunction to issue after trial, it applies here because to withstand a motion for summary judgment, a plaintiff is not required to plead additional matters and submit supporting proof more exacting than that ultimately required for judgment in its favor.

As we have recently observed, "[t]he principles of standing determine whether a particular plaintiff is the type of person the law intends to protect against the harm of which he complains." *Ozonoff v. Berzak,* 744 F.2d 224, at 227 (1st Cir.1984). We

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cannot conceive of a more appropriate plaintiff to challenge defendants' merger. [2] Caribe is a direct competitor of defendants in the refined gasoline market. The gravamen of its complaint is that defendants' merger tends to lessen competition and to yield a greater concentration of firms within that market. Caribe acknowledges that it has not sustained an actual measurable injury in the short term flowing from the merger, but it correctly claims that this is not required for a § 16 action; its allegations that the refined gasoline market has been harmed by these putative antitrust violations and that it will likely be "squeezed" out of the market in the foreseeable future because of defendants' actions are sufficient. Accordingly, we rule that Caribe has alleged sufficient facts showing it " 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 [99 S.Ct. 1601, 1608, 60 L.Ed.2d 66] (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41 [96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976)." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (footnote omitted). None of the prudential considerations we summarized in *Ozonoff* counsel otherwise. *See* *Ozonoff v. Berzak,* 744 F.2d 224, at 227–228. Caribe is a proper plaintiff to bring this action.

III. PROCEDURAL CLAIMS

A. *The Reply Brief and Affidavits*

Faced with a motion for partial summary judgment filed by plaintiff Caribe and a cross-motion for summary judgment filed by defendants, the district court established a timetable at a pretrial conference on November 7, 1983, and restated it in an ***409** order dated November 14. All motions for summary judgment were to be filed by November 15 and the hearing on the cross-motions was scheduled for December 19.

The announced timetable notwithstanding, on the day of hearing, both plaintiff and defendants arrived at the courthouse with additional papers pertaining to the cross-motions. Defendants, prior to the hearing, went to the clerk of court's office and filed a reply brief and affidavits. Plaintiff proceeded to the hearing and sought to file in open court affidavits supporting its opposition to defendants' motion for summary judgment. According to the clerk's minutes of the proceeding (no transcript is available), short statements were heard from each of the parties prior to the court's announcement of its decision to grant defendants' motion for summary judgment. Plaintiff requested permission to file affidavits but the court refused to accept them. Defendants then informed the court that they had filed a reply to plaintiff's opposition to summary judgment, but the court did not amend its earlier ruling rejecting plaintiff's affidavits or strike defendants' reply. Plaintiff claims that by this action, the court transgressed the requirements of Federal Rules of Civil Procedure 6(d) and 56(c), and that it was fundamentally unfair to allow defendants' papers, but not its own, to be filed on the day of hearing. Further, Caribe claims that once it accepted defendants' reply brief and affidavits, the court should have granted it time to respond to these papers before considering and ruling on the motions for summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure states that a motion for summary judgment is to be served at least ten days prior to the hearing. Under the requirements of Rule 6(d), if an affidavit is used to support a motion, it must be served with the motion. *Accord* *In re Stone,* 588 F.2d 1316, 1321 (10th Cir.1978); *Mount Vernon Preservation Society v. Clements,* 415 F.Supp. 141, 143 (D.N.H.1976); *see also* Moore's Federal Practice ¶ 56.14[1] at 56–358. The party adverse to the motion has a more extensive period for filing affidavits, *viz.,* "prior to the day of hearing [it] may serve opposing affidavits." Although Rule 56 does not create an explicit timetable for replies, the "purpose of Rule 56(c) is to allow a party to have a meaningful opportunity to challenge a summary judgment motion." *Indiana Port Comm'n v. Bethlehem Steel Corp.,* 702 F.2d 107, 111 (7th Cir.1983); *Winbourne v. Eastern Airlines, Inc.,* 632 F.2d 219, 223 (2d Cir.1980).

In this case, defendants filed a reply brief and supporting affidavits which contained *new evidence;* one affidavit was by defendants' expert, Dr. Freyre, which set forth an analysis of the most recent data from the Puerto Rican Energy Department,

and concluded that increased concentration and lessened competition had not occurred as a result of defendants' merger. While Federal Rule of Civil Procedure 6(b) allows "for cause shown" a discretionary enlargement of time, this discretion must not be exercised in a manner that prejudices the other party's substantial rights. The defendants here not only failed to show cause for not serving the affidavits with their motion, or at least by November 15, the date all motions for summary judgment were to be served, but the late affidavits plainly prejudiced plaintiff. As Judge Aldrich has explained, "[t]here is a substantial difference between accepting matters at the hearing which show that an issue of fact exists, and taking evidence in support of the motion at the last minute when there is no opportunity to rebut." *Chan Wing Cheung v. Hamilton,* 298 F.2d 459, 460 (1st Cir.1962). Defendants' affidavits and attachments filed on December 19, the day of hearing, should not have been considered. *Cf. Jones v. Mernard,* 559 F.2d 1282 (5th Cir.1977) (moving party's affidavit could not be served during oral argument on motion instead of being served prior to the date of hearing).

For similar reasons, we believe defendants' reply brief was also improperly before the court below. At oral argument, plaintiff informed us that it had requested an opportunity to respond to defendants' ***410** reply brief, which it had received by hand on the day of hearing contrary to Rule 56(c). The district court refused to grant an opportunity to respond. The court then granted defendants' motion for summary judgment and stated that it was already drafting an opinion. When the opinion issued, it relied heavily on defendants' reply brief and supporting affidavits and even incorporated verbatim a number of consecutive pages directly from defendants' brief. Although a busy trial judge is entitled to obtain assistance from the parties, this heavy reliance on the moving party's brief and affidavits suggests that the district court failed to accord the nonmovant's papers the indulgence required. *Cf. Cuthbertson v. Biggers Brothers, Inc.,* 702 F.2d 454, 459 (4th Cir.1983) (extensive verbatim use of party's proposed findings of fact undercuts appearance of disinterested court). On motions for summary judgment, the indulgence required at both the trial and appellate levels mandates the court to review the record and draw all inferences in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Metropolitan Life Insurance Co. v. Ditmore,* 729 F.2d 1, 4 (1st Cir.1984); *Stepanischen v. Merchants Despatch Transportation Co.,* 722 F.2d 922, 928 (1st Cir.1983).

We believe that as the nonmoving party, Caribe should have had an opportunity to examine and reply to the moving party's papers before the court considered them in its decision process. This conclusion is especially required here because in its reply brief, the defendants advanced new reasons justifying summary judgment in their favor and relied on the untimely filed affidavits. Moreover, reply briefs were not authorized for either party under the district court's timetable. The district court therefore had two choices when it was informed that defendants had filed a reply brief: it could strike the brief or grant plaintiff as the nonmoving party the opportunity to respond to it. Certainly, after discovering that use of the information contained in the tardily served brief and affidavit would be helpful to its opinion, the district court should then have provided the nonmoving party with an opportunity to respond.

Whether the plaintiff as adverse party was entitled to have its affidavit accepted by the court presents a somewhat different question. As already noted, Rule 56(c) provides that an adverse party may file affidavits "prior to the day of hearing." Rule 6(d) restates this requirement with the modification that the court may "permit" an opposing party's affidavit "to be served at some other time." A district court's refusal to accept a late affidavit is reviewable only for abuse of discretion. *Accord Alghanim v. Boeing Co.,* 477 F.2d 143, 148–9 (9th Cir.1973). While the district court is not required to accommodate additional untimely submissions, we think that the trial court abused its discretion by allowing defendants' tardy submissions but declining to accept plaintiff's where neither party showed cause for the delay. The rules are structured to provide the nonmovant with substantially more time for filing affidavits than moving parties. Where no cause for the delay is shown by either party, we cannot discern any reason for the district court's reversal of the indulgence structurally provided to the nonmoving party by the Federal Rules. *Accord id.* (where moving party filed his affidavits two days after his motion, this is legitimate factor to be considered in determining whether court had abused its discretion in not allowing an extension of time for plaintiff to file affidavits in opposition). Accordingly, in evaluating the grant of summary judgment, we shall utilize only those portions of

the court's opinion that do not rely on defendants' reply brief, affidavits, and other attachments. In this way, we deprive the defendants of the benefit of the procedural error. [3]

***411** B. *Oral Argument*

Oral argument on the cross-motions for summary judgment was calendared and the parties arrived prepared, but at the start of the hearing the district judge announced his decision in favor of defendants and declined to hear oral argument. Caribe urges us to hold that the district court erred in not having oral argument on defendants' motion for summary judgment. Inasmuch as we have concluded that the grant of summary judgment was wrong on the merits of the motion, this procedural point may well be academic. But, the matter arises with sufficient frequency in the trial courts that we believe a general statement of our views would be beneficial.

Rule 56(c) is again our text. It states in pertinent part: "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." Fed.R.Civ.P. 56(c). We note that at least five circuits have held that the rule's reference to a "hearing" does not necessarily imply oral argument; a matter can be heard simply on the papers. The Third, Fourth, Seventh, Eighth, and District of Columbia Circuits have held that oral argument may be dispensed with in appropriate circumstances. *See* *Spark v. Catholic University,* 510 F.2d 1277, 1280 (D.C.Cir.1975); *Ailshire v. Darnell,* 508 F.2d 526 (8th Cir.1974); *Season-All Industries, Inc., v. Turkiye,* 425 F.2d 34, 39 (3d Cir.1970); *United States Fidelity & Guaranty Co. v. Lawrenson,* 334 F.2d 464, 466–67 (4th Cir.), *cert. denied,* 379 U.S. 869, 85 S.Ct. 141, 13 L.Ed.2d 71 (1964); *Sarelas v. Porikos,* 320 F.2d 827 (7th Cir.1963), *cert. denied,* 375 U.S. 985, 84 S.Ct. 519, 11 L.Ed.2d 473 (1964); *cf.* *Hazen v. Southern Hills National Bank of Tulsa,* 414 F.2d 778, 780 (10th Cir.1969) (holding oral argument not required on motions in general unless a local rule provides otherwise). These circuits decline to displace the local rules promulgated under Federal Rule of Civil Procedure 78 that governs the submission and determination of motions without oral argument. *Cf.* *United States v. One 1974 Porsche 911–S,* 682 F.2d 283, 286–87 (1st Cir.1982) (burden is on parties to request oral argument pursuant to local rules and, if not requested, argument is waived); *but see* *Dredge Corp. v. Penny,* 338 F.2d 456, 462 (9th Cir.1964).

We think this rule is sound. As those courts have recognized, ordinarily it is appropriate to hear oral argument before rendering summary judgment. But, the trial court has wide latitude in this regard. Where affidavits, depositions, and other documentary material indicate that the only issue is a question of law, and where the briefs have adequately developed the relevant legal arguments, it is not error to deny oral argument consistent with the district court's local rules. This antitrust action, however, as the next section will elaborate, presented a number of critical factual and fact-law questions. Given the posture of the case, we need not rule that it was error to refuse to grant oral argument. But, the case underscores the wisdom of hearing oral argument on motions bottomed on difficult questions of law and alleged questions of fact. It is likely that oral argument here would have highlighted the obstacles to a supportable summary judgment decision and resulted in the denial of the motion.

IV. SUMMARY JUDGMENT

The standard for granting summary judgment is well established. Summary judgment is appropriate only when the pleadings and other submissions show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In reviewing a grant of summary judgment, we must view the record in the light most favorable to the party opposing the motion, and indulge all inferences favorable to that party. *Adickes v. Kress & Co.,* 398 U.S. at 157, 90 S.Ct. at 1608; *Stepanischen v. Merchants Despatch Transportation Co.,* 722 F.2d at 928. Applying ***412** this standard, we find that there were disputed material issues of fact and that the court erred in its application of the law, which it adopted from defendants' brief. [4] Although these reasons are sufficient unto themselves for reversing the grant of summary judgment, the record also shows that the district court failed to grant plaintiff all favorable inferences suggested by the evidence and, instead, *weighed* the conflicting evidence, and did so in the light most favorable to the moving party.

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The parties continually differed regarding a number of crucial facts at issue. They also bitterly contested the appropriate inferences to be drawn from the facts on which they were agreed. Examples of controverted facts and inferences include: whether competition has been increased or decreased by the merger; whether the Isla-GPR merger was an attempt to monopolize the gasoline market; whether gasoline is a homogenous product; whether it is likely Caribe will be "squeezed" from the market and, if so, whether this would be fairly traceable to the merger; whether the post-merger market share of Isla-GPR is sufficient to allow it to diminish competition; what the appropriate time frame is for analyzing the effects of the merger on the gasoline market; what the barriers to entry into this market are; and whether these barriers are significant deterrents to new entries. [5] Rather than denying the motion, the district court acted as a trier of fact. It assessed the challenged merger's impact upon competition in the gasoline market, it evaluated the statistical data available, and it compared and weighed the parties' expert testimony regarding a number of the other issues. This was not appropriate in ruling on a motion for summary judgment.

We now turn to the central error of law. Although the law governing each of the substantive claims must be applied with reference to the remedy requested, *see, e.g., Brunswick Corp. v. Pueblo Bowl-O Mat,* 429 U.S. 477, 486, 97 S.Ct. 690, 696, 50 L.Ed.2d 701 (1979), the district court made use of the wrong remedial law. The sole remedy requested by Caribe was injunctive relief pursuant to Clayton Act § 16, yet the district court utilized the legal standards governing the recovery of treble damages under Clayton Act § 4. This was prejudicial error because the standards for relief under § 4 are substantially more stringent than those under § 16. Section 4 is retrospective in orientation; it seeks to remedy the past by penalizing wrongdoers with treble damages, thereby deterring other wrongdoing. *Id.* at 485, 97 S.Ct. at 695. Accordingly, § 4 "makes awards available only to *injured parties,* and measures the award by a multiple of the injury actually proved." *Id.* By contrast, § 16 is prospective and prophylactic, allowing injunctive relief upon demonstration of "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine,* 395 U.S. at 130, 89 S.Ct. at 1580. As we emphasized in our earlier discussion of plaintiff's "standing," the district court cannot require plaintiff to show *fact* of injury, *id.,* in an action under § 16. Summary judgment, therefore, was not and could not have been properly granted on the Sherman Act § 1 and § 2 claims and the Clayton Act § 7 claim.

Although the grant of summary judgment for defendants on the Clayton Act § 8 claim alleging that some of the defendant corporations have interlocking directorates is a closer question, that ruling must also be reversed. The district court held that § 8 did not apply because "the corporations Isla and GPR are separate entities in form only and [ ] they are truly ***413** one merged corporation. There is no evidence to the contrary...." Caribe correctly points out that some contrary evidence may be found in an affidavit of Nelson Capote, chief operating officer of both GPR and Isla, dated October 31, 1983. Mr. Capote states:

> At the time of the acquisition, GPR had its own middle management and lower organizational structure. ISLA, which was the Puerto Rican of [*sic*] ARCO Carribean, Inc., inhereted [*sic*] from it the existing middle management and lower organizational structure. For convenience of operation, I decided to maintain these two entities so as to be able to distinguish between the performance of each....

The district court grounded its ruling partly on a stipulation that the corporations had merged, but we find no such stipulation in the record. What we do find is plaintiff's statement of material facts at issue, appended to docket entry 91, which alleges that defendants are separate entities for purposes of § 8 but a single entity for § 7.
We venture no opinion now as to whether plaintiff can have it both ways but, ordinarily, such a statement could not constitute a stipulation. It may well be that there was an oral stipulation by Caribe upon which the district court relied. On the record before us, however, we must set aside the summary judgment granted defendants on plaintiff's claim under § 8 of the Clayton Act.

It is possible that the factual dispute can be settled with stipulations such that the question becomes one of law. Because the parties failed to cite the law relevant to determining the question, we draw attention to, *inter alia,* *T.R.W., Inc. v. F.T.C.,* 647 F.2d 942 (9th Cir.1981) (proof that interlock has actual anticompetitive effect is not required); *Las Vegas Sun, Inc. v. Summa Corp.,* 610 F.2d 614 (9th Cir.), *cert. denied,* 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980) (where district court found that six entities owned and operated by one individual neither competed with each other nor represented themselves as competitors, no violation of Clayton Act § 8); *Kennecott Copper Corp. v. Curtiss-Wright Corp.,* 584 F.2d 1195, 1205 (2d Cir.1978) (§ 8 does not prohibit interlocking directorships between parent companies whose subsidiaries are competitors); *Protectoseal Co. v. Barancik,* 484 F.2d 585, 588–89 (7th Cir.1973) (Stevens, J.) (by § 8, Congress intended, *inter alia,* to prohibit interlocks between corporations that could not lawfully merge; § 8 has broader coverage than § 7); *In re Penn Central Securities Litigation,* 367 F.Supp. 1158, 1168 (E.D.Pa.1973); *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.,* 1966 Trade Cas. (CCH) ¶ 71,678 at 82,065 (S.D.N.Y.1966)*Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.,* 1966 Trade Cas. (CCH) ¶ 71,678 at 82,065 (S.D.N.Y.1966); and more generally to *Bankamerica Corp. v. United States,* 462 U.S. 122, 128, 103 S.Ct. 2266, 2270, 76 L.Ed.2d 456 (1983); *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984); *Borg Warner Corp.,* 3 Trade Reg.Rep. (CCH) ¶ 22,663 (FTC 1983); ABA Section on Antitrust Law, *Antitrust Law Developments* (Second) 210–14 (1984); *Kramer, Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L.J. 1266 (1950). The court below should, upon renewed motions for summary judgment or at trial, as the case may be, study the issues in the afterlight of these authorities.

V. DIVESTITURE

We now turn to consider whether divestiture is excluded *per se* from the armory of equitable relief available to a district judge in § 16 cases. Caribe petitions solely for injunctive relief from defendants' antitrust violations and specifically requests an order directing USAP to divest itself of Isla Corporation, the former ARCO subsidiary. Caribe asserts that unless divestiture is ordered, the competitive conditions in the Puerto Rican retail gasoline market will be destroyed and the trend toward monopolization of the market will continue unabated. Such a result, it claims, would work a manifest detriment to Caribe and the other minority share companies.

***414** The defendants contend that divestiture is not an authorized form of injunctive relief under § 16, standing solely upon the analysis set forth in *International Telephone and Telegraph v. GTE Corp.,* 518 F.2d 913, 921 (9th Cir.1975) (hereinafter *I.T.T.*), and reaffirmed in *Calnetics v. Volkswagen of America,* 532 F.2d 674 (9th Cir.1975), *cert. denied,* 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976). [6] In its cases, the Ninth Circuit decided that the statutory language of § 16 authorizing private plaintiffs to sue for and obtain "injunctive relief" was ambiguous. It then concluded on the basis of the legislative history of the Clayton Act that Congress had not intended divestiture as one of the equitable remedies available to private plaintiffs under § 16.

Other courts, however, have concluded that divestiture is an available § 16 remedy. In *NBO Industries Companies, Inc. v. Brunswick Corp.,* 523 F.2d 262 (3d Cir.1975), *rev'd on other grounds sub nom.* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 the Third Circuit explicitly rejected both the Ninth Circuit's approach to the question and its conclusion, while deciding that divestiture was not an appropriate remedy in its case. Several district courts also provide support for Caribe's position. Most recently, in *Fuchs Sugar and Syrups, Inc. v. Amstar Corp.,* 402 F.Supp. 636 (S.D.N.Y.1975), and *Nasso Concrete Corp. v. DIC Concrete Corp.,* 467 F.Supp. 1016, 1025 (S.D.N.Y.1979), divestiture was held to be a remedy available to private plaintiffs suing for injunctive relief. Preceding these rulings were four district court opinions that reached the same conclusion, excluding, of course, the district courts the Ninth Circuit reversed in the two cases cited above. *See* *Bay Guardian Co. v. Chronicle Publishing Co.,* 340 F.Supp. 76, 82 (N.D.Cal.1972) (divestiture available for Clayton Act § 7 violation); *Credit Bureau Reports v. Retail Credit Co.,* 358 F.Supp. 780, 797 (S.D.Tex.1971) (divestiture available under

§ 16 generally), *aff'd,* 476 F.2d 989, 992 (5th Cir.1973); *Burkhead v. Phillips Petroleum Co.,* 308 F.Supp. 120, 126–27 (N.D.Cal.1970) (same); *Julius M. Ames Co. v. Bostitch, Inc.,* 240 F.Supp. 521, 526 (S.D.N.Y.1965) (same).

In view both of the split in authority, and of the long-range ramifications of a decision concerning the availability of divestiture as a potential remedy in a private antitrust suit, a comprehensive treatment of this question is necessary. Accordingly, our statutory construction of § 16 begins by recounting the general antitrust legislative background. We next turn to an analysis of the statute's plain language. Because the statutory language does not explicitly state whether Congress intended divestiture to be a remedy available to private plaintiffs, we examine the legislative history of the Clayton Act in some detail. We then consider the question in light of the goals the statutory language and legislative history enunciated. We conclude that § 16 encompasses divestiture.

A. *Legislative Background*

In 1890, as a result of widespread alarm over concentration and anticompetitive conditions in the transportation, fuel and beef industries, Congress passed the Sherman Act. It prohibits, *inter alia,* "[e]very contract, combination, ... or conspiracy in restraint of trade," and every monopolization or attempt to monopolize. 15 U.S.C. §§ 1, 2 (1982). As the Supreme Court has observed,

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing ***415** an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). [7]

Despite the expansive language and broad remedial purposes of the Sherman Act, [8] it soon became apparent that the Act was an inadequate instrument for achieving some of the lofty goals Congress had identified. Chief among its deficiencies was its inability to obstruct and prohibit corporate integrations that could lead to future monopoly. To supplement the Sherman Act so as "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency," S.Rep. No. 698, 63d Cong., 2d Sess. (July 22, 1914) (Judiciary Committee), Congress passed the Clayton Act, 15 U.S.C. §§ 12–27. Section 7 of the Clayton Act, 15 U.S.C. § 18, which originally provided that no corporation engaged in commerce shall acquire directly or indirectly the whole or any part of the stock of another corporation where the effect of such acquisition is to lessen competition substantially or tend to create a monopoly, was subsequently amended to extend its reach still farther. In 1950, § 7 was amended to encompass the acquisition of assets as well as of stock, and to apply unequivocally both to mergers between actual competitors and to mergers effected vertically or by conglomerates whose effect may tend to lessen competition. *See* 15 U.S.C. § 18 (1982) as amended by Pub.L. No. 81–899, 64 Stat. 1125; *see also* *Brown Shoe Co. v. United States,* 370 U.S. 294, 315–18, 82 S.Ct. 1502, 1518–20, 8 L.Ed.2d 510 (1962).

Private parties may sue to enforce the antitrust laws, including the substantive provisions of the Sherman and Clayton Acts, under § 4 and § 16 of the Clayton Act. Section 4 offers the successful private litigant treble damages, costs, and attorney's fees upon proving measurable injuries actually sustained. 15 U.S.C. § 15. Section 16, by contrast, provides injunctive relief to "any person, firm, corporation, or association ... against threatened loss or damage by a violation of the antitrust laws...." 15 U.S.C. § 26. Section 16 has recently been amended to provide attorney's fees and costs to a prevailing plaintiff who receives injunctive relief. *Id.* (as amended by Pub.L. 94–435 (1976)). Courts have long recognized that Congress intended private antitrust suits both to provide a remedy to injured parties when the government fails to act or is not able to provide an adequate remedy, and to

enlist the business public as private attorneys general to aid the government in "achieving the broad social object of the statute." *Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358, 365 (9th Cir.1955); *see also* *Monarch Life Insurance Co. v. Loyal Protective Life Insurance Co.,* 326 F.2d 841, 845 (2d Cir.1963), *cert. denied,* 376 U.S. 952, 84 S.Ct. 968, 11 L.Ed.2d 971 (1964).

B. *Plain Language*

Our starting point in determining the scope of the injunctive relief available under ***416** § 16 is the statutory language. *North Haven Board of Education v. Bell,* 456 U.S. 512, 520, 102 S.Ct. 1912, 1917, 72 L.Ed.2d 299 (1981); *Consumer Product Safety Commission v. GTE Sylvania Corp.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id.; Russello v. United States,* 464 U.S. 16, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983); *United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). Section 16 provides:

> Any person, firm, corporation or association shall be entitled to sue for and *have injunctive relief,* in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, *when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity....*

15 U.S.C. § 26 (1982) (no amendment in pertinent part since original enactment) (emphasis added). The section further provides that a preliminary injunction may issue upon the posting of a bond if plaintiff shows the "danger of irreparable loss or damage is immediate...." *Id.*

We are first struck by the broad language Congress employed in § 16. "Injunctive relief" is made available "when and under the same conditions as injunctive relief against threatened conduct ... is granted by courts of equity." *Id.* Significantly, the statute states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. " 'Nothing on the face of the statute suggests a congressional intent to limit [the types of injunctions a court may order].' " *Lewis v. United States,* 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980) (quoting *United States v. Culbert,* 435 U.S. 371, 373, 98 S.Ct. 1112, 1113, 55 L.Ed.2d 349 (1978)). Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief.

The Supreme Court has described the principles of equity as derived from a "practice with a background of several hundred years of history." *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 591–2, 88 L.Ed. 754 (1944). The Court has noted, "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." Equity is the instrument "for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Id.; see also* *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982). Because of the vital role of equity in our system of law,

> "this equitable jurisdiction *is not to be denied or limited in the absence of a clear and valid legislative command.* Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown v. Swann,* 10 Pet. 497, 503 [9 L.Ed. 508]."

Weinberger v. Romero-Barcelo, 456 U.S. at 313, 102 S.Ct. at 1803–04 (quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed. 1332 (1946)) (emphasis added). This directive clarifies the onerous burden that must be discharged for us to restrict the district court's inherent equity powers; in either the plain language of the statute, or in authoritative legislative history, a "clear and valid legislative command" must be identified.

Although "Congress may intervene and guide or control the exercise of the courts' ***417** discretion,"[9] *Weinberger v. Romero-Barcelo,* 456 U.S. at 313, 102 S.Ct. at 1803; *see also* *Yakus v. United States,* 321 U.S. 414, 441–42, 64 S.Ct. 660, 675–76, 88 L.Ed. 834 (1944), the plain language of § 16 fails to indicate by either "a clear and valid legislative command," *Porter v. Warner Holding Co.,* 328 U.S. at 398, 66 S.Ct. at 1089, or even a veiled suggestion, any intended limitation of the types of injunctive relief available to private litigants under § 16. Nor do we find any indication of an intention to limit the district court's inherent powers of equity.[10] Accordingly, we believe Congress intended that courts should fashion their injunctions by exercising sound discretion according to the exigencies of the particular situation before them, which is to allow courts their "traditional equitable discretion." *Romero-Barcelo,* 456 U.S. at 319, 102 S.Ct. at 1806. It is reasonable to hypothesize that, in some aggravated cases, the threatened or actual injury to the market and a litigant will not cease unless the acquiring corporation is required to divest itself of its acquisition. The plain language of § 16 does not suggest that Congress intended to exempt from the district court's equity jurisdiction the power to order divestiture in appropriate cases brought by private plaintiffs.

Our conclusion is fortified by comparing the language Congress utilized in granting the government the power to obtain equitable relief, § 15 of the Clayton Act, 15 U.S.C. § 25, to that used in § 16. Section 15 vests the government with the power "to institute proceedings in equity to prevent and restrain" violations of the antitrust laws and allows it to petition "that such violation ... be enjoined or otherwise prohibited." 15 U.S.C. § 25. The predecessor statute to § 15, § 4 of the Sherman Act, contained language that the Congress reenacted virtually verbatim in § 15. The government's ability to seek and obtain divestiture or "dissolution" under this general language was clear by 1914, at the time the Clayton Act was passed. *See* ***418** *United States v. American Tobacco Co.,* 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911); *Standard Oil Co. v. United States,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). That Congress knew of the use of these remedies by the government under this broadly-phrased language is clear from the discussion of these cases during the hearings and debate on the Clayton Act. *See infra* at 419.

We are unable to discern from the plain language of these statutes any intended distinction between the equitable remedies Congress provided to the government and those it provided to private plaintiffs. The Ninth Circuit, however, determined that "proceedings in equity" (§ 15) and "injunctive relief" (§ 16) were not coextensive in their embrace of divestiture and dissolution. *I.T.T.,* 518 F.2d at 923–24. Although that opinion appears to concede that divestiture is within the ambit of "injunctive relief" as presently conceived and practiced, the Ninth Circuit declined to take the currently recognized scope of possible injunctions as its guidepost for determining the kinds of remedies available under § 16. It, instead, apparently believed that the proper inquiry was the meaning of the words employed in 1914, at the time of enactment. The Ninth Circuit identified what it considered to be a significant distinction between injunctive relief and dissolution or divestiture current at that time, and concluded that divestiture is not available under § 16.

Although ascertaining the intent of Congress is a court's primary objective in construing a statute, we disagree with the Ninth Circuit's interpretive approach. We do not believe that a court can ignore the contemporary legal meaning and scope of words employed in statutes and base its interpretation of the plain language solely on what it surmises was the meaning of the words at the time of original enactment. *See generally* Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L.Rev. 204 (1980). Just as the concepts of "discrimination" and "equal protection of the laws" are susceptible of varying interpretations

that change over time, *University of California v. Bakke,* 438 U.S. 265, 284, 98 S.Ct. 2733, 2745, 57 L.Ed.2d 750 (1978) (Powell, J., announcing the judgment of the Court), so, too, are other words, such as "injunctive relief," that are invested with legal meaning. We must recognize, as Justice Holmes so perceptively stated, that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918). Especially in view of the growth and change of equity powers and injunctive relief over the centuries, [11] and Congress' general authorization of "injunctive relief" with no restrictions or exceptions, we believe it is inappropriate to interpret this statute's language restrictively. We are, moreover, specifically charged to interpret a remedial statute generously. *See* *Gomez v. Toledo,* 446 U.S. 635, 639, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980); *Doe v. Brookline,* 722 F.2d 910, 919 (1st Cir.1983). Because the Ninth Circuit based most of its determination of the 1914 meaning of "injunctive relief" on the comments made in the legislative history, we reserve our specific critique for our discussion of those materials. We now turn to that analysis.

C. *Legislative History*

The legislative history of the Clayton Act is voluminous, comprising approximately 3000 pages of committee reports, hearings, and debate. This unusual breadth of attention found its impetus in the widespread public perception that trusts and monopolistic corporations possessed excessive economic, political, and social power, and that government action in this area was necessary to remedy the problem. *See* Katzmann, *The Attenuation of Antitrust,* 2 ***419** Brookings Rev. 23, 23–25 (1984). The political significance of the issue is evinced by President Wilson's 1914 State of the Union address; his sole topic was to propose in general terms legislation to supplement the Sherman Act. 51 Cong.Rec. 1964–65 (daily ed. Jan. 20, 1914).

Following the President's address, a subcommittee of the House Judiciary Committee was appointed to draft legislation along the lines proposed by the President. That drafting process consumed approximately two weeks, and the result was styled a "tentative bill by Mr. Clayton." Although the Judiciary Committee reported one bill to the House, H.R. 15657, the subcommittee proposal was initially contained in three separate "committee print" bills which were published in newspapers throughout the country with an express invitation to the public, especially "businessmen," to testify at the House hearings or to otherwise contact committee members with comments. The bulk of the committee hearings and other commentary was devoted to four issues: determining what substantive offenses should be expressly prohibited; the proper reach of the interlocking directorates proscription; suggested restrictions on the use of federal injunctions against striking workers; and a reform of the criminal contempt process.

Before turning to our analysis of specific legislative materials, we must explore one additional interpretive problem. At no point in the legislative history of the Clayton Act do we find any use of the term "divestiture." Consequently, any inquiry into the intent of Congress regarding the availability of divestiture is at least one step removed; the inquiry must focus on other terms used at that time, such as "dissolution" and "partition," in an effort to ascertain the relationship between these concepts and "divestiture."

Defendants rely on the analysis set forth by the Ninth Circuit on this question. That court ruled that "the terms 'dissolution' and 'divestiture' are not interchangeable," *I.T.T.,* 518 F.2d at 923 n. 49, but that " 'dissolution' is the inclusive term and 'divestiture' is a subcategory." *Id.* at 923. The crux of this argument is found in the following passage:

> During the hearings on § 16, the members of the House Judiciary Committee used "dissolution" to include the remedy of divestiture. Throughout the hearings references were made by members of the committee and witnesses to "dissolution of the trusts." One of the more frequently mentioned trusts whose "dissolution" was discussed was the Standard Oil Trust. The Committee was intimately familiar with the Supreme Court's decision "dissolving" the Standard Oil Trust. If any specific equitable remedy was in the minds of the members of the committee when they were considering the right to bring dissolution suits, then it was the remedy obtained by the government in the Standard Oil case.

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> That remedy was divestiture.... In short, the dissolution of Standard Oil Co. of New Jersey was accomplished by an order that it divest itself of the stock of the subsidiary corporations. In that case, the Supreme Court used the term "dissolution" to refer to the remedy of divestiture.

Id. at 923–24 (footnotes omitted).

We agree with the Ninth Circuit that one starting point in understanding what Congress meant by the term "dissolution" is the antitrust experience in the opinion issued in *Standard Oil v. United States,* 221 U.S. at 77–81, 31 S.Ct. at 522–524. But we would add that the companion opinion of *United States v. American Tobacco Co.,* 221 U.S. at 184–88, 31 S.Ct. at 650–51, the district court opinion and decree in *Standard Oil,* 173 Fed. 177 (E.D.Mo.1909), which the Supreme Court affirmed, and the order for relief on remand in *American Tobacco,* 191 Fed. 371 (S.D.N.Y.1911), also were explicit parts of this experience, figuring in congressional discussions on whether the power to order relief, and the relief actually ordered, was sufficient. [12] ***420** These cases were continually referred to both by Members of Congress and by witnesses when speaking of "dissolution." [13] To discern the meaning and scope of that term we look to the historical framework within which it was used. [14]

During the late nineteenth century, when monopolistic corporate power was at its height, state courts of equity, [15] and eventually federal courts, refashioned traditional equitable powers in order to do "complete justice" in the face of this new evil. The power to dissolve a partnership, upon petition of a partner, or to dissolve and wind up a corporation, evidently were the old equity powers gradually remolded into the antitrust power of dissolution. [16] This was a period of judicial creativity in adapting the traditional tools of the court when necessary to achieve the statutory goals enunciated by the Sherman Act. [17]

The Supreme Court had explicitly approved the use of "dissolution" as a remedy available under § 4 of the Sherman Act in the *American Tobacco* and *Standard Oil* cases. In *American Tobacco,* the Court observed: "[this case] involves difficulties in the application of remedies greater than have been presented by any case involving the Antitrust Act which has been hitherto considered by this court." *American Tobacco Co.,* 221 U.S. at 185, 31 S.Ct. at 650. In stating the considerations which brought it to that conclusion, the Court observed that a "mere decree forbidding stock ownership by one part of the combination in another part ... would afford no adequate measure of relief, since the ingredients of the combination would remain unaffected, and *by the very nature and character of their organization* would be able to continue the wrongful situation *which it is our duty to destroy.*" *Id.* at 185–86, 31 S.Ct. at 650–51 (emphasis added). To achieve this goal, the Court noted that it might

> resort to one or the other of two general remedies—*a,* the allowance of a permanent injunction *restraining the combination ... from continuing to engage in interstate commerce until the illegal situation be cured, ... or, b,* to direct the appointment of a receiver to take charge of the assets and property ... of the combination ... for the purpose of preventing a continued violation of the law, and thus *working out by a sale of the property of the combination.*

Id. at 186–187, 31 S.Ct. at 651 (emphasis added). Rather than ordering either of these two means of effectuating a dissolution, the Court directed that, on remand, ***421** the trial court hear the parties and fashion a plan "of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law." *Id.* at 187, 31 S.Ct. at 651.

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We think this discussion in *American Tobacco* indicates that the Supreme Court envisioned a dissolution being accomplished in any of several ways. The combination's market power could effectively be dissolved by a prohibitory injunction forbidding the corporation from engaging in interstate commerce, with the result that the offending combination partitions itself, sells assets, or otherwise restricts itself in a manner that recreates a competitive market. Or, the court could take a more active role as by appointing a receiver to sell assets in such a manner as to restore market conditions. Or, in lieu of either of these two drastic remedies, the court could encourage the formulation of a consent decree under the direction of the court. All of these approaches may be called dissolutions—dissolutions of market power, of combinations of assets, or of the corporation itself. Today, as then, we would say that dissolutions achieved through the use of any of these mechanisms were achieved by use of the injunctive power according to principles of equity, *see, e.g., United States v. Standard Oil Co.,* 173 Fed. 177, 192–93 (E.D.Mo.1909), *aff'd,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); O. Fiss, The Civil Rights Injunction 10 (1978). Forcing a corporation to divest itself of some of its assets, as by a sale, is one means through which the remedy of dissolution could be achieved, but it plainly is not the only means. *See* Adams, *Dissolution, Divorcement, Divestiture: The Pyrric Victories of Antitrust,* 27 Ind.L.J. 1 n. 1 (1951) ("The term 'dissolution' is generally used to refer to any situation where the dissolving of an illegal combination or association is involved, including the use of divestiture and divorcement as methods of achieving that end") (quoting Oppenheim, Cases on Federal Antitrust Laws 885 (1948)).

Moreover, when the Second Circuit, on remand in *American Tobacco,* fashioned relief according to what it conceived to be mandated by the Supreme Court's order for "dissolution," some members of Congress considered this not to be a dissolution in fact, but merely a "circuitous course" by which that end was not achieved. *See, e.g.,* 51 Cong.Rec. 16326 (daily ed. Oct. 8, 1914) (remarks of Rep. Nelson); 51 Cong.Rec. 15864 (daily ed. Sept. 29, 1914) (remarks of Sen. Reed). [18] These congressmen apparently equated dissolution with the complete destruction and reorganization of an offending corporation: a court should "cause all of its assets to be sold in such a manner ... as to restore competition ... fully and completely...." 51 Cong.Rec. 16326 (daily ed. Oct. 8, 1914) (remarks of Rep. Nelson). Thus, even within Congress, there existed a difference of opinion as to what the remedy of dissolution entailed. [19] We, therefore, ***422** find the relationship between the terms "dissolution" and "divestiture" more complex than defendants would have it, and we cannot in good faith simply substitute the latter term for the former in reviewing the legislative history.

We now turn to an analysis of the legislative materials. It bears repeating that in order to limit or displace the meaning of a statute's plain language, authoritative legislative history that rises to the level of "a clearly expressed legislative intent" must be identified. *Consumer Products Safety Commission v. GTE Sylvania Corp.,* 447 U.S. at 108, 100 S.Ct. at 2056; *United States v. Turkette,* 452 U.S. at 580, 101 S.Ct. at 2527. Moreover, to restrict a court's inherent powers of equity, we must have nothing less than "a clear and valid legislative command." *Weinberger v. Romero-Barcelo,* 456 U.S. at 313, 102 S.Ct. at 1803. Defendants' legislative arrows lack the velocity necessary to reach either mark.

1. Committee Reports

In reviewing the legislative process, we first look to see whether Congress specifically addressed the question in the official committee reports, which are entitled to substantial weight. The House Judiciary report does not speak to whether § 16 was meant to encompass dissolution or divestiture. Its explanation of § 16 essentially reiterates the text of that provision and states that it was aimed at remedying a defect in prior law which had enabled private parties to recover damages but not injunctive relief. H.Rep. No. 627, 63d Cong., 2d Sess. 22 (1914) (hereinafter House Report). The report fails to identify any intended limits on the scope of injunctive relief available to private parties.

Somewhat more revealing is a House minority report from the Judiciary Committee, in which some committee members dissatisfied with the bill expressed their reservations about the broad scope of private relief authorized by § 16: [20]

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> The provision giving to any individual the right to enjoin any threatened loss or damage is a serious one.... The beginning of an investigation by the government on any complaint that a concern has violated the antitrust laws almost immediately to some extent affects his credit but not so seriously as an *injunction and perhaps receivership which might be brought by an individual.*

Minority Views, pt. 2 to H.R. 15637, H.Rep. No. 627, 63d Cong.2d Sess. (1914) (emphasis added). The specific reference to receivership suggests that some committee members believed dissolution and corporate reorganization would fall within the scope of § 16 "injunctive relief."[21]

***423** The report from the Senate Committee on the Judiciary does not shed much, if any, additional light on our particular inquiry. The report's preface announces that the bill's purpose "is only to supplement" the Sherman and other antitrust provisions. S.Rep. No. 698, 63d Cong., 2d Sess. 1 (1914) (hereinafter Senate Report). It "seeks to prohibit and make unlawful certain trade practices which, as a rule," are not presently illegal, "and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." *Id.* The Senate report then reproduced in its entirety the House report on the proposed Clayton Act.

The Senate committee proposed several amendments to the bill, including amendments to § 16. In particular, the committee sought to make the injunctive relief section apply specifically to four named sections of the bill, "so that all doubt of the cumulative and not exclusive character of the remedy may be removed."[22] Plainly, none of this material evinces a congressional intention that § 16 injunctive relief have restrictions placed upon it beyond the principles traditionally governing a court sitting in equity.

2. Floor Debates

The House began its consideration of H.R. 15657 in early May, 1914. 51 Cong.Rec. 8201 (daily ed. May 6, 1914). Although Representative Clayton, the chair of the House Judiciary Committee, did not participate in the floor debates, his coauthors of the bill, Representatives Carlin and Floyd, and other committee members were actively involved in explaining the bill to their colleagues. Committee Member McGillicuddy, on behalf of the committee, discussed the purpose of § 16:

> Under the [Sherman Act] any person injured in his business or property by acts in violation of the [Act] ... is entitled to recover threefold damage whenever he is able to prove his case. There is no provision under the present law, however, to prevent threatened loss or damage even though it be irreparable. The practical effect of this is that a man would have to sit by and see his business ruined before he could take advantage of his remedy. In what condition is such a man to take up a long and costly lawsuit to defend his rights?
>
> The proposed bill solves this problem for the person, firm, or corporation threatened with loss or damage to property by *providing injunctive relief against the threatened act that will cause such loss or damage. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy.*

51 Cong.Rec. 9261 (daily ed. May 26, 1914) (emphasis added). Representative McGillicuddy mentioned no limitations on the injunctive power either he or the committee understood to be implied by § 16.

Later that same day, in response to criticism that the bill lacked substance, Representative Carlin took the floor in defense of the bill and said:

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> First, we found that the Sherman law did not permit an injunction on petition of an individual. *The Government could enjoin a combination or trust;* and though an individual was standing face to face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages. So ... the committee, proposed to place in this bill *a law which allows the individual to sue for equitable relief and to enjoin* monopoly when he is threatened with irreparable loss or damage.

***424** *Id.* at 9270 (emphasis added). After drawing this express parallel between the government's and the individual's right to enjoin antitrust violations, Representative Carlin then outlined other protections for the individual contained in the bill. In particular, he named the right to use a governmentally obtained judgment as evidence in a private suit, and the suspension of the statute of limitations for individuals while a pertinent government suit is pending. All these remarks indicate a desire to provide the individual with effective remedies against anticompetitive practices, and to permit early intervention to protect a business and market. [23] The House passed the committee's bill without amendment.

As noted above, the Senate committee's bill contained a number of amendments differentiating it from the House bill. On the floor of the Senate, still more amendments were passed. One such amendment passed by the Senate, § 25, is pertinent to our inquiry:

> That whenever a corporation shall acquire or consolidate the ownership or control of the plants, franchises or property of other corporations, copartnerships, or individuals, so that it shall be adjudged to be a monopoly or combination in restraint of trade, the court rendering such judgment shall decree its *dissolution* and shall *to that end* appoint receivers to *wind up its affairs and shall cause all of its assets to be sold* in such manner and to such persons as will, in the opinion of the court, restore competition as fully and completely as it was before said combination began to be formed. The court shall reserve in its decree jurisdiction over said assets so sold for a sufficient time to satisfy the court that full and free competition is restored and assured.

51 Cong.Rec. 15863 (daily ed. Sept. 29, 1914) (emphasis added). We note that the amendment was the only explicit proposal for the codification of the dissolution remedy, and that the amendment's plain language would not have restricted its availability to the government. The Senate approved this amendment and passed the bill. When the bill was returned to the House, a call was made for a conference committee to resolve the differences between the two bills. While this amendment was rejected by the conference committee and ultimately not enacted, we believe that it indicates greater conflict over the meaning of "dissolution" than the Ninth Circuit acknowledges. Plainly, a number of Senators appear to have connected "dissolution" with the winding up of a corporation, or its general termination. [24]

3. Conference Committee Reports

Both the Senate and the House issued conference reports, but neither mentioned the Senate amendment except to note that ***425** the Senate "recede[s]." H.Rep. No. 1168, 63d Cong., 2d Sess. 1 (1914); S.Doc. No. 585, 63d Cong., 2d Sess. 3 (1914). It is unclear what inferences should be drawn from the conference's rejection of § 25. One position that could be advanced is that because § 25 was rejected by the committee and ultimately not enacted, Congress explicitly rejected dissolution as a remedy available to private plaintiffs. Such an argument, however, fails to take into consideration that both the government and private plaintiffs would be swept within such an inferred intention because the amendment did not differentiate between types of

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plaintiffs. We would also note that rejection of § 25 has not obstructed the government from obtaining divestiture in appropriate cases. *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. E.I. du Pont de Nemours,* 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957). Because a significant number of substantive provisions were contained within § 25, including, *inter alia,* the authorization of dissolution with no restrictions as to type of plaintiff, we apprehend no reason for assigning the rejection of the amendment to a congressional decision that dissolution should be restricted to the government's cases alone. This perspective receives additional support from a comparison between the Senate amendment and the alternative language pressed upon the conference committee. This alternative would have made it permissive rather than mandatory for a court to order the sale of all assets when a Sherman Act § 1 or § 2 violation was found, and would have restricted the availability of dissolution to the government. This alternative language, too, was rejected by the conference. *See* 51 Cong.Rec. 16325–26 (Oct. 8, 1914) (remarks of Rep. Nelson, conference committee member).

4. Floor Debates on the Conference Bill

Representative Floyd, one of the conference members, explained the conference bill to the House:

> Heretofore there has been *only one power that might enjoin an unlawful trust or monopoly in restraint of trade, and that was the Government of the United States*....
>
> This provision in § 16 gives any individual, company, or corporation damaged in its property or business by the unlawful operations or actions of any corporation or combination the right to go into court and enjoin the doing of these unlawful acts....

51 Cong.Rec. 16319 (Oct. 8, 1914) (emphasis added). We note that Representative Floyd reiterated the explicit parallel drawn between the government's power to obtain an injunction and that of the individual under § 16 of the Clayton Act, a point which had originally been elaborated by Representative Carlin during floor debates on the initial bill. Again, no distinction between the two authorizations was noted.

5. Committee Hearings

We review the committee hearings last because these are entitled to less weight than committee reports, *United States v. Auto Workers,* 352 U.S. 567, 585, 77 S.Ct. 529, 538, 1 L.Ed.2d 563 (1957), and remarks on the floor by a bill's sponsor which are entitled to substantial weight. *North Haven Bd. of Educ. v. Bell,* 456 U.S. at 526–27, 102 S.Ct. at 1920–21; *FEA v. Algonquin SNG, Inc.,* 426 U.S. 548, 564, 96 S.Ct. 2295, 2304, 49 L.Ed.2d 49 (1976).

When reviewed as a whole, only scant consideration was given in the hearings to the remedy provisions, or the judicial "machinery," of the proposed act. In House hearings that lasted over four months and filled over 2000 pages of record, the testimony relating specifically to the scope of § 16 is contained in approximately thirty pages. The Ninth Circuit accorded particular weight to an exchange between Representative Floyd and a witness who testified at the committee's request. The witness commented "when a private individual is allowed to begin a suit to dissolve a corporation, or an injunctive suit, the same kind of suit the Government may begin...." H. Hearings on H.R. 15657, 63d Cong., 2d Sess. 842 (February 6, 1914) (hereinafter H. ***426** Hearings). Mr. Floyd, one of the members of the drafting subcommittee, responded:

> We did not intend by section [16] to give the individual the same power to dissolve the corporation that the Government has.... We discussed it very thoroughly among ourselves and decided he should not have [it].

Id. (remarks of Rep. Floyd).

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We think the context of the remark belies any idea that the committee had arrived at an understanding about the intended scope of § 16. Just a few days prior to the time this remark was made, a national invitation had been issued for citizens to comment on the bill and elaborate their views regarding its proper scope. On the day the comment was made, the hearings had been in session barely one week. It is difficult to believe that a committee intention had been formed at this early stage. This perception is borne out by the repeated inquiries committee members made of other witnesses on later dates regarding whether individuals should have a right to obtain the dissolution of an offending corporation. *See, e.g.,* House Hearings at 492 (Feb. 12, 1914); *id.* at 666 (Feb. 16); *id.* at 1183 (March 4). [25]

Additionally, a close reading of the Floyd remarks shows that he stated there was no intent to give the individual the *same* power to bring a suit to dissolve a corporation that the government was intended to possess. We cannot ascertain whether Representative Floyd intended that the individual should have the power to request and obtain dissolution in certain kinds of cases but not others, for instance, in especially egregious cases or upon more stringent proof than the government. Moreover, congressional members' comments during committee hearings while interviewing witnesses may indicate preliminary concerns and issues but generally are not weighted as representative of the intent of Congress embedded in the proposed statute eventually reported to the floor. Having considered these aspects of Representative Floyd's remarks, we hold them to be insufficiently reliable for a court to give them interpretive weight in construing § 16. *See* *New England Power Co. v. New Hampshire,* 455 U.S. 331, 342, 102 S.Ct. 1096, 1102, 71 L.Ed.2d 188 (1982) ("Reliance on such isolated statements of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously' ") (quoting *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977)).

Finally, regardless what weight is accorded these remarks, we note that Representative Floyd rejected the individual's power to bring a suit for *dissolution* of a combination. As divestiture of an acquisition can be so different in degree of impact on a combination as to amount to a difference in kind, we cannot hold these remarks to indicate a proscription of divestiture.

We derive support for our analysis from *NBO Industries Treadways Companies, Inc. v. Brunswick Corp.,* 523 F.2d 262 (3d Cir.1975). There, the Third Circuit stated that while it was possible that members of the House committee assumed that § 16 did not create a private divestiture remedy, it doubted whether comments made during 1914 committee hearings should "control the contemporary application of a statute laying down a fundamental national economic policy." Rather, the court held

> ***427** [t]he antitrust laws are of necessity statements of general principle. They must be given meaning on a case-by-case basis. It is impossible for a legislature to devise codes so all-encompassing as to predict every case to which the general principles should apply. So, too, with antitrust remedies. There is a danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of statutes which are almost an economic constitution for our complex national economy.

NBO Industries, 523 F.2d at 278–79. This is especially so where the statements on which reliance is to be grounded lack indicia of reliability and authority, as do these remarks made near the inception of committee hearings, the import of which is controverted by other comments and materials. While the Third Circuit concluded that a rule of general application was not required in its case because less drastic remedies would adequately redress the violations, the court hypothesized that divestiture might be an appropriate injunctive remedy where the effect of a merger of two competitors would be to lessen competition. *Id.* at 279; *see also id.* at 278 n. 17 (collecting cases on the availability of divestiture under § 16). Similarly, in *Fuchs Sugar and Syrups, Inc. v. Amstar Corp.,* 402 F.Supp. 636 (S.D.N.Y.1975), Judge Ward refused to grant a motion to dismiss on the grounds that divestiture was not available to a private plaintiff, and suggested that "[b]elaboring inconclusive scraps of legislative history may be less worthwhile than examining the broad aim of the statutory scheme." *Id.* at 639. The court concluded that divestiture is a potential remedy for private parties suing under the Clayton Act.

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We draw additional support for our position from the comments of Professors Areeda and Turner. In commenting on the Ninth Circuit's *I.T.T.* opinion, these scholars stated:

> The court also gave decisive weight to a colloquy in the course of hearings in a House committee on the Clayton Act in which a congressman asserted a distinction between dissolution on the one hand and injunctions on the other. *That fragment of legislative history cannot bear the weight the court placed upon it, when the reports of the relevant House and Senate committees were silent on the point, which also did not appear to have been mentioned on the House or Senate floor.* Indeed, the court recognized that its conclusion deprived it of the natural and perhaps only effective remedy in the case before it. To hold a merger unlawful in a private suit while refusing to decree the undoing of that merger makes little sense in terms of antitrust policy.
>
> Fortunately, other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers. The existence of power to order divestiture is distinct from the appropriateness of decreeing it in a particular case. Nevertheless, *divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff.*

II P. Areeda & D. Turner, Antitrust Law § 328b (1978) (footnotes omitted; emphasis added).

In conclusion, the Ninth Circuit's interpretation of the legislative history, on which the defendant relies, can be stated as follows. In 1914, there was such a clearly demarked and uniformly understood division between the equitable remedies of dissolution and injunction that it must be found that by authorizing "injunctive relief" but not other equitable remedies, Congress [26] expressly and intentionally excluded ***428** the latter from the purview of § 16. We summarize our response as follows.

First, a court possesses inherent powers of equity regardless of whether equitable remedies are expressly authorized under the statute. *Romero-Barcelo,* 456 U.S. at 313, 102 S.Ct. at 1803; *Doe v. Brookline,* 722 F.2d 910, 917–18 (1st Cir.1983). To hold Congress to have restricted these powers, a "clear and valid legislative command" must be identified. *Id.; Romero-Barcelo* 456 U.S. at 313, 102 S.Ct. at 1803. We do not believe that a technical distinction between two equitable remedies arguably current in 1914 rises to the level of a congressional command to restrict the court's inherent powers to secure "complete justice."

Second, we do not agree that "dissolution" and "injunctive relief" had unequivocal, or even generally agreed upon, definitions sufficient to conclude that injunctive relief was separate and distinct from dissolution. Indeed, the Supreme Court of that period, as now, appeared to view injunctions as one mechanism for bringing about a dissolution. *See American Tobacco Co.,* 221 U.S. at 186, 188, 31 S.Ct. at 650, 651. Moreover, at that time traditional equitable remedies were being refashioned to combat antitrust violations and labor strikes, *see* O. Fiss, The Civil Rights Injunction 1–4, 10, 20–21 (1978), and thus, in this transitional period during which the law was grappling with the changes wrought by the accelerating industrialization of the nation, it is doubtful that a sharp distinction between the remolded dissolution remedy, and injunctive relief, was understood and intended by the Congress.

Third, unlike the Ninth Circuit, we do not believe that the term "injunctive relief" can be limited to what a court surmises was the meaning of the words at the time of the original statutory enactment. [27] The Clayton Act is a living statute; the current legal meaning and scope of its words cannot be ignored.

Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals. [28] This principle has been understood and endorsed repeatedly both by the federal judiciary, *see, e.g.,* ***429** *Gomez*

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v. Toledo, 446 U.S. at 639, 100 S.Ct. at 1923 (1980); *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977); *Doe v. Brookline,* 722 F.2d at 919; *McComb v. Super-A Fertilizer Works,* 165 F.2d 824, 826 (1st Cir.1948), and Congress, *see, e.g., supra* note 8, and it is therefore an especially reliable and legitimate canon of construction. The attempt to restrict "injunctive relief" to its putative meaning in 1914 collides head-on with this principle and must be rejected.

Our reliance on this principle of statutory construction here is especially appropriate because the Sherman and Clayton Acts were drafted in broad terms to defeat an evil that Congress knew could take many forms. The explanations of record offered by committee and conference members were equally broad and general, stressing the purpose for which the section had been drafted. On the floor of neither the Senate nor the House, nor in any committee report, is there a single reference to any limitations or restrictions on § 16 "injunctive relief" which would negate the plain language or the sponsors' broad explanations of the provision. Accordingly, we decline to engraft judicially a *per se* limitation on § 16 forbidding an order for divestiture.

D. *"Doing Equity" and Implementing the Goals of the Statute*

Section 16 requires that injunctive relief for private plaintiffs be dispensed "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity...." 15 U.S.C. § 26. In an important private action requesting injunctive relief, the Court clarified the important role of § 16:

> [T]he purpose of giving private parties treble-damages and injunctive relief was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws.... Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords [injunctive relief], like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." ... Its availability should be "conditioned by the necessities of the public interest which Congress sought to protect."

Zenith Radio Corp. v. Hazeltine, 395 U.S. at 130–31, 1580–81.

An order to divest stock or assets acquired in effecting a combination is one of the most effective kinds of remedies available to combat mergers that have, or threaten to have, anticompetitive consequences. *See, e.g., United States v. du Pont & Co.,* 366 U.S. at 326, 81 S.Ct. at 1250; *I.T.T.,* 518 F.2d at 925. As the Supreme Court has observed:

> Divestiture is the most important of the antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of the court's mind when a violation of § 7 has been found.

United States v. du Pont & Co., 353 U.S. at 597, 77 S.Ct. at 879. *See also* *United States v. Greater Buffalo Press,* 402 U.S. 549, 556, 91 S.Ct. 1692, 1697, 29 L.Ed.2d 170 (1971) ("Divestiture performs several functions, the foremost being the liquidation of the illegally acquired market power"). Although the Court was speaking of divestiture in the context of a suit brought by the government, we apprehend no reasons why the efficacy of divestiture as a remedy would not hold as well in § 16 cases. Because we are concerned with "doing equity," efficacy concerns are relevant; the goal is to "*secur[e] complete* justice." *Brown v. Swann,* 10 Pet. at 503.

Under the Clayton Act, courts have always possessed the power to prohibit a merger through a preliminary injunction. It is a logical extension of that power to divorce the partners to a merger at a later time when anticompetitive effects of the merger are, if not actually felt, considerably more imminent. Caribe here initially requested a preliminary injunction to prohibit the merger and backed that up with a petition for divestiture of the acquired company ***430** if it failed to achieve interlocutory

relief. We cannot understand the logic of allowing a plaintiff, on the one hand, to obtain a congressionally intended result—the prohibition of an anticompetitive merger—on a showing that there will likely be market deterioration; but, on the other hand, if it fails to make the preliminary showing yet actually *proves* at trial that a merger is anticompetitive, obtain perhaps far less in that the same relief is barred.

Moreover, it is contrary to equitable principles to permit some defendants to maintain an illegal market share merely because they were able to merge before any of their competitors could prevent it. This places a premium on gamesmanship and stealth, and allows anticompetitive mergers to be treated differently on the basis of the speed and skill with which the merger is consummated. Unfortunately, the public is also the loser under such an approach as it cannot bring its own suit except through the Justice Department and must rely on the adventitious suits of private plaintiffs to maintain competitive conditions. We can conceive of no valid reason for allowing the presence or absence of proof at an interlocutory stage in and of itself to determine whether the private enforcement of antitrust laws prohibiting anticompetitive mergers will be deprived of one of its most effective remedies. *See* Dexter & Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act,* 48 Tex.L.Rev. at 55.

Any determination regarding whether divestiture would be an appropriate remedy in this case is, of course, premature and we venture no suggestion regarding what remedy the trial court should order if Caribe prevails. A range of injunctive relief is possible and, like all equitable remedies, the relief ordered is highly dependent upon the proof adduced at trial. We note only that "[t]he key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *United States v. du Pont & Co.,* 366 U.S. at 326, 81 S.Ct. at 1250. We do not direct or constrain the district court's sound discretion as to how the public and private interests in effective enforcement of the antitrust laws can best be effectuated and refer the trial court both to traditional equitable principles and to those cases where the Supreme Court has applied those principles in an antitrust context.

Reversed and remanded.

Since the district court originally adopted so strong a position against the availability of the divestiture remedy, we think that this is a case where it would be easier all around, including for the judge himself (without any reflection on him), to have the case reassigned to a different trier. Costs to appellants.

All Citations

754 F.2d 404, 77 A.L.R. Fed. 465, 53 USLW 2405, 1985-1 Trade Cases P 66,400, 1 Fed.R.Serv.3d 70

Footnotes

* Of the District of Rhode Island, sitting by designation.

1 At oral argument, we were informed that the Puerto Rican assets of Gulf and Chevron have recently been merged.

2 Because the plaintiff in this action is within the "core" of possible plaintiffs under § 16, we have no need to examine the outer limits of standing under this section, and this discussion should not be interpreted as adumbrating requirements that must be met by all § 16 plaintiffs.

3 We must also note that the defendants were not alone in disregarding the Federal Rules of Civil Procedure. Our review of the record reveals that Caribe, too, was far from scrupulous in following the Rules. The cavalier attitude of the parties towards the Federal Rules of Civil Procedure and the court's orders cannot be condoned.

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4 We note that, even if the defendants' late-filed affidavits are factored into the Rule 56 equation, the calculus remains unchanged; genuine issues of material fact nonetheless appear distinctly and in some abundance.

5 One of the few facts about which the parties did not disagree was the relevant geographic market—the island of Puerto Rico. Some disagreement may exist, however, on the existence of relevant geographic submarkets.

6 The Sixth Circuit adopted summarily the Ninth Circuit's position in *Langenderfer v. S.E. Johnson Co.,* 729 F.2d 1050 (6th Cir.), *cert. denied,* 469 U.S. 1036, 105 S.Ct. 510, 511, 83 L.Ed.2d 401 (1984).

7 At the time his bill was called for discussion on the floor of the Senate, Senator Sherman identified the impetus of the legislation later to be known as the Sherman Act:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.

21 Cong.Rec. 2460 (daily ed. March 21, 1890). *See generally* Katzmann, *The Attenuation of Antitrust,* 2 Brookings Rev. 23, 23–25 (1984) ("Antitrust reflected the deep-rooted and persistent American fear that concentrated private power could undermine democratic government").

8 Senator Sherman explained: "The first section, being a remedial statute, would be construed liberally, with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally...." 21 Cong.Rec. 2456 (daily ed. March 21, 1890).

9 The Supreme Court has noted a number of "instances in which Congress has regulated and restricted the power of the federal courts to grant injunctions." *Yakus v. United States,* 321 U.S. 414, 442 n. 8, 64 S.Ct. 660, 676 n. 8, 88 L.Ed. 834 (1944). *See, e.g.,*

> section 16 of the Judiciary Act of 1789, 1 Stat. 82, Judicial Code § 267, 28 U.S.C. § 384, denying relief in equity where there is adequate remedy at law; section 5 of the Act of March 2, 1973, 1 Stat. 334, Judicial Code § 265, 28 U.S.C. § 379, prohibiting injunction of state judicial proceedings; Act of March 2, 1867, 14 Stat. 475, 26 U.S.C. § 3653, prohibiting suits to enjoin collection or enforcement of federal taxes; the Johnson Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 41(1), restricting jurisdiction to enjoin orders of state bodies fixing utility rates; Act of Aug. 21, 1937, 50 Stat. 738, 28 U.S.C. § 41(1), similarly restricting jurisdiction to enjoin collection or enforcement of state taxes; section 17 of the Act of June 18, 1910, 36 Stat. 557 and § 3 of the Act of Aug. 24, 1937, 50 Stat. 752, 28 U.S.C. §§ 380 and 380(a), requiring the convening of a three-judge court for the granting of temporary injunctions in certain cases and allowing a temporary restraining order by one judge only to prevent irreparable injury; the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101–15, regulating the issue of injunctions in labor disputes and prohibiting their issue "contrary to the public policy" declared in the Act.

Id.

10 At the time the Clayton Act was passed, a split in authority existed among the circuits regarding the availability of injunctive relief to a private party suing under the Sherman Act. Although the Sherman Act expressly conferred the power to initiate "proceedings in equity" for injunctive or other equitable relief only upon the government, the Sixth Circuit affirmed a case where the district court had granted a preliminary injunction to a private party pursuant to its

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inherent powers of equity. Through the injunction, the court had forbidden an acquiring corporation to vote the stock of its new acquisition, and then, after trial, had dissolved the injunction and dismissed the bill. *See Bigelow v. Calumet & Hecla Mining Co.,* 155 F.2d 869 (W.D.Mich.1907), *aff'd,* 167 F. 704 (6th Cir.1909). The Second Circuit, however, held that injunctions were not available to private parties under the Sherman Act. *See Greater New York Film Rental Co. v. Biograph Co.,* 203 Fed. 39 (2d Cir.1913) (by implication). These cases, and the question whether inherent powers of equity were withdrawn from the courts under the Sherman Act, were discussed in the committee hearings. *See* Senate Hearings at 629–31 (issue and cases); House Hearings at 485–87 (case), 963–64 (issue but not cases). In view of these discussions, it is noteworthy that no exclusion of inherent powers of equity, or of certain kinds of injunctive relief, was included in the Clayton Act.

11 The evolution of judicial powers of equity was a subject before congressional committee hearings on the Clayton Act and its unsuccessful precursors. *See, e.g.,* Senate Hearings at 1091–95 (witness Samuel Gompers); 1130–1163.

12 *See, e.g.,* 51 Cong.Rec. 9090 (daily ed. May 22, 1914) (remarks of Rep. Mitchell); at 9169 (daily ed. May 23, 1914) (remarks of Rep. Nelson); at 16326 (daily ed. Oct. 8, 1914) (remarks of Rep. Nelson); H.R. No. 627, 63d Cong., 2d Sess. 648, 652, 689–90 (remarks of witness Louis Brandeis); at 666 (Rep. Nelson) (1914) (hereinafter House Hearings).

13 *See, e.g.,* the discussions identified in note 10 *supra;* House Hearings at 263 (Rep. Floyd); at 273 (Rep. Nelson); 331 (Rep. McCoy); 51 Cong.Rec. at 15821–23 (Sept. 28, 1914) (Sen. Reed); at 15864 (Sept. 29, 1914) (Sen. Reed); at 15864–5 (Sept. 29, 1914) (Sen. Overman).

14 As Arthur Corbin observed, a "word appearing suddenly, in empty space and with no history, would express nothing at all. To be expressive of any meaning, all words must have a context and a history...." 3 Corbin, Contracts 90 (1960).

15 Injunctive relief had regularly been sought and awarded to private plaintiffs under state antitrust laws and in common law suits alleging restraint of trade and price fixing. *See, e.g., Gibbs v. Consolidated Gas,* 130 U.S. 396, 9 S.Ct. 553, 32 L.Ed. 979 (1889) (price fixing agreement).

16 During the House hearings, a famous antitrust lawyer of the day, Louis Brandeis, suggested remolding the power to order a "partition." Brandeis stated his belief that the courts already had this power—the power to order the division and sale of assets—but that it was doubted by some members of the judiciary, as evidenced by the *American Tobacco* opinion on remand, *see* 191 Fed. 371 (S.D.N.Y.1911), and was not utilized as broadly as it should. Brandeis proposed that Congress "educate" the courts and facilitate achievement of the antitrust goals by passing statutes specifically authorizing the use of this and other equitable powers in the antitrust context. *See* House Hearings at 652.

17 Other traditional equitable tools, specifically the injunctive power, were refashioned for the purpose of quelling labor strikes and boycotts. *See generally* F. Frankfurter & N. Greene, *The Labor Injunction* (1930).

18 Evidently this perspective was shared by some officials in the Justice Department. *See* 51 Cong.Rec. 15864 (daily ed. Sept. 29, 1914) ("The fundamental weakness in the enforcement of the antitrust act in previous administrations was the failure to insist upon a real dissolution of monopolies and combinations which the courts had adjudged unlawful") (excerpt from Justice Dept. letter quoted by Sen. Reed).

19 It appears that over the years the legal meaning of the concepts "dissolution" and "divestiture" has become somewhat more settled than in 1914, so much so that the Supreme Court has recently pronounced them to be a "large degree interchangeable." *United States v. du Pont & Co.,* 366 U.S. 316, at 330 n. 11, 81 S.Ct. 1243, at 1252 n. 11, 6 L.Ed.2d 318 (1961). In reviewing the Court's cases, we found that the term "dissolution" tended to be used when ordering a remedy for violations of § 1 and § 2 of the Sherman Act, but not for Clayton Act § 7 violations. *See, e.g., United States v. Reading Co.,* 253 U.S. 26, 40 S.Ct. 425, 64 L.Ed. 760 (1920) (dissolution); *United States v. Lehigh Valley R.R.,* 254 U.S. 255, 41 S.Ct. 104, 65 L.Ed. 253 (1920) (same); *United States v. Southern Pacific Co.,* 259 U.S. 214, 42 S.Ct.

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496, 66 L.Ed. 907 (1922) (same). This was especially true for the older cases. "Divestiture" of some assets or interests was frequently ordered as a part of the remedy of dissolution, *see, e.g., United States v. Crescent Amusement Co.,* 323 U.S. 173, 189, 65 S.Ct. 254, 262, 89 L.Ed. 160 (1944) (Sherman Act §§ 1, 2); *Schine Chain Theatres v. United States,* 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245 (1948) (same); *International Boxing Club of New York v. United States,* 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959) (same). These last three cases clarify that a distinction between the two terms was felt at one time. In *Schine Theatres,* the Court stated: "The plan does not provide for the dissolution of the Schine circuit through the separation of the several affiliated corporations as was done in [*Crescent Amusement*]. It keeps the circuit intact in that sense but requires Schine to sell certain theatres.... Schine is to be divested of more than 50 of its theatres." 334 U.S. at 126–27, 68 S.Ct. at 956. And again, our view that a "dissolution" tends to be ordered where monopolies and restraints of trade are found, and has as one of its essential elements a major judicial reorganization of the corporation, is supported by *International Boxing.* There, the Court ordered dissolution of the combination, recognizing that new corporations would be formed to handle the business formerly transacted by the combination. The Court further noted that "dissolution might well have the salutary effect of completely clearing new horizons that the trial judge was attempting to create in the boxing world, especially when effected *in conjunction with* the stock divestiture provision." 358 U.S. at 260–61, 79 S.Ct. at 255 (emphasis added).

20 Section 16, 15 U.S.C. § 26, was originally § 13 of the proposed Clayton Act. Although most of the legislative history speaks in terms of § 13, we shall avoid confusion by referring to the provision as § 16.

21 While the fears and doubts of the minority are not an authoritative guide to the construction of legislation, *see Schwegmann Brothers v. Calvert Distillers Corp.,* 341 U.S. 384, 394, 71 S.Ct. 745, 750, 95 L.Ed. 1035 (1951), their report did comprise the only specific explanation of the meaning of the private injunction provision that was readily accessible to the whole Congress. Moreover, the Supreme Court has consistently favored the "presumably well considered and carefully prepared committee report" over informal or casual statements made in the course of the legislative process. *Id.* at 396, 71 S.Ct. at 751 (Jackson, J. concurring); *United States v. Auto Workers,* 352 U.S. 567, 585, 77 S.Ct. 529, 538, 1 L.Ed.2d 563 (1957); *United States v. Public Utilities Commission,* 345 U.S. 295, 73 S.Ct. 706, 97 L.Ed. 1020 (1953).

22 The Senate committee also sought to delete the exception for common carriers the House had provided in § 16, although it ultimately failed to do so.

23 Representative Carlin then turned to clarify the relaxed standard for anticompetitive practices under the bill:

> The Sherman law in its operation is limited to three things: First, a contract or combination in the form of a trust or otherwise; second, a conspiracy in restraint of trade; third, an attempt to monopolize. There is nothing about competition in the Sherman law. There must be actual restraint of trade under the Sherman law to bring anyone under either its civil or criminal process.
>
> Under this bill there has to be only a lessening of competition. Competition may be lessened without restraint of trade. Competition may be lessened without attempt to monopolize. Competition may be lessened without conspiracy. It may be the natural effect of the putting together in close relationship through a holding company of two corporations that are natural competitors, or ought to be. Yet there would not be restraint. So instead of subtracting from the Sherman law, ... we have added to the Sherman law a most effective rule by which the actions of these combinations in the future may be determined....

51 Cong.Rec. 9271 (daily ed. May 26, 1914).

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24 The author and prime proponent of the Senate amendment expressed his view of a dissolution:

> Wh[at] I propose [is] that we shall have a real decree, that there shall be a real burial, and that we shall sod down the grave upon the monster that was created in defiance of law, but that we shall at the same time preserve its parts and restore them to competition and activity....

51 Cong.Rec. 15864 (Sept. 29, 1914) (remarks of Sen. Reed).

25 Our belief that Representative Floyd's comments cannot be taken as stating a Judiciary Committee intention regarding the scope of § 16 is supported by an exchange between Representative Floyd and a later witness. Floyd stated during the hearings on February 27, 1914, in reference to another proposed section "the purpose of these provisions as tentatively drafted...." The next witness that day then begins his comments by referring to that clarification and stating, "but as that point has been disposed of by the committee, ... it is unnecessary to discuss that phase." Representative Floyd responded: "I think it has not been disposed of, Mr. Harlan. There are 21 members of this Committee, and matters are not so easily disposed of. I simply made an explanation as one member of the subcommittee that had prepared the bill, as to my view of it. I would be very glad ... if you would state your views...." House Hearings at 1049–53.

26 The Ninth Circuit explicitly holds this to be the House Judiciary Committee's view, and states that "[w]hether Congress shared this intention is not subject to rigorous proof." *I.T.T.,* 518 F.2d at 922. But the opinion treats its view of the Committee's understanding *cum* intention as that of Congress, *viz.,* asking "[w]hether by refusing to allow private 'dissolution' suits, Congress also refused to allow private 'divestiture' suits." *Id.*

27 The problems inherent in that approach to statutory construction have been elaborated by Professor Brest:

> [such an interpreter] must determine what the adopters intended future interpreters to make of their substantive views. Even if she can learn how the adopters intended contemporary interpreters to construe the [statute], she cannot assume they intended the same canons to apply one or two hundred years later. Perhaps they wanted to bind the future as closely as possible to their own notions. Perhaps they intended a particular provision to be interpreted with increasing breadth as time went on. Or—more likely than not—the adopters may have had no intentions at all concerning these matters.

Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L.Rev. at 220 (footnotes omitted). Although Professor Brest's comments were directed to constitutional interpretation, they are equally appropriate here. *See* *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 351, 359–60, 53 S.Ct. 471, 473–74, 77 L.Ed. 825 (1933) ("as a charter of freedom, the [Sherman Act] has a generality and adaptability comparable to that found to be desirable in constitutional provisions"); *NBO Industries v. Brunswick Corp.,* 523 F.2d 262, 298 (3d Cir.1975) (antitrust laws are almost an "economic constitution" for this nation), *rev'd on other grounds sub nom.* *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

28 *See also* *Leh v. General Petroleum Corp.,* 382 U.S. 54, 59, 86 S.Ct. 203, 207, 15 L.Ed.2d 134 (1965) ("effect must be given to the broad terms of the statute itself ... read in the light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws"); *Cabell v. Markham,* 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"), *aff'd,* 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945).

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965 F.3d 753
United States Court of Appeals, Ninth Circuit.

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-Appellee,
v.
William P. BARR, Attorney General; Alan R. Hanson; United States Department of Justice; Matt M. Dummermuth, Defendants-Appellants.
State of California, ex rel. Xavier Becerra, in his official capacity as Attorney General of the State of California, Plaintiff-Appellee,
v.
William P. Barr, Attorney General; Alan R. Hanson; United States Department of Justice; Matt M. Dummermuth; Phil E. Keith, Defendants-Appellants.

No. 18-17308, No. 18-17311
|
Argued and Submitted December 2, 2019 San Francisco, California
|
Filed July 13, 2020

Synopsis
Background: Municipality and state brought actions against Attorney General and other Department of Justice (DOJ) officials to prevent DOJ from denying funding for criminal justice programs based on their failure to provide Department of Homeland Security (DHS) with access to detained aliens and advance notice of their scheduled release, or to certify their compliance with federal statute prohibiting them from restricting flow of information about aliens to DHS. The United States District Court for the Northern District of California, William H. Orrick, J., 349 F.Supp.3d 924, entered summary judgment in plaintiffs' favor and issued nationwide permanent injunction. DOJ appealed.

Holdings: The Court of Appeals, Clifton, Senior Circuit Judge, held that:

DOJ exceeded its authority in conditioning funding on providing DHS with access to detained aliens and advance notice of their scheduled release;

California laws constraining law enforcement from providing federal immigration authorities with release dates of people in custody did not conflict with federal information-sharing statute;

municipality's laws prohibiting its officials from responding to any non-criminal requests from Immigration and Customs Enforcement (ICE) did not conflict with federal statute; and

district court abused its discretion by issuing nationwide permanent injunction.

Affirmed in part and vacated in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

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Appeal from the United States District Court for the Northern District of California, William Horsley Orrick, District Judge, Presiding, D.C. No. 3:17-cv-04642-WHO, D.C. No. 3:17-cv-04701-WHO

Before: William A. Fletcher, Richard R. Clifton, and Eric D. Miller, Circuit Judges.

OPINION

CLIFTON, Circuit Judge:

***756** The federal government has provided funding for state and local criminal justice ***757** programs through Edward Byrne Memorial Justice Assistance Grants since 2006. In Fiscal Year ("FY") 2017, the Attorney General and the Department of Justice ("DOJ") announced three new conditions that state and local governments must satisfy to receive Byrne grants. Two conditions require recipient jurisdictions to provide the Department of Homeland Security ("DHS") with (1) access to the jurisdiction's detention or correctional facilities to interview people in custody about their right to be in the United States (the "Access Condition"), and (2) advance notice of the scheduled release of aliens in the jurisdiction's custody (the "Notice Condition"). The third condition requires jurisdictions to certify that their laws and policies comply with 8 U.S.C. § 1373, a federal statute prohibiting states and localities from restricting the flow of "information regarding [an individual's] citizenship or immigration status" between state and local officials and DHS (the "Certification Condition").

Plaintiffs—the City and County of San Francisco and the State of California—are so-called "sanctuary" jurisdictions, which have enacted laws that limit their employees' authority to assist in the enforcement of federal immigration laws. Plaintiffs sued DOJ, the Attorney General, and other DOJ officials (collectively, "DOJ") to prevent DOJ from denying funding of Byrne grants for failure to comply with the Access, Notice, and Certification Conditions (collectively, the "Challenged Conditions"). Plaintiffs also sought a declaratory judgment that their respective "sanctuary" laws do not violate 8 U.S.C. § 1373, or alternatively, that 8 U.S.C. § 1373 is unconstitutional. On summary judgment, the district court entered declaratory relief in favor of Plaintiffs on all of their legal claims. It also permanently enjoined DOJ, among other things, from "[u]sing the Section 1373 certification condition, and the access and notice conditions ... as requirements for Byrne JAG grant funding." It extended relief to the entire country by providing that the permanent injunction applied to "any California state entity, any California political subdivision, or any jurisdiction in the United States."

Recent precedential decisions by this court have done the heavy lifting with regard to the merits of the relief granted by the district court. We held that DOJ lacked statutory authority to impose the Access and Notice Conditions on Byrne funds in reviewing a preliminary injunction obtained by the City of Los Angeles. *See* *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019). Consistent with our discussion in *City of Los Angeles*, we affirm the injunction barring DOJ from using the Access and Notice Conditions as Byrne funding requirements for any California state entity or political subdivision.

We also uphold the injunction barring DOJ from denying or withholding Byrne funds on account of the Certification Condition based on Plaintiffs' alleged non-compliance with 8 U.S.C. § 1373. We narrowly construed the statutory language of 8 U.S.C. § 1373 in an action filed by DOJ to enjoin California's enforcement of its newly-enacted Values Act, Cal. Gov't Code § 7284 *et seq.*, to conclude that the Values Act did not conflict with § 1373. *See* *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 590 U.S. ——, —— S.Ct. ——, 207 L.Ed.2d 1072 (U.S. Jun. 15, 2020) (No. 19-532). Consistent

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with our analysis in that case, we hold that the remaining California and San Francisco laws at issue here also comply with 8 U.S.C. § 1373 and cannot be cited in relation to the Certification Condition as a basis to deny Byrne funding.

With regard to the geographical reach of the relief granted by the district court, ***758** however, we conclude that the district court abused its discretion in issuing an injunction that extended nationwide. Although San Francisco offered evidence that some jurisdictions across the country might welcome an injunction against the Challenged Conditions, nothing in the record or in the nature of the claims suggests that the relief granted by the district court needs to be extended to state and local governments outside of California, not parties to this litigation, in order to fully shield Plaintiffs. Therefore, we vacate the nationwide reach of the permanent injunction and limit its reach to California's geographical boundaries.

I. Background

The Byrne program is the "primary provider" of federal grant dollars to support state and local criminal justice programs. DOJ's Office of Justice Programs, which administers the grant, disburses over $80 million in awards each year. California has used prior Byrne awards to support programs focused on criminal drug enforcement, violent crime, and anti-gang activities. San Francisco has used them to support programs focused on reducing the drug trade and providing services to individuals with substance and mental health issues.

Each year, DOJ distributes Byrne funds pursuant to a statutory formula based on population and violent crime rate. *See* 34 U.S.C. § 10156(d)(2)(A). In FY 2017, California, through its Board of State and Community Corrections, expected to receive $28.3 million and allocate $10.6 million in sub-grants to its localities. San Francisco expected to receive a sub-grant of $923,401, plus a direct award of $524,845 pursuant to its own FY 2017 application.

To receive and draw upon a Byrne award, a state or local government must submit an application that complies with the statutory requirements outlined in 34 U.S.C. § 10153, in a form set forth in annual solicitation documents that DOJ provides and in accordance with all lawful conditions stated therein. *See* 34 U.S.C. § 10153. DOJ's FY 2017 solicitation documents included the Challenged Conditions at issue in this appeal.

A. The Challenged Conditions

The FY 2017 Byrne solicitations included the Access and Notice Conditions, "two new express conditions" related to "the 'program or activity' that would be funded by the FY 2017 award." Respectively, the Access and Notice Conditions require recipient jurisdictions to:

> (1) permit personnel of the U.S. Department of Homeland Security ("DHS") to access any correctional or detention facility in order to meet with an alien (or an individual believed to be an alien) and inquire as to his or her right to be or remain in the United States; and
>
> (2) provide at least 48 hours' advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien pursuant to the Immigration and Nationality Act.

The Byrne statute requires applicants to certify that "the applicant will comply with all provisions of this part and all other applicable Federal laws." 34 U.S.C. § 10153(a)(5)(D). In FY 2016, DOJ announced that 8 U.S.C. § 1373 is an "applicable Federal law" under the Byrne statute. In relevant part, 8 U.S.C. § 1373 prohibits states and localities from restricting their officials from sharing "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" with DHS. [1]

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***759** In FY 2017, DOJ attached the Certification Condition to all Byrne awards. In the FY 2017 Byrne solicitations, DOJ announced that a jurisdiction cannot validly accept an award until its Chief Legal Officer executes and submits a form certifying that the jurisdiction complies with 8 U.S.C. § 1373. This form and the statutory text of 8 U.S.C. § 1373 were attached as appendices to the solicitations.

B. Factual and Procedural History

The City and County of San Francisco and the State of California filed lawsuits in the Northern District of California in August 2017, seeking to enjoin DOJ from implementing the Challenged Conditions. Plaintiffs asserted that the Challenged Conditions are not authorized by the Byrne statute and violate constitutional separation of powers, the Spending Clause, and the Administrative Procedure Act ("APA"). Plaintiffs also argued that 8 U.S.C. § 1373 cannot be enforced against them because it violates the Tenth Amendment.

Plaintiffs understood the Access and Notice Conditions to be inconsistent with the sanctuary laws and policies they have enacted. Plaintiffs claimed, however, that they could comply with the Certification Condition if the statute on which it is based, 8 U.S.C. § 1373, were appropriately construed. Because DOJ threatened to withhold FY 2017 funds based on the assertion that Plaintiffs' sanctuary laws violate 8 U.S.C. § 1373, Plaintiffs sought declaratory relief narrowly construing § 1373 and holding that the statute as so construed does not conflict with Plaintiffs' sanctuary laws. [2]

***760** In October 2018, the district court decided the case in Plaintiffs' favor on cross-motions for summary judgment. *See* *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018), *judgment entered sub nom.* *California ex rel. Becerra v. Sessions*, No. 3:17-CV-04701-WHO, 2018 WL 6069940 (N.D. Cal. Nov. 20, 2018). It issued declaratory and injunctive relief on all of Plaintiffs' legal claims, holding the Challenged Conditions and 8 U.S.C. § 1373 unconstitutional and unenforceable against Plaintiffs and any other jurisdiction in the United States. The district court stayed the effect of the injunction's nationwide scope pending appellate review. *See* *id.* at 973–74.

On appeal, DOJ argues that the Challenged Conditions were imposed pursuant to lawful authority and did not violate the Spending Clause or the APA, and that the district court erroneously construed 8 U.S.C. § 1373 and erred in holding that Plaintiffs' respective laws did not conflict with § 1373. DOJ also argues that the district court abused its discretion by extending the scope of injunctive relief to non-parties nationwide.

II. Standard of Review

Decisions regarding matters of law, including issues of statutory interpretation, are reviewed *de novo*. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009) (citations omitted). We review a decision to enter a nationwide injunction for abuse of discretion. *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 654 (9th Cir. 2011). "District courts abuse their discretion when they rely on an erroneous legal standard or clearly erroneous finding of fact." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1271 (9th Cir. 2020) (citation omitted). "[A]n overbroad injunction is an abuse of discretion." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009)).

III. The Access and Notice Conditions

The district court invalidated the Access and Notice Conditions on multiple grounds, holding that they exceed DOJ's statutory authority, violate constitutional separation of powers, violate the Spending Clause, and are arbitrary and capricious under the

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APA. *See* *City & Cty. of San Francisco*, 349 F. Supp. 3d at 944–48, 955–66. While this appeal was pending, we upheld a preliminary injunction obtained by the City of Los Angeles against DOJ's enforcement of the Access and Notice Conditions, holding that DOJ lacked statutory authority to implement them. *See* *City of Los Angeles v. Barr*, 941 F.3d 931, 945 (9th Cir. 2019).

DOJ contends that Congress granted it independent authority to establish the Access and Notice Conditions under 34 U.S.C. § 10102(a)(6). This statute provides: "The Assistant Attorney General shall ... exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." In *City of Los Angeles*, we held that when § 10102 was amended in ***761** 2006, "Congress affirmatively indicated its understanding that the Assistant AG's powers and functions could include 'placing special conditions on all grants, and determining priority purposes for formula grants.' " 941 F.3d at 939 (quoting 34 U.S.C. § 10102(a)(6)). We held, however, that the Access and Notice Conditions did not constitute "special conditions" or "priority purposes." *See* *id.* at 939–44. Therefore, although we agreed with DOJ that it was given independent authority in § 10102(a)(6), we held that the Access and Notice Conditions were not imposed pursuant to this authority. *Id.* at 944.

DOJ alternatively argues that the Access and Notice Conditions are authorized by provisions in the Byrne statute requiring applicants to certify that "there has been appropriate coordination" between the applicant and "affected agencies," 34 U.S.C. § 10153(a)(5)(C), and to assure that it will maintain "programmatic" information "as the Attorney General may reasonably require," *id.* § 10153(a)(4). We rejected these arguments in *City of Los Angeles*, holding that the requirements under the Access and Notice Conditions far exceed what the statutory language of these provisions require. *See* 941 F.3d at 944–45.

Other circuits have reached differing conclusions regarding DOJ's authority under § 10102(a)(6) and the Byrne statute to impose the Access and Notice Conditions, which has resulted in a circuit split. [3] Consistent with our analysis in *City of Los Angeles*, we affirm the district court's order declaring the Access and Notice Conditions unlawful and enjoining DOJ from enforcing them against Plaintiffs.

IV. The Certification Condition and 8 U.S.C. § 1373

The district court enjoined DOJ from enforcing the Certification Condition on multiple alternative grounds. *See* *City & Cty. of San Francisco*, 349 F. Supp. 3d at 948–55, 957–61. Among other things, the district court declared that Plaintiffs' sanctuary laws do not violate 8 U.S.C. § 1373, which it narrowly construed, and that DOJ cannot withhold Byrne funds pursuant to the Certification Condition by asserting that Plaintiffs' laws prevent their compliance with § 1373. *See* *id.* at 968–70. Because we affirm on this basis, it is unnecessary for us to consider the district court's alternative grounds for enjoining the Certification Condition, including constitutional grounds, and we do not address them.

As described above, at page 11, applicants for Byrne grants are required to certify that they "will comply with all provisions of this part and all other applicable Federal laws." 34 U.S.C. § 10153(a)(5)(D). DOJ has identified 8 U.S.C. § 1373 as an "applicable Federal law" referenced in the statute. In relevant part, § 1373 prohibits states and local governments from restricting their officials from sharing "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" with DHS.

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This court recently interpreted § 1373 in *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, ***762** 590 U.S. ——, —— S.Ct. ——, 207 L.Ed.2d 1072 (U.S. Jun. 15, 2020) (No. 19-532), a decision that was rendered while this appeal was pending. In *California*, we reviewed the denial of DOJ's motion for a preliminary injunction against California's implementation of several recent enactments, including the Values Act, which DOJ brought affirmative litigation to invalidate. Among other things, DOJ argued that provisions in the Values Act governing the exchange of information with federal immigration authorities, *See* Cal. Gov't Code § 7284.6(a)(1)(C)–(D), [4] are prohibited by the information-sharing requirements of 8 U.S.C. § 1373. *See* *California*, 921 F.3d at 886, 891–93. We disagreed. *See* *id.* at 893.

DOJ argued that § 1373's language referring to "information regarding ... citizenship or immigration status" should be construed to include information that helps federal immigration authorities determine "whether a given alien may actually be removed or detained," such as information about when a person will be released from state or local custody. *Id.* at 891. We rejected DOJ's broad construction of § 1373, holding that § 1373, by its terms, only concerned " 'information strictly pertaining to immigration status (i.e. what one's immigration status is).' " *Id.* (quoting *United States v. California*, 314 F. Supp. 3d 1077, 1102 (E.D. Cal. 2018)).

In November 2017, using the same broad construction of § 1373 we later rejected in *California*, DOJ informed Plaintiffs that it had identified specific laws that appeared to violate § 1373, thereby rendering Plaintiffs ineligible for FY 2017 Byrne awards. In a letter to the State, DOJ specifically identified provisions of the Values Act and suggested that additional offending laws may be identified in the future. California accordingly sought a declaratory judgment that the Values Act and other state laws related to immigration enforcement and information-sharing—the TRUST Act, the TRUTH Act, and six confidentiality statutes [5] —did not violate 8 U.S.C. § 1373 or render California ineligible for Byrne funds under the Certification Condition. San Francisco requested similar relief regarding chapters 12H and 12I of the San Francisco Administrative Code, which DOJ identified as likely violative of § 1373 in a letter to San Francisco. [6]

***763** The district court entered declaratory judgment in Plaintiffs' favor. *See* *City & Cty. of San Francisco*, 349 F. Supp. 3d at 966–70. It held that 8 U.S.C. § 1373 only narrowly "extends to 'information strictly pertaining to immigration status (i.e. what one's immigration status is),' " *id.* at 968 (quoting *California*, 314 F. Supp. 3d at 1102), and concluded that Plaintiffs' respective sanctuary laws did not violate § 1373 so construed, *See* *id.* at 968–70. We affirm.

As noted above, while this appeal was pending, we adopted the same narrow construction of § 1373 in *California*, holding that § 1373's information-sharing requirements applied to "just immigration status" or "a person's legal classification under federal law." 921 F.3d at 891. We also held that the challenged provisions of the Values Act did not conflict with § 1373 because they restricted the sharing of release status and contact information but did not prohibit the sharing of information regarding "immigration status." [7] *See* *id.* at 891–93. Consistent with these holdings in *California*, we affirm the district court's decision below, applying the same narrow construction of § 1373 to the state and local laws at issue in this case.

DOJ "effectively conceded" that the TRUST Act, TRUTH Act, and confidentiality statutes do not conflict with § 1373 by not arguing otherwise on summary judgment. *City & Cty. of San Francisco*, 349 F. Supp. 3d at 968; *See* *Kingdomware Tech., Inc. v. United States*, —— U.S. ——, 136 S. Ct. 1969, 1978, 195 L.Ed.2d 334 (2016). DOJ now argues for the first time

on appeal that these laws offend § 1373 because, "[a]s relevant here," they constrain law enforcement from sharing the release dates of people in custody. Section 1373 does not cover release dates, however. *California*, 921 F.3d at 891–92. We therefore affirm that these California laws do not conflict with § 1373.

DOJ similarly argues that San Francisco's laws conflict with § 1373 because they prohibit local officials from giving federal immigration authorities the contact information and release status of aliens and from "us[ing] any City funds or resources to assist in the enforcement of Federal immigration law." S.F., Cal., Admin. Code ch. 12H, § 12H.2; *see also id.* ch. 12I, §§ 12I.2, 12I.3. However, these prohibitions are subject to a savings clause, which requires compliance with federal law. *See id.* ch. 12H, § 12H.2. Because § 1373 does not extend to contact and release status information, *See* *California*, 921 F.3d at 891–92, federal law does not ***764** preclude San Francisco from prohibiting the release of such information.

DOJ claims that San Francisco, in accordance with these provisions, "provides *no information* in response to ICE requests regarding individuals in local custody." The declaration cited in the record, however, only states that "[l]ocal law enforcement officials in San Francisco, California, do not respond to any non-criminal requests from ICE, including requests for notification regarding the release of detainees ...." Again, such information is not within the scope of 8 U.S.C. § 1373. *See* *California*, 921 F.3d at 891–92. And while San Francisco prohibits the "use [of] any City funds or resources to assist in the enforcement of federal immigration law," *see* S.F. Admin. Code ch. § 12H.2, no evidence has been cited to suggest that local officials have ignored ICE requests for "immigration status" information based on this provision or on any other basis.

In sum, we affirm the ruling below holding that Plaintiffs' respective sanctuary laws comply with 8 U.S.C. § 1373. Although the laws restrict some information that state and local officials may share with federal authorities, they do not apply to information regarding a person's citizenship or immigration status, which is the only information to which § 1373 extends. We uphold the injunction barring DOJ from withholding or denying Byrne funds to Plaintiffs based on the assertion that these laws violate 8 U.S.C. § 1373 and/or the Certification Condition.

V. The Nationwide Injunction

We uphold the district court's entry of permanent injunctive relief barring DOJ from withholding or denying Plaintiffs' Byrne awards based on the Challenged Conditions. However, we vacate the district court's imposition of a nationwide injunction. The district court abused its discretion by issuing a nationwide injunction without determining whether Plaintiffs needed relief of this scope to fully recover. We do not remand to the district court for further consideration because Plaintiffs have established no nexus between their claimed injuries and the nationwide operation of the Challenged Conditions, and they advance no reason why limiting the injunction along state boundaries would not grant them full relief. Therefore, the geographical reach of the relief should be limited to California.

"Although 'there is no bar against ... nationwide relief in federal district court or circuit court,' such broad relief must be '*necessary* to give prevailing parties the relief to which they are entitled.' " *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987)). On appeal, Plaintiffs argue that they are entitled to nationwide relief by emphasizing evidence in the record, including declarations from "all types [of] grant recipients across the geographical spectrum" about how they are affected by the Challenged Conditions. Plaintiffs argue that the "far-reaching impact" of the Challenged Conditions makes this "one of the 'exceptional cases' in which program-wide relief is necessary."

The district court agreed, basing its analysis on "recent guidance" from the Ninth Circuit "on the breadth of evidence and inquiry needed to justify nationwide injunctive relief in the context of [Executive action] attempting to place similar conditions on grant

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funding." *See* *City & Cty. of San Francisco*, 349 F. Supp. 3d at 971 (citing *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018)). In those cases, we held that nationwide injunctions against unlawful Executive action, obtained by state and municipal plaintiffs, were overbroad where, ***765** among other things, the record contained no evidence showing impact to other jurisdictions. *See* *Trump*, 897 F.3d at 1244 (noting that the proffered evidence was "limited to the effect of the [Executive] Order on their governments and to the State of California"); *Azar*, 911 F.3d at 584 (holding that there was no "showing of nationwide impact or [harm to other jurisdictions of] sufficient similarity to the plaintiff states"). Citing these cases, the district court reasoned that, before issuing a nationwide injunction, it must "undertake 'careful consideration' of a factual record evidencing 'nationwide impact,' or in other words, 'specific findings underlying the nationwide application of the injunction.' " *City & Cty. of San Francisco*, 349 F. Supp. 3d at 971 (quoting *Trump*, 897 F.3d at 1231, 1244).

While it was correct to state this rule, the district court erred by considering *only* this rule. This rule addresses one form of tailoring: "Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Trump*, 897 F.3d at 1244 (quoting *Hills v. Gautreaux*, 425 U.S. 284, 293–94, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976)). However, this is not the only form of tailoring a court must do when issuing a remedy. *See, e.g.*, *Azar*, 911 F.3d at 584.

We have long held that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)) (internal quotation marks omitted). Under this rule, the appropriate inquiry would be whether Plaintiffs themselves will continue to suffer their alleged injuries if DOJ were enjoined from enforcing the Challenged Conditions only in California. The district court did not make such a finding, and it is not apparent how the record would support one.

We look first to the injuries Plaintiffs claimed. By imposing the Challenged Conditions, San Francisco argued, DOJ offered "an unacceptable choice: either comply with [the Challenged Conditions] and abandon local policies that San Francisco has found to promote public safety and foster trust and cooperation between law enforcement and the public, or maintain these policies but forfeit critical funds that it relies on to provide essential services to San Francisco residents." San Francisco claimed that it faced "the immediate prospect of losing over $1.4 million" in program funds. California claimed it was at risk of "losing $31.1 million," which would have devastating impacts on state and local law enforcement agencies, requiring many of their programs to be cut.

An injunction barring DOJ from enforcing the Challenged Conditions within California's geographical limits would resolve Plaintiffs' injuries by returning Plaintiffs to the status quo. While extending this same relief to non-party jurisdictions beyond California's geographical bounds would likely be of consequence to those other jurisdictions, it does nothing to remedy the specific harms alleged by the Plaintiffs in this case. A nationwide injunction was therefore unnecessary to provide complete relief. It was overbroad and an abuse of discretion.

We acknowledge the "increasingly controversial" nature of nationwide injunctions, *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1094 (9th Cir. 2020), and distinguish this case from recent decisions in which we upheld this form of relief. *See* *id.* (affirming an injunction operating in four ***766** states within three circuits); *E. Bay Sanctuary Covenant v. Barr (E. Bay Transit)*, Nos. 19-16487, 19-16773, 964 F.3d 832 (9th Cir. Jul. 6, 2020) (same); *E. Bay Sanctuary Covenant v. Trump (E. Bay Port-of-Entry)*, 950 F.3d 1242 (9th Cir. 2020).

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Plaintiffs here, a state and a municipality, " 'operate in a fashion that permits neat geographic boundaries.' " *E. Bay Port-of-Entry*, 950 F.3d at 1282–83 (quoting *E. Bay Sanctuary Covenant v. Trump (E. Bay III)*, 354 F. Supp. 3d 1094, 1120–21 (N.D. Cal. 2018)). Because Plaintiffs do not operate or suffer harm outside of their own borders, the geographical scope of an injunction can be neatly drawn to provide no more or less relief than what is necessary to redress Plaintiffs' injuries. This is distinguishable from a case involving plaintiffs that operate and suffer harm in a number of jurisdictions, where the process of tailoring an injunction may be more complex.

We recognized this distinction when we affirmed the nationwide injunction entered in *East Bay Port-of-Entry*:

> The Organizations ... represent "asylum seekers" broadly. Unlike the plaintiffs in *California v. Azar*—individual states seeking affirmance of an injunction that applied past their borders—the Organizations here "do not operate in a fashion that permits neat geographic boundaries." [*E. Bay] III*, 354 F. Supp. 3d at 1120–21... An injunction that, for example, limits the application of the Rule to California, would not address the harm that one of the Organizations suffers from losing clients entering through the Texas-Mexico border. One fewer asylum client, regardless of where the client entered the United States, results in a frustration of purpose (by preventing the organization from continuing to aid asylum applicants who seek relief), and a loss of funding (by decreasing the money it receives for completed cases).

950 F.3d at 1282–83 (citation omitted).

Accordingly, we vacate the nationwide reach of the permanent injunction and limit its reach to California's geographical boundaries.

VI. Conclusion

We affirm the district court's order to the extent it held that DOJ did not have statutory authority to impose the Access and Notice Conditions and declared that Plaintiffs' respective sanctuary laws comply with 8 U.S.C. § 1373, the law on which the Certification Condition is based. We uphold the permanent injunction barring DOJ from withholding, terminating, or clawing back Byrne funding based on the Challenged Conditions and statutes at issue. We also determine that the district court abused its discretion in granting nationwide injunctive relief, which was broader than warranted, and vacate that portion of the district court's order.

Each party to bear its own costs.

AFFIRMED in part; VACATED in part.

All Citations

965 F.3d 753, 20 Cal. Daily Op. Serv. 6946

Footnotes

1 Congress enacted 8 U.S.C. § 1373 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *See* Pub. L. No. 104-208, div. C, tit. VI, § 642, 110 Stat. 3009, 3009–707. It provides in full:

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(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

2 The State of California sought similar relief related to a condition that DOJ placed on FY 2017 awards under the Community Oriented Policing Services ("COPS") grant program and the COPS Anti-Methamphetamine Program ("CAMP"). *See generally* 34 U.S.C. § 10381 *et seq.* Like the Certification Condition attached to Byrne awards, the challenged condition attached to the COPS/CAMP awards requires applicants to certify their compliance with 8 U.S.C. § 1373. California's Department of Justice submitted this certification when it applied for a FY 2017 CAMP award, and although it received $1 million in CAMP funding that year, it was told it could not "draw down" the funds pending an inquiry into its compliance with § 1373.

The dispositive issue on appeal related to COPS/CAMP is whether California's state laws render California ineligible for COPS/CAMP funding based on asserted non-compliance with 8 U.S.C. § 1373. This issue is identical to the issue regarding the Certification Condition attached to the Byrne program. *See infra* Part IV. For the sake of simplicity, the issue is discussed in the text of this opinion in terms of the Byrne program's Certification Condition, but that discussion and our resolution of that challenge applies similarly to the § 1373 certification condition under COPS/CAMP.

3 To date, only the Second Circuit has held that the Access and Notice Conditions were imposed pursuant to appropriate authority. *New York v. Dep't of Justice*, 951 F.3d 84, 101–04, 116–22 (2d Cir. 2020). The First, Third, and Seventh Circuits have held to the contrary. *City of Chicago v. Barr*, 957 F.3d 772 (7th Cir. 2020); *City of Chicago v. Sessions*, 888 F.3d 272, 283–87 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); *City of Philadelphia v. Att'y Gen.*, 916 F.3d 276, 284–88 (3d Cir. 2019); *City of Providence v. Barr*, 954 F.3d 23, 45 (1st Cir. 2020).

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4 Cal. Gov't Code § 7284.6(a)(1)(C) prohibits California law enforcement agencies from "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public, or is in response to a notification request from immigration authorities" under certain circumstances.

Cal. Gov't Code § 7284.6(a)(1)(D) prohibits the agencies from "[p]roviding personal information ... about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public."

5 The TRUST Act limits the ability of state and local law enforcement officers to provide federal immigration authorities information regarding a person's release date from custody. Cal. Gov't Code §§ 7282.5(a), 7284.6(a)(1)(C). The TRUTH Act requires local officials to provide inmates in their custody a notification of rights before any interview by immigration authorities takes place regarding civil immigration violations. *Id.* § 7283.1(a). The six confidentiality laws at issue include three statutes concerning the protection of minors' personal information, *see* Cal. Welf. & Inst. Code §§ 827, 831; Cal. Code of Civ. Proc. § 155, and three statutes concerning California's policy of protecting the personal information of victims and witnesses of crime, *see* Cal. Penal Code §§ 422.93, 679.10, 679.11.

6 DOJ's letter cited specific concerns with sections 12H.2 and 12I.3 of the San Francisco Administrative Code. Section 12H.2 prohibits the "use [of] any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding release status of individuals or any such personal information as defined in Chapter 12I," except as "required by Federal or State statute, regulation, or court decision." S.F., Cal., Admin. Code ch. 12H, § 12H.2; *see id.* ch. 12I, § 12I.2 (" 'Personal information' means any confidential, identifying information about an individual, including, but not limited to, home or work contact information, and family or emergency contact information."). Section 12I.3 provides that City law enforcement officials "shall not ... provide any individual's personal information to a federal immigration officer, on the basis of an administrative warrant, prior deportation order, or other civil immigration document based solely on alleged violations of the civil provisions of immigration laws." *Id.* ch. 12I, § 12I.3(e).

7 Indeed, we noted that one provision of the Values Act expressly permits the sharing of information pursuant to § 1373. *California*, 921 F.3d at 891 (quoting Cal. Gov't Code § 7284.6(e) ("This section does not prohibit or restrict any government entity or official from sending to, or receiving from, federal immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of an individual ... pursuant to Section[ ] 1373.")).

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140 S.Ct. 599
Supreme Court of the United States.

DEPARTMENT OF HOMELAND SECURITY, et al.
v.
NEW YORK, et al.

No. 19A785
|
January 27, 2020

ON APPLICATION FOR STAY

Opinion

The application for stay presented to Justice GINSBURG and by her referred to the Court is granted, and the District Court's October 11, 2019 orders granting a preliminary injunction are stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Second Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Justice GINSBURG, Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN would deny the application.

Justice GORSUCH, with whom Justice THOMAS joins, concurring in the grant of stay.

On October 10, 2018, the Department of Homeland Security began a rulemaking process to define the term “public charge,” as it is used in the Nation's immigration laws. Approximately 10 months and 266,000 comments later, the agency issued a final rule. Litigation swiftly followed, with a number of States, organizations, and individual plaintiffs variously alleging that the new definition violates the Constitution, the Administrative Procedure Act, and the immigration laws themselves. These plaintiffs have urged courts to enjoin the rule's enforcement not only as it applies to them, or even to some definable group having something to do with their claimed injury, but as it applies to *anyone*.

These efforts have met with mixed results. The Northern District of California ordered the government not to enforce the new rule within a hodge-podge of jurisdictions—California, Oregon, Maine, Pennsylvania, and the District of Columbia. The Eastern District of Washington entered a similar order, but went much farther geographically, enjoining the government from enforcing its rule globally. But both of those orders were soon stayed by the Ninth Circuit which, in a 59-page opinion, determined the government was likely to succeed on the merits. Meanwhile, across the country, the District of Maryland entered its own universal injunction, only to have that one stayed by the Fourth Circuit. And while all these developments were unfolding on the coasts, the Northern District of Illinois was busy fashioning its own injunction, this one limited to enforcement within the State of Illinois.

If all of this is confusing, don't worry, because none of it matters much at this point. Despite the fluid state of things—some interim wins for the government over here, some preliminary relief for plaintiffs over there—we now have an injunction to rule them all: the one before us, in which a single judge in New York enjoined the government from applying the new definition to anyone, without regard to geography or participation in this or any other lawsuit. The Second Circuit declined to stay this particular universal injunction, and so now, after so many trips up and down and around the judicial map, the government brings its well-rehearsed arguments here.

***600** Today the Court (rightly) grants a stay, allowing the government to pursue (for now) its policy everywhere save Illinois. But, in light of all that's come before, it would be delusional to think that one stay today suffices to remedy the problem. The real

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problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of "nationwide," "universal," or "cosmic" scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case.

Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies. Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III. See *Trump* v. *Hawaii*, 585 U.S. ——, ——, 138 S.Ct. 2392, 2428–2429, 201 L.Ed.2d 775 (2018) (THOMAS, J., concurring); Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 471–472 (2017) (Bray); Morley, De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases, 39 Harv. J. L. & Pub. Pol'y 487, 523–527 (2016).

It has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice. As the brief and furious history of the regulation before us illustrates, the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions. Rather than spending their time methodically developing arguments and evidence in cases limited to the parties at hand, both sides have been forced to rush from one preliminary injunction hearing to another, leaping from one emergency stay application to the next, each with potentially nationwide stakes, and all based on expedited briefing and little opportunity for the adversarial testing of evidence.

This is not normal. Universal injunctions have little basis in traditional equitable practice. Bray 425–427. Their use has proliferated only in very recent years. See *Trump*, 585 U. S., at —— – ——, 138 S.Ct., at 2428–2429 (THOMAS, J., concurring). And they hardly seem an innovation we should rush to embrace. By their nature, universal injunctions tend to force judges into making rushed, high-stakes, low-information decisions. Bray 461–462. The traditional system of lower courts issuing interlocutory relief limited to the parties at hand may require litigants and courts to tolerate interim uncertainty about a rule's final fate and proceed more slowly until this Court speaks in a case of its own. But that system encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process. *Ibid.* The rise of nationwide injunctions may just be a sign of our impatient times. But good judicial decisions are usually tempered by older virtues.

Nor do the costs of nationwide injunctions end there. There are currently more than 1,000 active and senior district court ***601** judges, sitting across 94 judicial districts, and subject to review in 12 regional courts of appeal. Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide. *Id*., at 457–461. The risk of winning conflicting nationwide injunctions is real too. *Id.*, at 462–464. And the stakes are asymmetric. If a single successful challenge is enough to stay the challenged rule across the country, the government's hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal. A single loss and the policy goes on ice—possibly for good, or just as possibly for some indeterminate period of time until another court jumps in to grant a stay. And all that can repeat, *ad infinitum*, until either one side gives up or this Court grants certiorari. What in this gamesmanship and chaos can we be proud of?

I concur in the Court's decision to issue a stay. But I hope, too, that we might at an appropriate juncture take up some of the underlying equitable and constitutional questions raised by the rise of nationwide injunctions.

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246 F.3d 708
United States Court of Appeals, District of Columbia Circuit.

FEDERAL TRADE COMMISSION, Appellant,
v.
H.J. HEINZ CO. and Milnot Holding Corporation, Appellees.

No. 00–5362
|
Argued Feb. 12, 2001.
|
Decided April 27, 2001.

Synopsis

Federal Trade Commission (FTC) brought suit under Clayton Act, seeking to prevent merger of second and third largest manufacturers of jarred baby food. The United States District Court for the District of Columbia, James Robertson, J., denied FTC's motion for preliminary injunction, and FTC appealed. The Court of Appeals, Karen LeCraft Henderson, Circuit Judge, held that: (1) FTC established prima facie case that merger would be anticompetitive, and (2) manufacturers failed to rebut presumption created by prima facie case.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

***710 **366** Appeal from the United States District Court for the District of Columbia (No. 00cv01688).

Attorneys and Law Firms

Debra A. Valentine, General Counsel, Federal Trade Commission, argued the cause for the appellant. John F. Daly, Assistant General Counsel, Richard G. Parker, Director, and Richard B. Dagen, David A. Balto and David C. Shonka, Attorneys, Federal Trade Commission, were on brief.

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James H. Skiles and Jan Amundson were on brief for Grocery Manufacturers of America, Inc. et al., Amici Curiae in support of the appellees.

C. Boyden Gray, William J. Kolasky, Jeffrey D. Ayer and Robert H. Bork were on brief for Citizens for a Sound Economy Foundation, Amicus Curiae, in support of the appellees.

Before: HENDERSON, RANDOLPH and GARLAND, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

Opinion

KAREN LeCRAFT HENDERSON, Circuit Judge.

On February 28, 2000 H.J. Heinz Company (Heinz) and Milnot Holding Corporation (Beech–Nut) entered into a merger agreement. The Federal Trade Commission (Commission or FTC) sought a preliminary injunction pursuant to section 13(b) of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 53(b), to enjoin the consummation of the merger. The injunction was sought in aid of an FTC administrative proceeding which was subsequently instituted by complaint to challenge the merger as violative of, *inter alia,* section 7 of the Clayton Act, 15 U.S.C. § 18. The district court denied the preliminary injunction and the FTC appealed to this court. For the reasons set forth below, we reverse the district court and remand for entry of a preliminary injunction against Heinz and Beech–Nut.

I. Background

Four million infants in the United States consume 80 million cases of jarred baby food annually, representing a domestic market of $865 million to $1 billion. [1] *FTC v. H.J. Heinz, Co.,* 116 F.Supp.2d 190, 192 (D.D.C.2000). The baby food market is dominated by three firms, Gerber Products Company (Gerber), Heinz and Beech–Nut. Gerber, the industry leader, enjoys a 65 per cent market share while Heinz and Beech–Nut come in second and third, with a 17.4 per cent and a 15.4 per cent share respectively. *Id*. The district court found that Gerber enjoys unparalleled brand recognition with a brand loyalty greater than any other product sold in the United States. *Id*. at 193. Gerber's products are found in over 90 per cent of all American supermarkets. [2]

By contrast, Heinz is sold in approximately 40 per cent of all supermarkets. Its sales are nationwide but concentrated ***712** ****368** in northern New England, the Southeast and Deep South and the Midwest. *Id*. at 194. Despite its second-place domestic market share, Heinz is the largest producer of baby food in the world with $1 billion in sales worldwide. Its domestic baby food products with annual net sales of $103 million are manufactured at its Pittsburgh, Pennsylvania plant, which was updated in 1991 at a cost of $120 million. *Id*. at 192–93. The plant operates at 40 per cent of its production capacity and produces 12 million cases of baby food annually. Its baby food line includes about 130 SKUs (stock keeping units), that is, product varieties (*e.g.,* strained carrots, apple sauce, etc.). Heinz lacks Gerber's brand recognition; it markets itself as a "value brand" with a shelf price several cents below Gerber's. *Id*. at 193.

Beech–Nut has a market share (15.4%) comparable to that of Heinz (17.4%), with $138.7 million in annual sales of baby food, of which 72 per cent is jarred baby food. Its jarred baby food line consists of 128 SKUs. Beech–Nut manufactures all of its baby food in Canajoharie, New York at a manufacturing plant that was built in 1907 and began manufacturing baby food in 1931. Beech–Nut maintains price parity with Gerber, selling at about one penny less. It markets its product as a premium brand. *Id*. Consumers generally view its product as comparable in quality to Gerber's. *Id*. Beech–Nut is carried in approximately 45 per cent of all grocery stores. Although its sales are nationwide, they are concentrated in New York, New Jersey, California and Florida. [3] *Id*. at 194.

At the wholesale level Heinz and Beech–Nut both make lump-sum payments called "fixed trade spending" (also known as "slotting fees" or "pay-to-stay" arrangements) to grocery stores to obtain shelf placement. *Id.* at 197. Gerber, with its strong name recognition and brand loyalty, does not make such pay-to-stay payments. The other type of wholesale trade spending is "variable trade spending," which typically consists of manufacturers' discounts and allowances to supermarkets to create retail price differentials that entice the consumer to purchase their product instead of a competitor's. *Id*.

Under the terms of their merger agreement, Heinz would acquire 100 per cent of Beech–Nut's voting securities for $185 million. Accordingly, they filed a Premerger Notification and Report Form with the FTC and the United States Department of Justice pursuant to the Hart–Scott–Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18a. [4] On July 7, 2000 the FTC authorized this action for a preliminary injunction under section 13(b) of the FTCA and, on July 14, 2000, it filed a complaint and motion for preliminary injunction. The district court conducted a five-day hearing in late August and early September and heard final arguments on September 21, 2000. The record before the district court consisted of 1,267 exhibits, including 150 demonstrative exhibits, 32 depositions and 41 affidavits. ***713 **369** In addition, eleven witnesses testified. On October 18, 2000 the district court denied preliminary injunctive relief. The court concluded that it was "more probable than not that consummation of the Heinz/Beech–Nut merger will actually increase competition in jarred baby food in the United States." *H.J. Heinz,* 116 F.Supp.2d at 200. The FTC appealed and sought injunctive relief pending appeal, which this court granted on November 8, 2000. On November 22, 2000 the FTC filed an administrative complaint against Heinz and Beech–Nut, charging that the proposed merger violates section 5 of the FTCA and, if consummated, would violate section 7 of the Clayton Act. *In the Matter of H. J. Heinz,* Docket No. 9295 (filed Nov. 22, 2000).

II. Analysis

A. *Standard of Review*

We review a district court order denying preliminary injunctive relief for abuse of discretion, *National Wildlife Fed'n v. Burford,* 835 F.2d 305, 319 (D.C.Cir.1987), and will set aside the court's factual findings only if they are "clearly erroneous." Fed.R.Civ.P. 52(a); *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 615 n. 13, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974). If our review of the district court order "reveals that it rests on an erroneous premise as to the pertinent law, however, we must examine the decision in light of the legal principles we believe proper and sound." *Ambach v. Bell,* 686 F.2d 974, 979 (D.C.Cir.1982). We apply *de novo* review to the district court's conclusions of law. *See* *FTC v. National Tea Co.,* 603 F.2d 694, 696–98 (8th Cir.1979) (reviewing *de novo* proper standard of proof under section 13(b) of FTCA); *cf.* *FTC v. Warner Communications Inc.,* 742 F.2d 1156, 1160 (9th Cir.1984) (per curiam) (finding as matter of law district court applied incorrect standard for section 7 violation). In deciding whether to grant preliminary injunctive relief under section 13(b), the court evaluates whether it is in the public interest to enjoin the proposed merger. *See* 15 U.S.C. § 53(b).

B. *Section 7 of the Clayton Act*

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Section 7 of the Clayton Act prohibits acquisitions, including mergers, "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18; *see* *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 355, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963) ("The statutory test is whether the effect of the merger 'may be substantially to lessen competition' 'in any line of commerce in any section of the country.' "). The "Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States,* 370 U.S. 294, 323, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (emphasis original); *see* S.Rep. No. 1775, at 6 (1950), U.S.Code Cong. & Admin. News at 4293, 4298 ("The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the pr[o]scribed effect...."). "Merger enforcement, like other areas of antitrust, is directed at market power. It shares with the law of monopolization a degree of schizophrenia: an aversion to potent power that heightens risk of abuse; and tolerance of that degree of power required to attain economic benefits." Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust* § 9.1, at 511 (2000). The Congress has empowered the FTC, *inter alia,* to weed out those mergers whose effect "may be substantially to lessen competition" from those that enhance competition. *See* H.R.Rep. No. 1142, at 18–19 (1914). ***714** ****370** In section 13(b) of the FTCA, the Congress provided a mechanism whereby the FTC may seek preliminary injunctive relief preventing the merging parties from consummating the merger until the Commission has had an opportunity to investigate and, if necessary, adjudicate the matter.

C. *Section 13(b) of the Federal Trade Commission Act*

"Whenever the Commission has reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act, the FTC may seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality." *FTC v. Staples, Inc.,* 970 F.Supp. 1066, 1070 (D.D.C.1997); *see* 15 U.S.C. § 53(b). Section 13(b) provides for the grant of a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits. 15 U.S.C. § 53(b).[5] The Congress intended this standard to depart from what it regarded as the then-traditional equity standard, which it characterized as requiring the plaintiff to show: (1) irreparable damage, (2) probability of success on the merits and (3) a balance of equities favoring the plaintiff. H.R.Rep. No. 93–624, at 31 (1971). The Congress determined that the traditional standard was not "appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief." *Id*. "The courts had evolved an approach to cases in which government agencies, acting to enforce a federal statute, sought interim relief. The agency, in such cases, was not held to the high thresholds applicable where private parties seek interim restraining orders." *FTC v. Weyerhaeuser Co.,* 665 F.2d 1072, 1082 (D.C.Cir.1981); *see* *FTC v. Exxon Corp.,* 636 F.2d 1336, 1343 (D.C.Cir.1980) ("In enacting [Section 13(b)], Congress further demonstrated its concern that injunctive relief be broadly available to the FTC by incorporating a unique 'public interest' standard in 15 U.S.C. § 53(b), rather than the more stringent, traditional 'equity' standard for injunctive relief."). The FTC is not required to *establish* that the proposed merger would in fact violate section 7 of the Clayton Act. *Staples,* 970 F.Supp. at 1071; *see* *FTC v. Food Town Stores, Inc.,* 539 F.2d 1339, 1342 (4th Cir.1976) ("The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance."). We now consider the FTC's likelihood of success and weigh the equities. *Accord* *FTC v. Freeman Hosp.,* 69 F.3d 260, 267 (8th Cir.1995); *FTC v. University Health, Inc.,* 938 F.2d 1206, 1217 (11th Cir.1991); *Warner Communications,* 742 F.2d at 1160.

1. Likelihood of Success

To determine likelihood of success on the merits we measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the Heinz/Beech–Nut merger "may be substantially to lessen competition, or to tend to create a monopoly" in violation of section 7 of the Clayton Act. 15 U.S.C. § 18. This court and others have suggested that the standard for likelihood of success on the merits is met if the FTC "has raised questions going to the merits so serious, substantial, ***715 **371** difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. Beatrice Foods Co.,* 587 F.2d 1225, 1229 (D.C.Cir.1978) (Appendix to Statement of MacKinnon & Robb, JJ.) [6]; *Staples,* 970 F.Supp. at 1071; *Warner Communications,* 742 F.2d at 1162 (quoting *National Tea,* 603 F.2d at 698); *see* *University Health,* 938 F.2d at 1218. This specific standard was articulated by the court below, *see* *H.J. Heinz,* 116 F.Supp.2d at 194, and it is a standard to which the appellees have not objected.

In *United States v. Baker Hughes Inc.,* 908 F.2d 981, 982–83 (D.C.Cir.1990), we explained the analytical approach by which the government establishes a section 7 violation. First the government must show that the merger would produce "a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market." *Philadelphia Nat'l Bank,* 374 U.S. at 363, 83 S.Ct. 1715. Such a showing establishes a "presumption" that the merger will substantially lessen competition. *See* *Baker Hughes,* 908 F.2d at 982. To rebut the presumption, the defendants must produce evidence that "show [s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition" in the relevant market. *United States v. Citizens & S. Nat'l Bank,* 422 U.S. 86, 120, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975). [7] "If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes Inc.,* 908 F.2d at 983; *see also* *Kaiser Aluminum,* 652 F.2d at 1340 & n. 12. Although *Baker Hughes* was decided at the merits stage as opposed to the preliminary injunctive relief stage, we can nonetheless use its analytical approach in evaluating the Commission's showing of likelihood of success. Accordingly, we look at the FTC's prima facie case and the defendants' rebuttal evidence.

a. Prima Facie Case

Merger law "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *FTC v. PPG Indus.,* 798 F.2d 1500, 1503 (D.C.Cir.1986). [8] Increases in concentration above certain levels are thought to "raise[ ] a likelihood of 'interdependent anticompetitive ***716 **372** conduct.' " *Id.* (quoting *General Dynamics,* 415 U.S. at 497, 94 S.Ct. 1186); *see* *FTC v. Elders Grain,* 868 F.2d 901, 905 (7th Cir.1989). Market concentration, or the lack thereof, is often measured by the Herfindahl–Hirschmann Index (HHI). *See* *Staples,* 970 F.Supp. at 1081 n. 12. [9]

Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive. *See* *Baker Hughes,* 908 F.2d at 982–83 & n. 3; *PPG,* 798 F.2d at 1503. The district court found that the pre-merger HHI "score for the baby food industry is 4775"—indicative of a highly concentrated industry. [10] *H.J. Heinz,* 116 F.Supp.2d at 196; *see* *PPG,* 798 F.2d at 1503; Horizontal Merger Guidelines, *supra,* § 1.51. The merger of Heinz and Beech–Nut will increase the HHI by 510 points. This creates, by a wide margin, a presumption that the merger will lessen competition in the domestic jarred baby food market. *See* Horizontal Merger Guidelines, *supra,* § 1.51 (stating that HHI increase of more than 100 points, where post-merger HHI exceeds 1800, is "presumed ... likely to create or enhance market power or facilitate its exercise"); *see also*

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Baker Hughes, 908 F.2d at 982–83 & n. 3; *PPG,* 798 F.2d at 1503.[11] Here, ***717 **373** the FTC's market concentration statistics[12] are bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties at the wholesale level, where they are currently the only competitors for what the district court described as the " second position on the supermarket shelves." *H.J. Heinz,* 116 F.Supp.2d at 196. Heinz's own documents recognize the wholesale competition and anticipate that the merger will end it. JA 2680; *see also* JA 2185. Indeed, those documents disclose that Heinz considered three options to end the vigorous wholesale competition with Beech–Nut: two involved innovative measures while the third entailed the acquisition of Beech–Nut. JA 2184. Heinz chose the third, and least pro-competitive, of the options.

Finally, the anticompetitive effect of the merger is further enhanced by high barriers to market entry.[13] The district court found that there had been no significant entries in the baby food market in decades and that new entry was "difficult and improbable." *H.J. Heinz,* 116 F.Supp.2d at 196. This finding largely eliminates the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthens the FTC's case. *See* *University Health,* 938 F.2d at 1219 & n. 26.

As far as we can determine, no court has ever approved a merger to duopoly under similar circumstances.

***718 **374** b. Rebuttal Arguments

In response to the FTC's prima facie showing, the appellees make three rebuttal arguments, which the district court accepted in reaching its conclusion that the merger was not likely to lessen competition substantially. For the reasons discussed below, these arguments fail and thus were not a proper basis for denying the FTC injunctive relief.

1. Extent of Pre–Merger Competition

The appellees first contend, and the district court agreed, that Heinz and Beech–Nut do not really compete against each other at the retail level. Consumers do not regard the products of the two companies as substitutes, the appellees claim, and generally only one of the two brands is available on any given store's shelves. Hence, they argue, there is little competitive loss from the merger.

This argument has a number of flaws which render clearly erroneous the court's finding that Heinz and Beech–Nut have not engaged in significant pre-merger competition. First, in accepting the appellees' argument that Heinz and Beech–Nut do not compete, the district court failed to address the record evidence that the two do in fact price against each other, *see, e.g.,* 8/31/2000 Tr. 247–48, and that, where both are present in the same areas,[14] they depress each other's prices as well as those of Gerber even though they are virtually never all found in the same store. *See, e.g.,* 8/30/2000 Tr. 147–48, 172; PX 531 at ¶ 8; PX 481 at ¶ 12; PX 479 at ¶ ¶ 6–7; PX 478 at ¶ 6; DX 14 at RP–110. This evidence undermines the district court's factual finding.

Second, the district court's finding is inconsistent with its conclusion that there is a single, national market for jarred baby food in the United States. The Supreme Court has explained that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502; *see also* *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956).[15] The definition of product market thus "focuses solely on demand substitution factors," *i.e.,* that consumers regard the products as substitutes. Horizontal Merger Guidelines, *supra,* § 1.0; Sullivan & Grimes, *supra,* § 11.2b1, at 579. By defining the relevant product market generically as jarred baby food, the district court concluded that in areas where Heinz's and Beech–Nut's products are both sold, consumers will switch between them in response to a "small but significant and nontransitory increase in price (SSNIP)." Horizontal Merger Guidelines, *supra,* § 1.11; *H.J. Heinz,* 116

F.Supp.2d at 195. The district court never explained this inherent inconsistency in its logic nor could counsel for the appellees explain it at oral argument.

Third, and perhaps most important, the court's conclusion concerning pre-merger competition does not take into account the indisputable fact that the merger will eliminate competition at the wholesale level between the only two competitors for the ****375** ***719** "second shelf" position. Competition between Heinz and Beech–Nut to gain accounts at the wholesale level is fierce with each contest concluding in a winner-take-all result. JA 2680. The district court regarded this loss of competition as irrelevant because the FTC did not establish to its satisfaction that wholesale competition ultimately benefitted consumers through lower retail prices. The district court concluded that fixed trade spending did not affect consumer prices and that "the FTC's assertion that the proposed merger will affect variable trade spending levels and consumer prices is ... at best, inconclusive." [16] *H.J. Heinz,* 116 F.Supp.2d at 197. Although the court noted the FTC's examples of consumer benefit through couponing initiatives, the court held that it was "impossible to conclude with any certainty that the consumer benefit from such couponing initiatives would be lost in the merger." *Id*.

In rejecting the FTC's argument regarding the loss of wholesale competition, the court committed two legal errors. First, as the appellees conceded at oral argument, no court has ever held that a reduction in competition for wholesale purchasers is not relevant unless the plaintiff can prove impact at the consumer level. Oral Arg. Tr. at 22, 28; *see* *Hospital Corp. of Am. v. FTC,* 807 F.2d 1381, 1389 (7th Cir.1986) ("Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of [collusive practices] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for.") (citation omitted). Second, it is, in any event, not the FTC's burden to prove such an impact with "certainty." To the contrary, the antitrust laws assume that a retailer faced with an increase in the cost of one of its inventory items "will try so far as competition allows to pass that cost on to its customers in the form of a higher price for its product." *In re Brand Name Prescription Drugs Antitrust Litig*., 123 F.3d 599, 605 (7th Cir.1997), *reh'g and suggestion for reh'g en banc denied* (Oct. 8, 1997). Section 7 is, after all, concerned with *probabilities,* not certainties. *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 658, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964); *Brown Shoe,* 370 U.S. at 323, 82 S.Ct. 1502; *Baker Hughes,* 908 F.2d at 984. [17]

***720** ****376** 2. Post–Merger Efficiencies

The appellees' second attempt to rebut the FTC's prima facie showing is their contention that the anticompetitive effects of the merger will be offset by efficiencies resulting from the union of the two companies, efficiencies which they assert will be used to compete more effectively against Gerber. It is true that a merger's primary benefit to the economy is its potential to generate efficiencies. *See generally* 4A Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 970 at 22–25 (1998). As the Merger Guidelines now recognize, efficiencies "can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, or new products." Horizontal Merger Guidelines, *supra,* § 4.

Although the Supreme Court has not sanctioned the use of the efficiencies defense in a section 7 case, *see* *Procter & Gamble Co.,* 386 U.S. at 580, 87 S.Ct. 1224, [18] the trend among lower courts is to recognize the defense. *See, e.g.,* *FTC v. Tenet Health Care Corp.,* 186 F.3d 1045, 1054 (8th Cir.1999), *reh'g and reh'g en banc denied* (Oct. 6.1999); *University Health,* 938 F.2d at 1222; *FTC v. Cardinal Health, Inc.,* 12 F.Supp.2d 34, 61 (D.D.C.1998); *Staples,* 970 F.Supp. at 1088–89; *see also* ABA Antitrust Section, *Mergers and Acquisitions: Understanding the Antitrust Issues* 152 (2000) ("The majority of courts have considered efficiencies as a means to rebut the government's prima facie case that a merger will lead to restricted output or increased prices. These courts, however, generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case."). In 1997 the Department of Justice and the FTC revised their Horizontal Merger Guidelines to recognize that "mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling

the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction." Horizontal Merger Guidelines, *supra,* § 4.

Nevertheless, the high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies, which the appellees failed to supply. *See* *University Health,* 938 F.2d at 1223 ("[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers."); Horizontal Merger Guidelines, *supra,* § 4 (stating that "[e]fficiencies almost never justify a merger to monopoly or near-monopoly"); 4A Areeda, *et al., Antitrust Law* ¶ 971f, at 44 (requiring "extraordinary" efficiencies where the "HHI is well above 1800 and the HHI increase is ***721** ****377** well above 100"). Moreover, given 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. The district court did not undertake that analysis here.

In support of its conclusion that post-merger efficiencies will outweigh the merger's anticompetitive effects, the district court found that the consolidation of baby food production in Heinz's under-utilized Pittsburgh plant "will achieve substantial cost savings in salaries and operating costs." *H.J. Heinz,* 116 F.Supp.2d at 199. The court also credited the appellees' promise of improved product quality as a result of recipe consolidation. [19] The only cost reduction the court quantified as a percentage of pre-merger costs, however, was the so called "variable conversion cost": the cost of processing the volume of baby food now processed by Beech–Nut. The court accepted the appellees' claim that this cost would be reduced by 43% if the Beech–Nut production were shifted to Heinz's plant, *see* JA 4619, a reduction the appellees' expert characterized as "extraordinary."

The district court's analysis falls short of the findings necessary for a successful efficiencies defense in the circumstances of this case. We mention only three of the most important deficiencies here. First, "variable conversion cost" is only a percentage of the total variable manufacturing cost. A large percentage reduction in only a small portion of the company's overall variable manufacturing cost does not necessarily translate into a significant cost advantage to the merger. Thus, for cost reduction to be relevant, we must at least consider the percentage of Beech–Nut's total variable manufacturing cost that would be reduced as a consequence of the merger. At oral argument, the appellees' counsel agreed. Oral Arg. Tr. at 43. This correction immediately cuts the asserted efficiency gain in half since, according to the appellees' evidence, using total variable manufacturing cost as the measure cuts the cost savings from 43% to 22.3%. *See* JA 4620.

Second, the percentage reduction in *Beech-Nut's* cost is still not the relevant figure. After the merger, the two entities will be combined, and to determine whether the merged entity will be a significantly more efficient competitor, cost reductions must be measured across the new entity's combined production—not just across the pre-merger output of Beech–Nut. *See* 4A Areeda, *et al., supra,* ¶ 976d at 93–94. The district court, however, did not consider the cost reduction over the merged firm's combined output. At oral argument the appellees' counsel was unable to suggest a formula that could be used for determining that cost reduction. *See* Oral Arg. Tr. at 45–47.

Finally, and as the district court recognized, the asserted efficiencies must be "merger-specific" to be cognizable as a defense. [20] ***722** ****378** *H.J. Heinz,* 116 F.Supp.2d at 198–99; *see* Horizontal Merger Guidelines, *supra,* § 4; 4A Areeda, *et al., supra,* ¶ 973, at 49–62. That is, they must be efficiencies that cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor. *See generally* 4A Areeda, *et al., supra,* ¶ 973. Yet the district court never explained why Heinz could not achieve the kind of efficiencies urged without merger. As noted, the principal merger benefit asserted for Heinz is the acquisition of Beech–Nut's better recipes, which will allegedly make its product more attractive and permit expanded sales at prices lower than those charged by Beech–Nut, which produces at an inefficient plant. Yet, neither the district court nor the appellees addressed the question whether Heinz could obtain the benefit of better recipes by investing more money in product development and promotion—say, by an amount less than the amount

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Heinz would spend to acquire Beech–Nut. At oral argument, Heinz's counsel agreed that the taste of Heinz's products was not so bad that no amount of money could improve the brand's consumer appeal. Oral Arg. Tr. at 54. That being the case, the question is how much Heinz would have to spend to make its product equivalent to the Beech–Nut product and hence whether Heinz could achieve the efficiencies of merger without eliminating Beech–Nut as a competitor. The district court, however, undertook no inquiry in this regard. In short, the district court failed to make the kind of factual determinations necessary to render the appellees' efficiency defense sufficiently concrete to offset the FTC's prima facie showing.

3. Innovation

The appellees claim next that the merger is required to enable Heinz to innovate, and thus to improve its competitive position against Gerber. Heinz and Beech–Nut asserted, and the district court found, that without the merger the two firms are unable to launch new products to compete with Gerber because they lack a sufficient shelf presence or ACV. *See* *H.J. Heinz,* 116 F.Supp.2d at 199–200. This kind of defense is often a speculative proposition. *See* 4A Areeda, *et al., supra,* ¶ 975g (noting "truly formidable" proof problems in determining innovation economies). In this case, given the old-economy nature of the industry as well as Heinz's position as the world's largest baby food manufacturer, it is a particularly difficult defense to prove. The court below accepted the appellees' argument principally on the basis of their expert's testimony that new product launches are cost-effective only when a firm's ACV is 70% or greater (Heinz's is presently 40%; Beech–Nut's is 45%). ***723** ****379** That testimony, in turn, was based on a graph that plotted revenue against ACV. According to the expert, the graph showed that only four out of 27 new products launched in 1995 had been successful—all for companies with an ACV of 70% or greater.

The chart, however, does not establish this proposition and the court's consequent finding that the merger is necessary for innovation is thus unsupported and clearly erroneous. All the chart plotted was revenue against ACV and hence all it showed was the unsurprising fact that the greater a company's ACV, the greater the revenue it received. Because the graph did not plot the profitability (or any measure of "cost-effectiveness"), there is no way to know whether the expert's claim—that a 70% ACV is required for a launch to be "successful" in an economic sense—is true. [21] Moreover, the number of data points on the chart were few; they were limited to launches in a single year; and they involved launches of all new grocery products rather than of baby food alone. Assessing such data's statistical significance in establishing the proposition at issue, *i.e.,* the necessity of 70% ACV penetration, is thus highly speculative. The district court did not even address the question of the data's statistical significance and the appellees' counsel could offer no help at oral argument. *See* Oral Arg. Tr. at 39 ("I'm not aware of the statistical significance of the underlying study."). [22] In the absence of reliable and significant evidence that the merger will permit innovation that otherwise could not be accomplished, the district court had no basis to conclude that the FTC's showing was rebutted by an innovation defense.

Moreover, Heinz's insistence on a 70–plus ACV before it brings a new product to market may be largely to persuade the court to recognize promotional economies as a defense. Heinz argues that to profitably launch a new product, it must have nationwide market penetration to recoup the money spent on advertising and promotion. It wants to spread advertising costs out among as many product units as possible, thereby lowering the advertising cost per unit. It does not want to "waste" promotional expenditures in markets where its products are not on the shelf or where they are on only a few shelves. For example, in a metropolitan area in which Heinz has a 75 per cent ACV, every dollar spent on advertising is two or three times more "effective" than in a market in which it has only a 25 per cent ACV. As one authority notes, however, "[t]he case for recognizing a defense based on promotional economies is relatively weak." 4A Areeda, *et al., supra,* ¶ 975f, at 77. The district court accepted Heinz's claim that it could not introduce new products without at least a 70 per cent ACV because it would ***724** ****380** be unable to adequately diffuse its advertising and promotional expenditures. But the court failed to determine whether substantial promotional scale economies exist now and, if they do, whether Heinz and Beech–Nut "for that reason operate at a substantial competitive disadvantage in the market or markets in which they sell" or whether there are effective alternatives to merger by which the disadvantage can be overcome. *Id*. at ¶ 975f2, at 78.

4. Structural Barriers to Collusion

In a footnote the district court dismissed the likelihood of collusion derived from the FTC's market concentration data. "[S]tructural market barriers to collusion" in the retail market for jarred baby food, the court said, rebut the normal presumption that increases in concentration will increase the likelihood of tacit collusion. *H.J. Heinz,* 116 F.Supp.2d at 198 n. 7. The court's sole citation, however, was to testimony by the appellees' expert, Jonathan B. Baker, a former Director of the Bureau of Economics at the FTC, who testified that in order to coordinate successfully, firms must solve "cartel problems" such as reaching a consensus on price and market share and deterring each other from deviating from that consensus by either lowering price or increasing production. He opined that after the merger the merged entity would want to expand its market share at Gerber's expense, thereby decreasing the likelihood of consensus on price and market share. 9/8/2000 Tr. 1010–1013. In his report, Baker elaborated on his theory, explaining that the efficiencies created by the merger will give the merged firm the ability and incentive to take on Gerber in price and product improvements. DX 617. He also predicted that policing and monitoring of any agreement would be more difficult than it is now, due in part to a time lag in the ability of one firm to detect price cuts by another. But the district court made no finding that any of these "cartel problems" are so much greater in the baby food industry than in other industries that they rebut the normal presumption. In fact, Baker's testimony about "time lag" is refuted by the record which reflects that supermarket prices are available from industry-wide scanner data within 4–8 weeks. *See* DX 617 at ¶ 86 (report of appellees' expert Jonathan Baker); *see also* Oral Arg. Tr. at 30 (statement by appellees' counsel that nothing in record reflects time lag is greater in baby food industry than in other industries). His testimony is further undermined by the record evidence of past price leadership in the baby food industry. [23]

The combination of a concentrated market and barriers to entry is a recipe for price coordination. *See* *University Health,* 938 F.2d at 1218 n. 24 ("Significant market concentration makes it 'easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.' " (citation omitted)). "[W]here rivals are few, firms will be able to coordinate their behavior, ***725 **381** either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *PPG,* 798 F.2d at 1503. The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices. The district court recognized this when it questioned Baker on whether the merged entity will, up to a point, expand its market share but "then [with Gerber will] find a nice equilibrium and they'll all get along together." 9/8/2000 Tr. 1014. Tacit coordination

> is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.

4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 901b2, at 9 (rev. ed.1998). Because the district court failed to specify any "structural market barriers to collusion" that are unique to the baby food industry, its conclusion that the ordinary presumption of collusion in a merger to duopoly was rebutted is clearly erroneous. [24]

* * *

Although we recognize that, post-hearing, the FTC may accept the rebuttal arguments proffered by the appellees, including their efficiencies defense, and permit the merger to proceed, we conclude that the FTC succeeded in "rais[ing] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC." *Warner Communications,* 742 F.2d at 1162. The FTC demonstrated that the merger to duopoly will increase the concentration in an already highly concentrated market; that entry barriers in the market make it unlikely that any anticompetitive effects will be avoided; that pre-merger competition is vigorous at the wholesale level nationwide and present at the retail level in some metropolitan areas; and that post-merger competition may be lessened

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substantially. These substantial questions have not been sufficiently answered by the appellees. As we said in *Baker Hughes,* "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." 908 F.2d at 991. In concluding that the FTC failed to make the requisite showing, the district court erred in a number of respects. Regarding the contention of lack of pre-merger competition, it made a clearly erroneous factual finding and misunderstood the law with respect to the import of competition at the wholesale level. Regarding the proffered efficiencies defense, the court failed to make the kind of factual findings required to render that defense sufficiently concrete to rebut the government's prima facie showing. Finally, as to the contention that the merger is necessary for innovation, the court clearly erred in relying on evidence that does not support its conclusion. Because the district court incorrectly assessed the merits of the appellees' rebuttal arguments, it improperly discounted the FTC's showing of likelihood of success.

***726 **382** 2. Weighing of the Equities

Although the FTC's showing of likelihood of success creates a presumption in favor of preliminary injunctive relief, we must still weigh the equities in order to decide whether enjoining the merger would be in the public interest. 15 U.S.C. § 53(b); *see* *PPG,* 798 F.2d at 1507; *Weyerhaeuser,* 665 F.2d at 1081–83. The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws. *University Health,* 938 F.2d at 1225. The Congress specifically had this public equity consideration in mind when it enacted section 13(b). *See* *Food Town Stores,* 539 F.2d at 1346 (Congress enacted section 13(b) to preserve status quo until FTC can perform its function). The district court found, and there is no dispute, that if the merger were allowed to proceed, subsequent administrative and judicial proceedings on the merits "will not matter" because Beech–Nut's manufacturing facility "will be closed, the Beech–Nut distribution channels will be closed, the new label and recipes will be in place, and it will be impossible as a practical matter to undo the transaction." *H.J. Heinz,* 116 F.Supp.2d at 201. Hence, if the merger were ultimately found to violate the Clayton Act, it would be impossible to recreate pre-merger competition. *See* *Warner Communications,* 742 F.2d at 1165 ("A denial of a preliminary injunction would preclude effective relief if the Commission ultimately prevails and divestiture is ordered."). Section 13(b) itself embodies congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case, 119 Cong. Rec. 36612 (1973), a point that has been emphasized by the United States Supreme Court. *See, e.g.,* *FTC v. Dean Foods Co.,* 384 U.S. 597, 606 n. 5, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966) ("Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture.").

On the other side of the ledger, the appellees claim that the injunction would deny consumers the procompetitive advantages of the merger. *See* *FTC v. Pharmtech Research, Inc.,* 576 F.Supp. 294, 299 (D.D.C.1983) (explaining that public equities include "beneficial economic effects and procompetitive advantages for consumers"). The district court found that if the merger were preliminarily enjoined, the injury to competition would also be irreversible, that is, the merger would be abandoned and could not be consummated if ultimately found lawful. By contrast to its first finding, however, for the latter conclusion the court relied not on the facts of this case but on our statement in *Exxon* that—as a general matter—temporarily blocking a tender offer is likely to end an attempted acquisition, "as a result of the short life-span of most tender offers." *Id*. (quoting *Exxon,* 636 F.2d at 1343). In their brief in this court, the appellees offer nothing more to support the finding that the merger would never be consummated were an injunction to issue. Indeed, they devote only a single sentence, without any citation, to the point. The district court's finding that an injunction would "kill this merger" is thus not a factual finding supported by record evidence. This case does not involve a short-lived tender offer as did the case cited by the court for its "kill the merger" conclusion. The appellees acknowledge that there is no alternative buyer for Beech–Nut and the court found that it is not a failing company but rather a "profitable and ongoing enterprise." *H.J. Heinz,* 116 F.Supp.2d at 201 n. 9. If the merger makes economic sense now, the appellees have offered no reason why it would not do so later. Moreover, Beech–Nut's principal assets of value to Heinz

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are, assertedly, its recipes and brand ***727** ****383** name. Nothing in the record leads us to believe that both will not still exist when the FTC completes its work. It may be that Beech–Nut will have to sell its recipes to Heinz at a lower price than the price of today's merger. But that is at best a "private" equity which does not affect our analysis of the impact on the market of the two options now before us and which has not in any event been urged by the appellees.[25] *See id*.

In sum, weighing of the equities favors the FTC. If the merger is ultimately found to violate section 7 of the Clayton Act, it will be too late to preserve competition if no preliminary injunction has issued. On the other hand, if the merger is found not to lessen competition substantially, the efficiencies that the appellees urge can be reclaimed by a renewed transaction. Our conclusion with respect to the equities necessarily lightens the burden on the FTC to show likelihood of success on the merits, a burden which the FTC has met here.

III. Conclusion

It is important to emphasize the posture of this case. We do not decide whether the FTC will ultimately prove its case or whether the defendants' claimed efficiencies will carry the day.[26] Our task is to review the district court's order to determine whether, under section 13(b), preliminary injunctive relief would be in the public interest. We have considered the FTC's likelihood of success on the merits. We have weighed the equities. We conclude that the FTC has raised serious and substantial questions. We also conclude that the public equities weigh in favor of preliminary injunctive relief and therefore that a preliminary injunction would be in the public interest. Accordingly, we reverse the district court's denial of preliminary injunctive relief and remand the case for entry of a preliminary injunction pursuant to section 13(b) of the Federal Trade Commission Act.

So ordered.

All Citations

246 F.3d 708, 345 U.S.App.D.C. 364, 2001-1 Trade Cases P 73,243

Footnotes

1 The facts as set forth herein are based on the district court's factual findings and the record material submitted by the parties.

2 Product volume in retail stores throughout the country is measured by the product's All Commodity Volume (ACV). Gerber's near 100 per cent ACV is impressive because virtually all supermarkets stock at most two brands of baby food. In at least one area of the country as many as 80 per cent of supermarket retailers stock only Gerber.

3 Although Heinz and Beech–Nut introduced evidence showing that in areas that account for 80% of Beech–Nut sales, Heinz has a market share of about 2% and in areas that account for about 72% of Heinz sales, Beech–Nut's share is about 4%, the FTC introduced evidence that Heinz and Beech–Nut are locked in an intense battle at the wholesale level to gain (and maintain) position as the second brand on retail shelves.

4 Section 18a requires pre-merger notification for a merger in which either the acquiring or the acquired firm has total net sales or assets of at least $10 million and the other firm has annual sales or total assets of at least $100 million. The

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acquirer must have at least 15 per cent or $15 million worth of the target firm's voting securities or assets. 15 U.S.C. § 18a(a). Filers must disclose specific financial and market data and pay a filing fee.

5 Section 13(b) of the FTCA provides that "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, ... a preliminary injunction may be granted." 15 U.S.C. § 53(b).

6 In *Beatrice Foods,* two members of the court, writing separately from a denial of *en banc* review, included the quoted language from an unpublished judgment and memorandum issued earlier in the litigation.

7 To rebut the defendants may rely on "[n]onstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences" such as "ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition." *Kaiser Aluminum & Chem. Corp. v. FTC,* 652 F.2d 1324, 1341 (7th Cir.1981). In addition, the defendants may demonstrate unique economic circumstances that undermine the predictive value of the government's statistics. *See* *United States v. General Dynamics Corp.,* 415 U.S. 486, 506–10, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974) (fundamental changes in structure of coal market made market concentration statistics inaccurate predictors of anticompetitive effect); *see also* *University Health,* 938 F.2d at 1218.

8 A "horizontal merger" involves firms selling the same or similar products in a common geographical market.

9 "The FTC and the Department of Justice, as well as most economists, consider the measure superior to such cruder measures as the four-or eight-firm concentration ratios which merely sum up the market shares of the largest four or eight firms." *PPG,* 798 F.2d at 1503. The Department of Justice and the FTC rely on the HHI in evaluating proposed horizontal mergers. *See* United States Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* §§ 1.5, 1.51 (1992), as revised (1997). The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. For example, a market with ten firms having market shares of 20%, 17%, 13%, 12%, 10%, 10%, 8%, 5%, 3% and 2% has an HHI of 1304 ($20^2 + 17^2 + 13^2 + 12^2 + 10^2 + 10^2 + 8^2 + 5^2 + 3^2 + 2^2$). If the firms with 13% and 5% market shares were to merge, the HHI would increase by 130 points, expressed by the formula 2ab, which is derived from $(a+b)^2$ or $a^2 + 2ab + b^2$. Under the Merger Guidelines a market with a postmerger HHI above 1800 is considered "highly concentrated" and mergers that increase the HHI in such a market by over 50 points "potentially raise significant competitive concerns." *Id.* at § 1.51. Mergers "producing an increase in the HHI of more than 100 points [in such markets] are [presumed] likely to create or enhance market power or facilitate its exercise." *Id*. Although the Merger Guidelines are not binding on the court, they provide "a useful illustration of the application of the HHI." *PPG,* 798 F.2d at 1503 n. 4.

10 To determine the HHI score the district court first had to define the relevant market. The court defined the product market as jarred baby food and the geographic market as the United States. *H.J. Heinz,* 116 F.Supp.2d at 195. The parties do not challenge the court's definition.

11 The FTC argues that this finding alone—that it is certain to establish a prima facie case—entitles it to preliminary injunctive relief under *PPG.* We disagree with the Commission's reading of *PPG*. In *PPG,* the Commission appealed the district court's denial of its request for a preliminary injunction to prevent PPG Industries, the world's largest producer of glass aircraft transparencies, from acquiring Swedlow, Inc., the world's largest manufacturer of acrylic aircraft transparencies. 798 F.2d at 1502. After defining the relevant market and determining market share, the district court found that the merger would significantly increase the concentration in an already highly concentrated market. It also "found high market-entry barriers that would prolong high market concentration." *Id.* at 1503. On appeal, this court stated: "There is no doubt that the pre-and post-acquisition HHI's and market shares found in this case entitle

the Commission to some preliminary relief." *Id.* This statement came, however, in the context of a case in which the appellants offered no rebuttal (other than the observation of rapid and continuing technological changes in the industry) to the presumption generated by the market concentration data on which the FTC based its prima facie showing. *Id*. at 1506. The court then noted the rule established in *Weyerhaeuser* that the FTC is entitled to a "presumption in favor of a preliminary injunction when [it] establishes a strong likelihood of success on the merits." *Id.* at 1507.

12 The Supreme Court has cautioned that statistics reflecting market share and concentration, while of great significance, are not conclusive indicators of anticompetitive effects. *See* *General Dynamics,* 415 U.S. at 498, 94 S.Ct. 1186; *Brown Shoe,* 370 U.S. at 322 n. 38, 82 S.Ct. 1502 ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger."). In *General Dynamics* the Supreme Court held that the market share statistics the government used to seek divestiture of the merged firm were insufficient because, in failing to take into account the acquired firm's long-term contractual commitments (coal contracts), the statistics overestimated the acquired firm's ability to compete in the relevant market in the future. *General Dynamics,* 415 U.S. at 500–504, 94 S.Ct. 1186.

13 Barriers to entry are important in evaluating whether market concentration statistics accurately reflect the pre- and likely postmerger competitive picture. *Cf.* *Baker Hughes,* 908 F.2d at 987. If entry barriers are low, the threat of outside entry can significantly alter the anticompetitive effects of the merger by deterring the remaining entities from colluding or exercising market power. *See* *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 532–33, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973); *Baker Hughes,* 908 F.2d at 987 ("In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time."); Horizontal Merger Guidelines, *supra,* § 3.0 ("A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels."). Low barriers to entry enable a potential competitor to deter anticompetitive behavior by firms within the market simply by its ability to enter the market. *FTC v. Procter & Gamble Co.,* 386 U.S. 568, 581, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967) ("It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market."). Existing firms know that if they collude or exercise market power to charge supracompetitive prices, entry by firms currently not competing in the market becomes likely, thereby increasing the pressure on them to act competitively. *See* *Baker Hughes,* 908 F.2d at 988; *Byars v. Bluff City News Co.,* 609 F.2d 843, 851 n. 19 (6th Cir.1979).

14 There are at least ten metropolitan areas in which Heinz and Beech–Nut both have more than a 10 per cent market share and their combined share exceeds 35 per cent. PX 781 at Ex. 1B.

15 Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in nature or use and the degree to which buyers are willing to substitute those similar products for one another. *See* *E.I. du Pont de Nemours,* 351 U.S. at 393, 76 S.Ct. 994.

16 Fixed trade spending consists of "slotting fees," "pay-to-stay" arrangements, new store allowances and other payments to retailers in exchange for shelf space and desired product display. *H.J. Heinz,* 116 F.Supp.2d at 197. Variable trade spending includes payments to retailers tied to sales volume and intended to insure a specific sales volume and lower shelf price. *Id*.

17 Although the merger's effects on the wholesale market for baby food are important to a determination of whether the merger is likely to reduce competition in the baby food market overall, we reject the FTC's argument here that the

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"wholesale competition" between Heinz and Beech–Nut is an entirely distinct "line of commerce" within the meaning of section 7 of the Clayton Act such that it must be analyzed independently from "retail competition." The Congress amended section 7 in 1950 "to make the measure of anticompetitive acquisitions the extent to which they lessened competition 'in any line of commerce,' rather than the extent to which they lessened competition 'between' the two companies." *Citizen Publishing Co. v. United States,* 394 U.S. 131, 137 n. 3, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969). Courts interpret "line of commerce" as synonymous with the relevant product market. *See* *General Dynamics,* 415 U.S. at 510, 94 S.Ct. 1186; *Falstaff Brewing,* 410 U.S. at 531–32, 93 S.Ct. 1096. The district court defined only one market—jarred baby food sold throughout the line of commerce in the United States. Thus, the proper "line of commerce" for analysis in this case is the *overall* market for jarred baby food, which includes both retail and wholesale levels. At this point in the proceedings, the wholesale market cannot be separated out for analysis without regard to the merger's effect on other levels of competition.

18 In *Procter & Gamble Co.,* 386 U.S. at 580, 87 S.Ct. 1224, the Supreme Court stated that "[p]ossible economies cannot be used as a defense to illegality" in section 7 merger cases. The issue is, however, not a closed book. *See* *Staples,* 970 F.Supp. at 1088 (collecting cases). Areeda and Turner explain that "[i]n interpreting the *Clorox* language, moreover, observe that the court referred only to 'possible' economies and to economies that 'may' result from mergers that lessen competition. To reject an economies defense based on mere possibilities does not mean that one should reject such a defense based on more convincing proof." 4 Phillip Areeda & Donald Turner, *Antitrust Law* ¶ 941b, at 154 (1980). They conclude that "[t]he Court's brief and unelaborated language [in *Clorox*] cannot reasonably be taken as a definitive disposition of so important and complex an issue as the role of economies in analyzing legality of a merger." *Id.*

19 In addition, the district court described Heinz's distribution network as much more efficient than Beech–Nut's. *H.J. Heinz,* 116 F.Supp.2d at 199. It failed to find, however, a significant diseconomy of scale in distribution from which either Heinz or Beech–Nut suffers. 4A Areeda, *et al., supra,* ¶ 975e1, at 73. In other words, although Beech–Nut has an inefficient distribution system, it can make that system more efficient without merger. Heinz's own efficient distribution network illustrates that a firm the size of Beech–Nut does not need to merge in order to attain an efficient distribution system.

20 The Horizontal Merger Guidelines explain that "merging firms must substantiate efficiency claims so that the Agency 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 or speculative or otherwise cannot be verified by reasonable means." Horizontal Merger Guidelines, *supra,* § 4. Regarding the types of efficiencies asserted here, the Guidelines state:

> The Agency has 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 marginal cost of production, are more likely to be susceptible to verification, merger-specific, and substantial, 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.

Id.

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21 For example, a 5 cent piece of bubble gum introduced with a 90% ACV could appear as a failure on the graph because of low revenue but nonetheless be profitable. On the other hand, a high priced grocery product introduced with the same ACV could generate a lot of revenue (and thus appear as a "success" on the graph) yet be unprofitable.

22 The graph evidence is also not useful unless we know the "sunk" costs in bringing the product to market and the manufacturer's fixed and variable costs in producing the product. Sunk costs are costs that have already been incurred such as research and development and promotional expenses, including brand name development. *See* Henry N. Butler, *Economic Analysis for Lawyers* 935 (1998). Fixed costs refer to those expenses that do not vary with output and will be incurred as long as the firm continues in business. Variable costs are those that change with the rate of output such as wages paid to workers and payments for raw materials. *See id*. at 920, 936; E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and its Economic Implications* 19–21 (3d ed.1998).

23 In an oligopolistic market characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions. *See* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); *see also* Jesse W. Markham, *The Nature and Significance of Price Leadership,* 41 Amer. Econ. Rev. 891 (1951); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach,* 21 Stan. L.Rev. 1562, 1582 (1969); Donald Arthur Washburn, *Price Leadership,* 64 Va. L.Rev. 691, 693–697 (1978). In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger. *See* Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value* 46–55 (8th ed.1962).

24 Contrary to the appellees' claims, nothing in *Baker Hughes* suggests otherwise. In that case, the sophisticated nature of the purchasers of the industry's product and the "volatile and shifting" nature of each firm's market share rendered the HHI figures an unreliable measure of concentration. *See* 908 F.2d at 986–87. No such circumstances exist in this case.

25 The district court noted that "[t]he parties have not stressed private equities" but the court nonetheless considered them. It concluded that while "the corporate interests of Heinz and Milnot and especially the interests of Dearborn Capital Partners LP, which presumably acquired Milnot through a leveraged buyout with the purpose and intent of selling its interest at a profit" were important to the private parties, they should not affect the outcome of the proceeding. *H.J. Heinz,* 116 F.Supp.2d at 200 n. 9. We agree. "While it is proper to consider private equities in deciding whether to enjoin a particular transaction, we must afford such concerns little weight, lest we undermine section 13(b)'s purpose of protecting the 'public-at-large, rather than the individual private competitors.' " *University Health,* 938 F.2d at 1225 (citation omitted); *cf.* *Weyerhaeuser,* 665 F.2d at 1083 ("Private equities do not outweigh effective enforcement of the antitrust laws. When the Commission demonstrates a likelihood of ultimate success, a countershowing of private equities alone would not suffice to justify denial of a preliminary injunction barring the merger.").

26 "The most difficult mergers to assess may be those that combine both negative and positive effects: creating market power that increases the risk of oligopolistic pricing while at the same time creating efficiencies that reduce production or marketing costs." Sullivan & Grimes, *supra,* § 9.1, at 511.

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190 F.Supp.3d 100
United States District Court, District of Columbia.

FEDERAL TRADE COMMISSION, Commonwealth of Pennsylvania, and The District of Columbia, Plaintiffs,
v.
STAPLES, INC. and Office Depot, Inc., Defendants.

Civil Action No. 15-2115 (EGS)
|
Signed May 10, 2016
|
Filed May 17, 2016

Synopsis
Background: Federal Trade Commission (FTC), Commonwealth of Pennsylvania, and District of Columbia sought preliminary injunction, under the Federal Trade Commission Act, to enjoin proposed merger between first and second largest office supply companies in United States, pending final disposition of administrative proceedings to determine whether merger would substantially lessen competition in violation of Section 7 of the Clayton Act.

Holdings: The District Court, Emmet G. Sullivan, J., held that:

sale and distribution of consumable office supplies to large business to business customers was relevant market;

exclusion of ink, toner, and "beyond office supplies" (BOSS) from relevant market was warranted;

analysis of data collected from companies that purchased office supplies from companies was reasonable method of approximating companies' share in relevant market;

merger between companies would result in undue concentration in relevant market;

companies' allegation that merger would not have anti-competitive effect because online retailer's new office supply business would sufficiently restore competition lost as result of merger was not supported by sufficient evidence; and

public interests weighed in favor of granting FTC's motion for preliminary injunction.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

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MEMORANDUM OPINION

Emmet G. Sullivan, United States District Judge

I. Introduction

Drawing an analogy to the fate of penguins whose destinies appear doomed in the face of uncertain environmental changes, Defendant. Staples Inc. ("Staples") and Defendant Office Depot, Inc. ("Office Depot") (collectively "Defendants") argue they are like "penguins on a melting iceberg," struggling to survive in an increasingly digitized world and an office-supply industry soon to be revolutionized by new entrants like Amazon Business. Prelim. Inj. Hrg Tr. ("Hrg Tr.") 60:15 (Opening Statement of Diane Sullivan, Esq.). Charged with enforcing antitrust laws for the benefit of American consumers, the Federal Trade Commission ("FTC") and its co-plaintiffs, the. Commonwealth of Pennsylvania and the District of Columbia, commenced this action in an effort to block Defendants' proposed merger and alleged that the merger would "eliminat[e] direct competition between Staples and Office Depot" resulting in "significant harm" to large businesses that purchase office supplies for their own use. Compl., Docket No. 3 at ¶ 4. The survival of Staples' proposed acquisition of Office Depot hinges on two critical issues: (1) the reliability of Plaintiffs' market definition and market share analysis; and (2) the likelihood that the competition resulting from new market entrants like Amazon Business will be timely and sufficient to restore competition lost as a result of the merger.

Subsequent to Defendants' announcement in February 2015 of their intent to ***110** merge, the FTC began an approximate year-long investigation into the $6.3 billion merger and its likely effects on competition. Defs.' Proposed Findings of Fact and Conclusions of Law ("Defs.' FOF") ¶ 58. On December 7, 2015, by a unanimous vote, the FTC Commissioners found reason to believe that the proposed merger would substantially reduce competition in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Compl. ¶ 34. That same day, Plaintiffs commenced this action seeking a preliminary injunction pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53 (b) to enjoin the proposed merger until the FTC's administrative proceedings are complete. Pls.' Mot. Prelim. Inj., Docket No. 5 at 1.

This antitrust case involved an extraordinary amount of work. As a result of the 'FTC's investigation and seven weeks of discovery, more than fifteen million pages of documents were produced, more than seventy depositions around the country were taken, and five expert reports were completed. Defs.' FOF ¶ 60. The Court presided over an evidentiary hearing and heard testimony from ten witnesses from March 21, 2016 to April 5, 2016. *Id.* Nearly 4,000 exhibits were admitted into evidence. *Id.* ¶ 61. Despite onerous time constraints created by the nature of this unique litigation, lawyers for the parties and non-parties completed this work with civility and professionalism while demonstrating the highest level of sophistication and competency in their written and oral advocacy. [1] The Court commends the lawyers and the paralegals for their outstanding work. [2]

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At the conclusion of Plaintiffs' case, Defendants chose not to present any fact or expert witnesses, arguing that Plaintiffs failed to establish their *prima facie* case. Hrg Tr. 2889:20-25 (Ms. Sullivan: "It's going to be the defendants' position that we're going to rest on the record as it exists, so there'll be no need for additional evidence or rebuttal."). And, although entitled to a trial on the merits before an Administrative Law Judge at the FTC, Defendants indicated that they will not proceed with the merger if Plaintiffs' motion is granted. Hrg Tr. at 3034:18-22; Defs.' FOF ¶ 17.[3]

Upon consideration of the evidence presented during the hearing, the parties' proposed findings of fact and conclusions of law, and the relevant legal authority, the Court concludes that the Plaintiffs have established their *prima facie* case by demonstrating that Defendants' proposed merger is likely to reduce competition in the Business to Business ("B-to-B") contract space for office supplies. Defendants' response relies in large part on the prospect ***111** that Amazon Business will replace any competition lost because of the merger. Although Amazon Business may transform how some businesses purchase office supplies, the evidence presented during the hearing fell short of establishing that Amazon Business is likely to restore lost competition in the B-to-B space in a timely and sufficient manner. For the reasons discussed in Section IV *infra*, Plaintiffs' Motion for Preliminary Injunction is **GRANTED**.[4]

In Section II of this Memorandum Opinion, the Court sets forth important background information, including many critical findings of fact underpinning the Court's analysis. Section III establishes the relevant legal standard pursuant to the Clayton Act. The Court's analysis in Section IV proceeds as follows: (A) legal principles considered when defining a relevant market; (B) application of legal principles to Plaintiffs' market definition; (C) Defendants' arguments in opposition to Plaintiffs' alleged market; (D) conclusions regarding the relevant market; (E) analysis of the Plaintiffs' arguments relating to the probable effects on competition based on market share calculations; (F) Defendants' arguments in opposition to Plaintiffs' market share calculations; (G) conclusions regarding Plaintiffs' market share; (H) Plaintiffs' evidence of additional harm; (I) Defendants' response to Plaintiffs' *prima facie* case; and (J) weighing the equities. In Section V, the Court concludes that the proposed merger must be enjoined due to the likelihood of anticompetitive effects that would result were the merger to be consummated.

II. Background

A. Overview

Every day millions of employees throughout the United States utilize office supplies in the course of their daily work. To sustain employees' use of pens, Post-it notes and paperclips, large companies purchase more than two billion dollars of office supplies from Defendants annually. Hrg Tr. 10:23-24, (Opening Statement of Tara Reinhart, Esq.). Companies that purchase office supplies for their own use operate in what the industry refers to as the B-to-B space. B-to-B customers prefer to work with one vendor that can meet all of the companies' office supply needs. Hrg Tr. at 204:1-20 (Gregg O'Neill, Category Manager for Workplace Services at American Electric Power ("AEP") testifying that because the company spends two million dollars on office supplies, its leverage with one vendor is greater than it would be if it utilized twenty vendors); *Id.* at 1617:1-1618:4 (Leo J. Meehan, III, CEO of WB Mason testifying about the benefits of utilizing one primary vendor, including lower prices, growth rebates, assistance with controlling leakage, etc.).

To establish a primary vendor relationship, companies in the B-to-B space request proposals from national suppliers like Staples and Office Depot. *See e.g.*, Hrg Tr. (AEP) 194: 10-195:16. The request for proposal ("RFP") process typically results in a multi-year contract with a primary vendor that guarantees prices for specific items, includes an upfront lump-sum rebate, and a host of other services. Pls.' Proposed Findings of Fact and Conclusions of Law ("Pls.' FOF") ¶¶ 41-46. Because the office supplies consumed by ***112** large companies are voluminous, such companies typically pay only half the price for basic supplies as compared to the average retail consumer. Plaintiffs' Exhibit ("PX") 06100, Pls.' Expert Dr. Carl Shapiro's Report ("Shapiro Report") at 019.[5]

B. Defendants Staples and Office Depot

Established as big-box retail stores in the 1980s, Defendants are the primary B-to-B office supply vendors in the United States today. Hrg Tr. 59. Plaintiffs allege that Defendants sell and distribute upwards of seventy-nine percent of office supplies in the B-to-B space. Hrg Tr. 20-21. Since the 2013 merger of Office Depot and Office Max, Defendants consistently engage in head-to-head competition with each other for B-to-B contracts. *See, e.g.*, PX04322 Staples ("SPLS") 001 (identifying only Office Depot as "Key Competitor[ ]").

Staples and Office Depot are publicly traded corporations. Compl. ¶¶ 29 and 30. Staples is the largest office supplier of consumable office supplies to large B-to-B customers in the United States and operates in three business segments: (1) North American stores and online sales; (2) North American commercial; and (3) international operations. *Id.* ¶ 29. In fiscal year 2014, Staples generated $22.5 billion in sales, with more than half of all sales coming from office supplies. *Id.* In fiscal year 2013, 34.8 percent of Staples' total revenue came from the North American commercial segment. *Id.*

Office Depot is the second largest office supplier of consumable office supplies to large B-to-B customers in the United States. *Id.* ¶ 30. Like Staples, Office Depot operates in similar business segments: (1) North America retail; (2) North American business solutions; and (3) an international division. *Id.* In fiscal year 2014, Office Depot made $16.1 billion in revenue, with nearly half of those sales coming from office supplies and 37.4 percent of overall sales from B-to-B business. *Id.*

Staples' "commercial" and Office Depot's "business solutions" segments focus on the B-to-B contracts at issue in this case. While both companies serve businesses of all sizes, this case focuses on large B-to-B customers, defined by Plaintiffs as those that spend $500,000 or more per year on office supplies. Hrg Tr. 30:4-6. Approximately 1200 corporations in the United States are included in this alleged relevant market. Hrg Tr. 2473:17-18.

C. FTC Investigation

On February 4, 2015, Defendants entered into a merger agreement in which Staples would acquire Office Depot for a combination of cash and Staples' stock. Compl. ¶ 32. Shortly after the merger was announced, the FTC launched an investigation into the competitive effects of the proposed merger. Defs.' FOF ¶ 58. Ultimately, the FTC commissioners filed an administrative complaint before an FTC Administrative Law Judge ("ALJ") and also authorized the Plaintiffs to seek a preliminary injunction to prevent the Defendants from consummating the merger to maintain the status quo pending a full hearing on the merits. Compl. ¶ 34. Plaintiffs filed this suit the same day. Pls.' Mot. Prelim. Inj.

***113 D. Regional and local vendors**

Regional and local office supply vendors exist throughout the country. Hrg Tr. 84:2. However, they typically do not bid for large B-to-B contracts. Hrg Tr. 907:7-14 (James Moise, Senior Vice President and Chief Sourcing Officer for Fifth Third Bank testifying that regional suppliers Office Essentials and WB Mason declined to bid on their RFP); Hrg Tr. 1941:18-20 (Leonard Allen Wright, Vice President of Strategic Sourcing for Health Trust Purchasing Group ("HPG") noting that neither WB Mason nor MyOfficeProducts could meet HPG's needs nationwide). When regional office supply vendors compete for large RFPs, they are rarely awarded the contract. PX02138 (Sears (Realogy) Dep. 156: 15-21, 191:6-17) ("... I was concerned about [WB Mason's] ability to service the entire country ....").

WB Mason is a regional supplier that targets its business to thirteen northeastern states plus the District of Columbia (known in the industry as "Masonville"). *Id.* WB Mason "ranks a distant third" behind Staples and Office Depot. PX03021-002, Meehan Decl. ¶ 6. In fiscal year 2015, WB Mason generated approximately $1.4 billion in total revenue. *Id.* WB Mason has no customers

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in the Fortune 100 and only nine in the Fortune 1000. Hrg Tr. 1611:21-1611:24. According to WB Mason's CEO, Leo Meehan, "Staples and Office Depot are the only consumable office supplies vendors that meet the needs of most large B2B customer[s] across the entire country, or even most of it." Meehan Decl. ¶ 19.

WB Mason recently abandoned a plan to expand nationwide. Hrg Tr. 1672 (Mr. Meehan: "And then I just got cold feet about it [redacted text].") When asked during the hearing if WB Mason would accept a divestiture of cash assets from the Defendants to cover the expenses of nationwide expansion, Mr. Meehan would not commit to accepting such a proposal. *Id.* 1790 ("Mr. I don't know if I would. That's a big challenge.").

E. Amazon Business

Amazon.com Inc.'s ("Amazon") effort to compete in the office supply industry, including the B-to-B space, is Amazon Business. Amazon began exploring how to target companies' procurement of office supplies more than fourteen years ago. PX02166, Mendelson Dep. 178:24-179:7; Hrg Tr. 525:10-526:10. In 2002, Amazon launched an "office product store at Amazon.com," a cooperative effort with Office Depot. Mendelson Dep. 178:24-179:7. In 2007, Amazon launched the All Business Center. *Id.* 175:18-176:21. In April 2012, Amazon launched Amazon Supply, a marketplace for selling a variety of products, including office supplies to business customers. Hrg Tr. 524:3-4.

Amazon Business was launched just over one year ago, in April 2015. Amazon Business is a "top priority" for Amazon, Hrg Tr. 659:17-20, and a "must win" opportunity. *Id.* 660:8-14. In 2016, Amazon Business forecasts making $[redacted text] profit. Defendants' Exhibit ("DX") 05038. By 2020, Amazon Business's forecasts estimate $[redacted text] revenue, [redacted text] percent ($[redacted text]) coming from the sale of basic office supplies. Hrg Tr. 719:25-720:3, 856: 5-16. [redacted text] Hrg Tr. 573:3-574:24.

Although in its infancy, Amazon's vision is for Amazon Business to be the "preferred marketplace for all professional, business and institutional customers worldwide." DX00030 at 1. Amazon Business has several undisputed strengths: tremendous brand recognition, a user-friendly marketplace, cutting edge technological innovation, ***114** and global reach. [6] Hrg Tr. 663:13 (Vice President of Amazon Business, Prentis Wilson: "We actually don't worry a lot about our competitors. Our focus has been on serving our customers."). Amazon Business also has several weaknesses with regard to its entry into the B-to-B space. One weakness is that Amazon Business is inexperienced in the RFP process. Amazon Business has not bid on many RFPs and has yet to win a primary vendor contract. Hrg Tr. 551:11-13 ("Q: Has Amazon Business ever won an RFP for the role as primary supplier of office supplies? A: No."). Amazon Business' marketplace model is also at odds with the B-to-B industry because half of the sales made through the marketplace are from independent third-party sellers over whom Amazon Business has no control. Hrg Tr. 843: 7-9 ("Q: You have no plans to force the third parties to offer particular prices? A: No, we'll never do that. No.").

III. Legal Standards

A. The Clayton Act

Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly," in any "line of commerce or in any activity affecting commerce in any section of the country." 15 U.S.C. § 18. When the FTC has "reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act," it may seek a preliminary injunction under Section 13(b) of the FTC Act to "prevent a merger pending the Commission's administrative adjudication of the merger's legality." *F.T.C. v. Staples, Inc.*, 970 F.Supp. 1066, 1070 (D.D.C.1997) (citing 15 U.S.C. § 53(b)); *see also* *Brown Shoe v. U.S.*, 370 U.S. 294, 317, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) ("Congress saw the process of concentration in American business as a dynamic force; it sought to ensure the Federal Trade Commission and

the courts the power to brake this force ... before it gathered momentum.") "Section 13(b) provides for the grant of a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *F.T.C. v. Heinz Co.*, 246 F.3d 708, 714 (D.C.Cir.2001) (citing 15 U.S.C. § 53(b)).

B. Section 13(b) Standard for Preliminary Injunction

The standard for a preliminary injunction under Section 13(b) requires plaintiffs to show: (1) a likelihood of success on the merits; and (2) that the equities tip in favor of injunctive relief. *FTC v. Cardinal Health*, 12 F.Supp.2d 34, 44 (D.D.C.1998). [7] To establish a likelihood of success on the merits, the government must show that "there is a reasonable probability that the challenged transaction will substantially impair competition." *Staples*, 970 F.Supp. at 1072 (citation omitted) (internal quotation marks omitted). "Proof of actual anticompetitive effects is not required; instead, the FTC must show an appreciable danger of future coordinated ***115** interaction based on predictive judgment." *F.T.C. v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 116 (D.D.C.2004) (internal quotations omitted).

The Court's task, therefore, is to "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger 'may be substantially to lessen competition, or tend to create a monopoly' in violation of Section 7 of the Clayton Act.'" *Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18). This standard is satisfied if the FTC raises questions going to the merits "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Id.* at 714–15 (citations omitted) (internal quotation marks omitted). As reflected by this standard, Congress' concern regarding potentially anticompetitive mergers was with "probabilities, not certainties." *Brown Shoe Co.*, 370 U.S. at 323, 82 S.Ct. 1502 (other citations omitted).

In sum, the Court "must balance the likelihood of the FTC's success against the equities, under a sliding scale." *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C.Cir.2008). The equities or "public interest" in the antitrust context include: "(1) the public interest in effectively enforcing antitrust laws, and (2) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial." *Sysco,* 113 F.Supp.3d at 86.

Nevertheless, "[t]he issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy." *F.T.C. v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C.Cir.1980)(citations omitted) (internal quotation marks omitted). The government must come forward with rigorous proof to block a proposed merger because "the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." *Id.*

C. *Baker Hughes* Burden-Shifting Framework

In *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982–83 (D.C.Cir.1990), the U.S. Court of Appeals for the D.C. Circuit established a burden-shifting framework for evaluating the FTC's likelihood of success on the merits. *See* *Heinz*, 246 F.3d at 715. The government bears the initial burden of showing the merger would result in "undue concentration in the market for a particular product in a particular geographic area." *Baker Hughes*, 908 F.2d at 982. Showing that the merger would result

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in a single entity controlling such a large percentage of the relevant market so as to significantly increase the concentration of firms in that market entitles the government to a presumption that the merger will substantially lessen competition. *Id.*

The burden then shifts to the defendants to rebut the presumption by offering proof that "the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975) (alterations in original)). "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data ***116** underlying the initial presumption in the government's favor." *Id.*

"If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* at 983. "[A] failure of proof in any respect will mean the transaction should not be enjoined." *Arch Coal*, 329 F.Supp.2d at 116. The court must also weigh the equities, but if the FTC is unable to demonstrate a likelihood of success on the merits, the equities alone cannot justify an injunction. *Id.*

IV. Discussion

The Court's analysis proceeds as follows: (A) legal principles considered when defining a relevant market; (B) application of legal principles to Plaintiffs' market definition; (C) Defendants' arguments in opposition to Plaintiffs' alleged market; (D) conclusions regarding the relevant market; (E) analysis of the Plaintiffs' arguments relating to the probable effects on competition based on market share calculations; (F) Defendants' arguments in opposition to Plaintiffs' market share calculations; (G) conclusions regarding Plaintiffs' market share; (H) Plaintiffs' evidence of additional harm; (I) Defendants' response to Plaintiffs' *prima facie* case; and (J) weighing the equities.

A. Legal principles considered when defining a relevant market

As discussed *supra*, the burden is on the Plaintiffs to show that the merger would result in a single entity controlling such a large percentage of the relevant market that concentration is significantly increased and competition is lessened. *See e.g.* *Baker Hughes*, 908 F.2d at 982. To consider whether the proposed merger may have anticompetitive effects, the Court must first define the relevant market based on evidence proffered at the evidentiary hearing. *See* *United States v. Marine Bancorp.*, 418 U.S. 602, 618, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974) (Market definition is a "'necessary predicate' to deciding whether a merger contravenes the Clayton Act."). Examination of the particular market, including its structure, history and probable future, is necessary to "provide the appropriate setting for judging the probable anticompetitive effects of the merger." *F.T.C. v. Arch Coal, Inc.*, 329 F.Supp.2d at 116 (quoting *Brown Shoe* at 322 n. 28, 82 S.Ct. 1502); *see also* *United States v. General Dynamics*, 415 U.S. 486, 498, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974). "Defining the relevant market is critical in an antitrust case because the legality of the proposed merger [ ] in question almost always depends on the market power of the parties involved." *Cardinal Health, Inc.*, 12 F.Supp.2d at 45.

Two components are considered when defining a relevant market: (1) the geographic area where Defendants compete; and (2) the products and services with which the defendants' products compete. *Arch Coal, Inc.*, 329 F.Supp.2d at 119. The parties agree that the United States is the relevant geographic market. Hrg Tr. (Shapiro) 2151:23-2152:4; *see also Orszag* Dep. 155:15-19. [8] The parties vigorously disagree, however, about how the relevant product market should be defined.

The Supreme Court in *Brown Shoe* established the basic rule for defining ***117** a product market: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. In other words, a product market includes all goods that are reasonable substitutes, even where the products are not entirely the same. Two factors contribute to an analysis of whether goods are "reasonable substitutes": (1) functional interchangeability; and (2) cross-elasticity of demand. *See e.g., Sysco*, 113 F.Supp.3d at 25–26.

As the following discussion demonstrates, the concepts of cluster and targeted markets are critical to defining the market in this case.

a. Consumable office supplies as cluster market

Cluster markets allow items that are not substitutes for each other to be clustered together in one antitrust market for analytical convenience. Shapiro Report at 007 (noting that cluster markets are "commonly used by antitrust economists.") The Supreme Court has made clear that "[w]e see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Here, Plaintiffs allege that items such as pens, file folders, Post-it notes, binder clips, and paper for copiers and printers are included in this cluster market. Compl. ¶¶ 36-37. Although a pen is not a functional substitute for a paperclip, it is possible to cluster consumable office supplies into one market for analytical convenience. *ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559, 565–68 (6th Cir.2014). Defining the market as a cluster market is justified in this case because "market shares and competitive conditions are likely to be similar for the distribution of pens to large customers and the distribution of binder clips to large customers." Shapiro Report at 007; *see also* PX02167 (Orszag Dep. 91:11-15) ("So, for example, pens may not often be substitutes for notebooks in the context of this case, but a cluster market would be the aggregation of those two and then the analysis of those together for, as we talked about earlier, analytical simplicity.").

b. Large B-to-B customers as target market

Another legal principle relevant to market definition in this case is the concept of a "targeted" or "price discrimination" market. According to the Merger Guidelines:

> When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others. [...]
>
> When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away.

U.S. Dep't of Justice & FTC Horizontal Merger Guidelines § 3 (2010) (hereinafter Merger Guidelines). [9]

Defining a market around a targeted consumer, therefore, requires finding ***118** that sellers could "profitably target a subset of customers for price increases ..." *See Sysco*, 113 F.Supp.3d at 38 (citing Merger Guidelines Section 4.1.4.). This means that

there must be differentiated pricing and limited arbitrage. Dr. Shapiro concluded that arbitrage is limited here because "it is not practical or attractive for a large customer to purchase indirectly from or through smaller customers." *Id.*

B. Application of relevant legal principles to Plaintiffs' market definition

The concepts of cluster and targeted markets inform the Court's critical consideration when defining the market in this case: the products and services with which the Defendants' products compete. *Arch Coal, Inc.*, 329 F.Supp.2d at 119. The parties vigorously disagree on how the market should be defined. As noted *supra*, Plaintiffs argue that the relevant market is a cluster market of "consumable office supplies" which consists of "an assortment of office supplies, such as pens, paper clips, notepads and copy paper, that are used and replenished frequently." Compl. ¶¶ 36-37. Plaintiffs' alleged relevant market is also a targeted market, limited to B-to-B customers, specifically large B-to-B customers who spend $500,000 or more on office supplies annually. Hrg Tr. 30:4-6. [10]

Defendants, on the other hand, argue that Plaintiffs' alleged market definition is wrong because it is a "gerrymandered and artificially narrow product market limited to *some*, but not all, consumable office supplies sold to only the most powerful companies in the world." Defs.' FOF ¶ 4 (emphasis in original). In particular, Defendants insist that ink and toner must be included in a proper definition of the relevant product market. *Id.* ¶ 101. Defendants also argue that no evidence supports finding sales to large B-to-B customers as a distinct market. *Id.* ¶ 77.

1. *Brown Shoe* "Practical Indicia"

The *Brown Shoe* practical indicia support Plaintiffs' definition of the relevant product market. The *Brown Shoe* "practical indicia" include: (1) industry or public recognition of the market as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes; and (7) specialized vendors. *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. Courts routinely rely on the *Brown Shoe* factors to define the relevant product market. *See, e.g.* *Staples*, 970 F.Supp. at 1075–80; *Cardinal Health*, 12 F.Supp.2d at 46–48; *F.T.C. v. Swedish Match*, 131 F.Supp.2d 151, 159–64 (D.D.C.2000); *F.T.C. v. CCC Holdings,* 605 F.Supp.2d 26, 39–44 (D.D.C.2009); *United States v. H & R Block*, 833 F.Supp.2d 36, 51–60 (D.D.C.2011). [11]

The most relevant *Brown Shoe* indicia in this case are: (a) industry or public recognition ***119** of the market as a separate economic entity; (b) distinct prices and sensitivity to price changes; and (c) distinct customers that require specialized vendors that offer value-added services, including: (i) sophisticated information technology (IT) services; (ii) high quality customer service; and (iii) expedited delivery.

a. Industry or public recognition of the alleged market as a separate economic entity

Vendors in the office supply industry identify customers according to how much they spend annually and recognize B-to-B customers as a distinct group. Shapiro Report 006-008. For example, Staples defines "Enterprise" customers as those who spend over $1 million per year, "Commercial" customers as those who spend between $100,000 and $1 million per year, and "mid-market" customers as those who spend between $6,000 and $100,000 per year. PX04062 (SPLS) at 009; PX04088 (SPLS) at 23. Office Depot maintains similar categories. PX02002 (Calkins, Office Depot ("ODP") IH 85:16-86:7). According to Staples, the $500,000 spend mark is a "threshold" that requires "closer attention" be paid to the customer. PX02153 (Mutschler (SPLS) Dep. 56:11-20).

These examples demonstrate that the industry recognizes large B-to-B customers as a separate economic entity.

b. Distinct prices and a high sensitivity to price changes

Large B-to-B customers solicit RFPs, requests for information ("RFI"), requests for quote ("RFQ"), or similar processes to select their primary office supply vendor. *See e.g.*, Hrg Tr. (AEP) 194:10-195:16; Hrg Tr. (HPG) 1883, 1915:13-1916:18. Through these competitive processes, large B-to-B customers enter into multi-year contracts that typically last for three to five years. Hrg Tr. at 70, 92. Large B-to-B customers generally request prices for all items on their core list of office supplies, particularly those purchased in high volume. Hrg. Tr. (AEP) 207:19-208:10; (Select Medical) 1012:18-25; 1112:14-18. The volume of consumable office supplies purchased by large B-to-B customers allows them to purchase office supplies for half the price paid by the average retail consumer. Shapiro Report at 019.

Multi-year contracts with a primary office supply vendor allow large B-to-B customers to avoid regional price differences and to lock in prices on core items for several years. Hrg Tr. (Select Medical) 1.023:3-7; (HPG) 1929:8-1931:19. B-to-B contracts are not exclusive, which means that B-to-B customers can buy office supplies off contract at any time without penalty. *See e.g.* Hrg Tr. at 411:7-20; 412:9-12; 919:20-25; 1898:24-1900:23. B-to-B customers may seek to amend the items on their core list and re-negotiate the price for those items. PX02100 (Heisroth (SPLS) Dep. 92:1-16). B-to-B customers typically receive a flat percentage discount off published prices for non-core items. Pls.' FOF ¶ 52. Upfront payments and volume discounts also reduce costs for large B-to-B ***120** customers. Hrg Tr. (AEP) 173:1-23; (Meester (Best Buy)) 1320:4-10.

In addition to price, other services are also evaluated, including delivery and information technology capabilities, customer service, and more. Hrg Tr. (AEP) 208:12-22; (HPG) 1914:15-1915:10. After evaluating all proposals and selecting finalists, intense competition between the top two or three bidders ensues. Hrg Tr. (AEP) 209:17-210:3. Vendors naturally seek to charge B-to-B customers the highest price possible, while the B-to-B customers' interest in obtaining the lowest possible price is served by the head-to-head competition among vendors. PX02002 (Calkins (ODP) IH 305:7-306:8). Large B-to-B customers possess a tremendous amount of bargaining power. *See e.g.* Hrg Tr. 404:3-16; 940:20-941:12.

The bargaining power of large B-to-B customers is enhanced by their ability to pit Defendants against each other. For example, in 2015, Staples was in "a dog fight" with Office Depot for [redacted text]'s business, so it offered an additional 1.5 percent volume rebate. PX04064. In November 2014, Staples offered a $[redacted text] upfront payment to win a contract with [redacted text], beating Office Depot's offer of $[redacted text]. PX04034 (SPLS) at 001. In 2014, Office Depot offered [redacted text] a retention incentive of $[redacted text] per year for three years. PX05266 (ODP) at 001. These examples demonstrate that large B-to-B customers are extremely price sensitive.

c. Large B-to-B customers are distinct

In addition to wanting the best price, large B-to-B customers also want the best service. PX02003 (Ringel (SPLS) IH 127:9-11) ("It's not always about the company wanting the lowest price, they want the best service, they want the best services, they want a competitive price, and they want good representation."). This includes sophisticated IT capabilities, personalized customer service, and expedited delivery capabilities. *See e.g.* Hrg Tr. (HPG) 1914:15-1915:10; PX02119 (O'Neill (AEP) Dep.) 262:16-263:5; PX 07006 ([redacted text]) at 012.

i. Sophisticated IT capabilities

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Sophisticated IT capabilities include customizable product catalogs, electronic procurement systems, and punch-out sites. *See e.g.*, Hrg Tr. (McDonalds) 375:25-376:13; (PDME) 1391:7-23. Customized catalogs allow large B-to-B customers to limit the products their employees can purchase in accordance with the specific high-volume items for which they have negotiated the lowest price from their vendor. *See e.g.*, Hrg Tr. (Select Medical) 1067:16-25; 1069:3-1070:4. The "punch out" IT interface enables companies to control ordering, approval, payment and invoicing. Hrg Tr. (WB Mason) 1624:3-1625:20. Such IT capabilities are expensive and are therefore offered by only a select few nationwide vendors. PX03032 (Pfizer Decl. ¶ 9). These capabilities are critical, however, to invoicing in such a way that reduces the administrative burden of processing a high volume of invoices. Hrg Tr. 1624.

In addition to detailed invoicing, large B-to-B customers require utilization reports. *See e.g.*, Hrg Tr. (AEP) 182:1-9; (McDonalds) 376:14-377:9. These reports include data on the products ordered by employees (whether they are core or non-core), the quantity, unit price and delivery location. *Id.* (Best Buy) 1237:7-1238:4. The reports also identify the product purchased by employees at the stock keeping unit ("SKU") level. *Id.* This detailed reporting allows B-to-B customers to track spending and make necessary adjustments in order to decrease off-contract spend and save money. *Id.*

*121 ii. Personalized, high quality customer service

Dedicated customer service experts are another unique feature demanded by large B-to-B contract customers. *See e.g.*, (WB Mason) 1631:18-1633:9. Large B-to-B customers demand an office supply vendor that provides a dedicated account manager. *Id.* (BestBuy) Hrg 1241:14-18; (HPG) 1938:7-13. Account managers for large B-to-B customers are expected to understand the customers' office supply needs. *Id.* (AEP) 187:19-18:14. According to Staples' CEO Ron Sargent, large B-to-B customers require "more high-touch hand holding" from dedicated sales experts. PX02012.

iii. Next day and desktop delivery

The sale and distribution of consumable office supplies to large B-to-B customers, many of whom have locations nationwide, requires the warehousing, sale, and distribution of a wide range of office supplies. Hrg Tr. (HPG) 1907:24-25. Nationwide delivery to dispersed geographic locations is critical for large B-to-B customers. *See e.g.*, Hrg Tr. (Fifth Third Bank) 895:24-896:13. Large B-to-B customers require reliable next-day delivery because they have limited storage space for office supplies. *Id.* (Select Medical) 1082:1-1083:24. Large B-to-B customers also prefer a vendor with the ability to make desktop deliveries because such a service eliminates the need to hire employees to make internal deliveries. Hrg Tr. (Fifth Third Bank) 982:25-983:10, 983:17-984:12. Defendants are the only two office supply vendors that provide nation-wide desktop delivery. *Id.* (WB Mason) 1695:25-1696:5. Defendants tout their nationwide distribution capabilities to differentiate themselves among other office supply vendors. PX 02002 (Calkins (ODP) IH 118:21—119:2); PX04321 (SPLS) at 001; PX04469 (SPLS) at 014; PX05380 (ODP) at 044; PX04320 (SPLS) at 001; PX04338 (SPLS) at 004.

In sum, the evidence shows that the *Brown Shoe* factors support Plaintiffs' alleged market definition because there is: (a) industry or public recognition of the market as a separate economic entity; (b) B-to-B customers demand distinct prices and demonstrate a high sensitivity to price changes; and (c) B-to-B customers require specialized vendors that offer value-added services, including: (i) sophisticated information technology (IT) services; (ii) high quality customer service; and (iii) expedited delivery. These factors support viewing large B-to-B customers as a target market.

2. Expert testimony of Dr. Carl Shapiro and the Hypothetical Monopolist Test

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In addition to the *Brown Shoe* factors, the Court must consider the expert testimony offered by Plaintiffs in this case. The parties agree that the main test used by economists to determine a product market is the hypothetical monopolist test. ("HMT"). Shapiro Report at 014; *see Orszag* Dep. at 89:6-8. This test queries whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products. Defs.' FOF ¶ 31 ("The key question is whether a hypothetical monopolist in the alleged market profitably could impose a small but significant and non-transitory increase in price ("SSNIP")") (citing *United States v. Oracle Corp.*, 331 F.Supp.2d 1098 at 1111–12 (N.D.Cal.2004)). If so, the products may comprise a relevant product market. *See H & R Block*, 833 F.Supp.2d at 51–52. The HMT is explained in the Merger Guidelines.

> [T]he test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ... likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least ***122** one product in the market, including at least one product sold by one of the merging firms.

Merger Guidelines § 4.1.1 The SSNIP is generally assumed to be "five percent of the price paid by customers for the products or services to which the merging firms contribute value." Merger Guidelines § 4.1.2.

Dr. Shapiro's HMT analysis emphasizes that the proposed or "candidate" market consisting of the sale and distribution of consumable office supplies includes *all* methods of procuring office supplies by large companies, i.e. procurement through a primary vendor relationship, off contract purchases, online and retail buys. Shapiro Report at 014. "Since the hypothetical monopolist, by definition, controls all sources of supply to large customers, it would not have to worry that raising prices would cause large customers to switch to other suppliers of consumable office supplies: by definition, there are none." *Id.*

Dr. Shapiro also points out that Staples and Office Depot's head-to-head competition "tells us that a *monopoly* provider of consumable office supplies would charge significantly more to large customers than Staples and Office Depot today charge these same customers." *Id.* Dr. Shapiro also highlights the record evidence that demonstrates Defendants compete "fiercely" for business in the large B-to-B space. *Id.* Dr. Shapiro concludes that such competition implies that "the elimination of competition would lead to a significant price increase to large customers, which in turn implies that the HMT is satisfied." *Id.*

Dr. Shapiro's conclusions are supported by the testimony presented during the hearing. For example, Mr. O'Neill, who testified on behalf of AEP, noted that the company was able to get a lower price because of competition between Staples and Office Depot. Hrg Tr. 340. Mr. Jason Cervone, Sourcing Manager of indirect procurement at McDonalds, acknowledged the same. *Id.* at 492 ("So in our definition of what we need in terms of vendor in this space [with Staples and Office Depot] you have more chance of lowering prices or maintaining pricing than you would with just one player there."); *see also* Hrg Tr. 1890:15-24 (Mr. Wright for HPG: "Without competition, we can't secure best-in-class price and best-in-class terms for our members and that's really part of our operating model.").

In sum, Dr. Shapiro's expert report and testimony, as well as the testimony of the corporate representatives, supports Plaintiffs' definition of the relevant market as the sale and distribution of consumable office supplies to large B-to-B customers.

C. Defendants' arguments in opposition to Plaintiffs' alleged market

Defendants make two primary arguments in response to Plaintiffs' alleged market. First, although Defendants do not explicitly discuss the *Brown Shoe* practical indicia, they argue that exclusion of ink and toner, as well as "beyond office supplies" or

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"BOSS" products from the alleged market, is error. Defs.' FOF ¶¶ 6 and 72. Second, Defendants argue that no evidence supports Plaintiffs' contention that large B-to-B customers should be treated as a separate market. Defs.' FOF ¶ 77.

1. Exclusion of ink, toner and BOSS from alleged market is proper

Defendants' principal challenge to Plaintiffs' alleged market centers on the exclusion of ink, toner and BOSS from the alleged relevant market. Defendants advance three arguments, none of which are persuasive. First, Defendants argue that exclusion of these products from the alleged market is a "made for litigation market," ***123** that is inconsistent with commercial realties. Defs.' FOF ¶ 6. Second, Defendants argue that Plaintiffs' market definition is inconsistent with the one used by the FTC in 1997 and 2013. *Id.* Finally, Defendants seize on Dr. Shapiro's admission that the FTC made the decision to exclude ink and toner from the proposed market prior to his independent determination that doing so was proper. *Id.* These arguments are addressed in turn.

a. Defendants' argument for inclusion of ink and toner fails because they are not subject to the same competitive conditions as general office supplies

Defendants' fundamental legal argument for inclusion of ink, toner and BOSS products in the alleged market is that "a well-defined product market must correspond to the commercial realties of the industry and be economically significant." Defs.' FOF ¶ 32 (citing *Brown Shoe*, 370 U.S. at 336–37, 82 S.Ct. 1502). Defendants argue that the dispositive "commercial reality" is that many large B-to-B customers include ink, toner and other BOSS products in the bundle of goods they contract for with their primary vendor. Defs.' FOF ¶ 74. Many large businesses include these adjacent items in their primary vendor bundle. Hrg Tr. 2641:3-9 (Professor Shapiro agreed that BOSS products are included in customer contracts and RFPs "the overwhelming majority of the time."); *see also id.* at 235:19-236:25; 342:13-343:1; 351:10-13; 353:8-14 (AEP testifying that "office supplies" includes pens, pencils, paper, binder clips, folders, ink and toner, [janitorial and sanitation "jan/san"] materials, break room supplies, furniture, and technology); *see also id,* at 397:11-398:22 (McDonald's testifying that "office supplies" includes traditional office supplies, toner, and copy paper, as well as break room supplies and some technology items). However, Defendants do not address the critical question that must be answered when determining whether a particular product should be included in a cluster market: are the items subject to the same competitive conditions? *ProMedica Health*, 749 F.3d at 566 (holding that "the competitive conditions across the markets for primary and secondary services are similar enough to justify clustering of those markets when analyzing the merger's competitive effects."); *see also* Hrg Tr. (Shapiro) 2123:3-2124:21, 2313:19-2314:8.

Competition for the sale of ink and toner has increased due to the "recent and rapid" rise of Managed Print Services ("MPS"). Pls.' FOF ¶ 26. MPS vendors like Xerox, Hewlett-Packard, Lexmark, and Ricoh provide a bundle of services that includes sale of ink and toner in addition to service and maintenance of printers and copiers. *See e.g.*, Hrg Tr. (Select Medical) 1018:18-1019:3; (WB Mason) 1604:14-20. There is ample record evidence to show that ink, toner, and other adjacent BOSS items are properly excluded from the relevant market because they are subject to distinct competitive conditions. For example, some large companies are shifting all of their ink and toner business to an MPS. *See e.g.*, Hrg Tr. 357-358; 503 (McDonalds noting that in November 2015 it changed from Office Depot to an MPS to procure its ink and toner and that the number of companies capable of providing ink and toner is larger than those that provide office supplies). Other large companies are disaggregating ink and toner purchases between their primary vendor and an MPS. *Id.* (AEP) 236 (noting that AEP buys some ink and toner from Office Depot and some from Xerox). Many companies hold separate sourcing events for ink and toner. *See e.g.*, Hrg Tr. 166-170 (AEP confirming that it runs a separate sourcing event for office furniture, jan/san and ink ***124** and toner); *id.* at 1019:13-1020:3 (Select Medical noting five vendors submitted bids during its 2013 RFP for MPS. Select Medical ultimately contracted with MPS Total Print); *id.* at 1316-18 (Best Buy confirming purchases of BOSS items from Kimberly-Clark and ink and toner through MPS contract with Hewlett-Packard). The same is true of other BOSS items. Hrg Tr. 168 (AEP: "... most of our commercial, if not all of our commercial jan san is part of a janitorial contract that also provides labor.").

Moreover, the authority relied on by Defendants is readily distinguished. Defendants rely on *Brown Shoe* to support a focus on the "commercial realities of the industry." However, Defendants rely on *Brown Shoe*'s discussion of the proper geographic boundaries of a market, which is distinct from *Brown Shoe*'s discussion of the relevant product market. *Brown Shoe,* 370 U.S. at 336–37, 82 S.Ct. 1502 ("The geographic market selected must, therefore both 'correspond to the commercial realities of the industry' and be economically significant."). To the extent that the "commercial realities of the industry" are important in this case, the Court agrees with Plaintiffs that the commercial realities are "that Defendants are the largest and second-largest office supplies vendors in the country; they are each other's closest competitor for large business customers; bid data show that they lose bids most often to each other; and large customers currently benefit greatly from their head-to-head competition." Pls.' FOF ¶ 288.

Defendants also rely on *PepsiCo, Inc. v. Coca Cola Co.*, a case brought by PepsiCo under Section 2 of the Sherman Act alleging that Coca Cola had monopolized, or attempted to monopolize, the market of fountain syrup distributed by independent food service entities. 114 F.Supp.2d 243 (S.D.N.Y.2000). *PepsiCo* is distinguishable for a number of reasons. First, the critical question before the Court in *PepsiCo* was whether the evidence supported a finding that the distribution channel of fountain syrup through independent foodservice distributors should be recognized as a relevant market. *Id.* at 249–50. The Court rejected *PepsiCo*'s proposed relevant market because the evidence showed that "while customers view fountain syrup delivered through independent foodservice distributors as preferential and advantageous, they view fountain syrup delivered through other means as acceptable." *Id.*

Here, the record evidence shows that large B-to-B customers do not view any alternative sources for bulk procurement of basic office supplies that would retain the current competitive conditions of the market. Hrg Tr. 349 (AEP) ("I think our team would be very good at finding alternatives to provide pens and pencils; however, they cannot create competition."); *Id.* (McDonalds) ("We would attempt to look for alternatives. We find ourselves, though, back to a situation where we don't have another national player that has a retail footprint nationwide that stocks everything we need ...") In contrast, large B-to-B customers not only view alternative vendors for ink, toner and BOSS as adequate, they increasingly contract with MPS, furniture, and janitorial companies for their primary purchase of these distinct products. *See e.g.*, Hrg Tr. 1019 (Select Medial) (after considering MPS bids in 2013 from Office Depot, OfficeMax, Staples, Total Print and Weaver, Select Medical entered into a contract with Total Print for its MPS needs). In light of these distinctions, *PepsiCo* does not support a finding that Plaintiffs' alleged market is in error.

In sum, inclusion of ink, toner and BOSS items by large companies in the bundle of goods they want to have the **option** of purchasing through their primary vendor ***125** does not mean that those goods are subject to the same competitive conditions.

b. Consideration of ink and toner during 1997 and 2013 investigations

Next, Defendants argue that the Plaintiffs' alleged market is inconsistent with how the FTC defined the market during its investigation of the Staples and Office Depot proposed merger in 1997 and the Office Depot and Office Max merger in 2013. Defs.' FOF ¶ 113-116.

In 1997, the proposed merger between Staples and Office Depot was enjoined by this Court. *F.T.C. v. Staples*, 970 F.Supp. 1066, 1070 (D.D.C.1997) (J. Hogan). At that time, FTC included ink and toner in its definition of consumable office supplies. *Id.* at 1080. However, scant precedential value can be gleaned from comparing the defined market in that case and the

Plaintiffs' alleged market in this case. The 1997 case is nearly twenty years old, and the office supply market has changed dramatically since that time. For example, as discussed in Section IV.B.1.a. *supra*, the rise of MPS services as a competitive force has occurred in the last several years. Moreover, the 1997 Staples case was a retail case that focused on how the proposed merger would affect the average consumer. The case before the Court today is a contract channel case focused on large B-to-B customers.

In 2013, after a seven month investigation, the FTC did not challenge Office Depot's proposed acquisition of Office Max. *See* FTC's Closing Statement ("2013 Closing Statement"), https://www.ftc.gov/system/files/documents/publicstatements/statement-commission/131101*o*fficedepotofficemaxstatement.pdf. Because the Commission cited to the definition of consumable office supplies from *Staples* in its Closing Statement, Defendants argue that ink and toner should be included in the relevant market because Plaintiffs "presented no evidence whatsoever that the 'competitive conditions' are different in any way from November 2013." Defs.' FOF ¶ 116.

The Court rejects this argument. In the 2013 Closing Statement, one of the rationales for allowing the proposed merger to proceed was because:

> large customers use a variety of tools to ensure that they receive competitive pricing such as ordering certain products (like ink and toner) directly from manufacturers and sourcing (or threatening to source) certain categories of office supply products from multiple firms.

2013 Closing Statement at 3. The FTC's decision recognized that "yesterday's market dynamics may be very different from market dynamics of today." *Id.* Plaintiffs' decision to not include ink and toner in their proposed relevant market in this case is therefore entirely consistent with the 2013 decision to not challenge the Office Depot and Office Max merger. *See also*, Hrg Tr. 3593 (Plaintiffs' closing argument noting that the 2013 decision is "wholly consistent with what we're doing here. It's exactly the same thing. We did not see a reason to challenge ink and toner based on the evidence that was developed in the investigation.").

c. Dr. Shapiro and the FTC worked collaboratively to determine that ink and toner should be excluded

Finally, Defendants challenge the propriety of excluding ink and toner from the alleged cluster market based on Dr. Shapiro's testimony indicating that the decision to exclude ink and toner resulted from a collaborative process with the FTC and that he did not perform a market share analysis including ink and toner. Defs.' FOF ¶ 121-124. The Court is not persuaded by Defendants' argument. First, the ***126** fact that the FTC works collaboratively with its experts to determine what products should be included in an antitrust market is not problematic. The FTC's own economists contribute to the FTC's decision regarding the relevant market prior to the time the expert witness for trial is retained. *See e.g.* Hrg Tr. 2907 (Ms. Reinhart: "The amount of work that went into this investigation is huge. And these staff attorneys, they're experts themselves. They know the antitrust laws, they know the antitrust economics. ...").

Further, Defendants take Dr. Shapiro's testimony regarding market shares of Defendants for ink and toner out of context. Defs.' FOF ¶ 124. Defendants' highlight Dr. Shapiro's statement that if one were to calculate market shares for ink and toner, Defendants' share would be significantly smaller. *Id.* Defendants seek to imply that Dr. Shapiro agrees that Defendants' market shares in the alleged market would be smaller if ink and toner were included. However, Dr. Shapiro's comment was referring to his earlier statement that:

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> I think that both the FTC and Staples and Office Depot agree, as far as I can tell, that if you took Staples and Office Depot's market share in ink and toner, it would be significantly lower than it is in core office supplies and paper. To me that is confirmation that it's correct not to include ink and toner in the cluster.

Hrg Tr. 2783. In other words, because there are more companies that sell ink and toner, Defendants' market share in an ink and toner market would be lower than they are in the alleged market.

All of the above arguments are advanced by Defendants to bolster their assertion that the Plaintiffs have "gerrymandered the market" to inflate Defendants' market share. Defs.' FOF ¶ 4. As discussed *supra*, voluminous record evidence supports excluding ink, toner and BOSS products from the relevant cluster market. To the extent Defendants sought to show that exclusion of ink and toner radically altered Defendants' market share, Defendants could have presented expert testimony to support that proposition.

2. Antitrust laws exist to protect competition, not a particular set of consumers

Defendants' second primary argument in opposition to Plaintiffs' proposed relevant market is that "there is no evidence to support Plaintiffs' claim that large B-to-Bs should be treated as a separate market." Defs' FOF ¶ 77. Defendants maintain that Plaintiffs' attempt to protect "mega companies" is misplaced because the merger "indisputably will benefit all retail customers, and more, than 99 percent of business customers." Defs.' FOF ¶ 1.

Antitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market. See Merger Guidelines § 3 ("When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers."). Indeed, the Supreme Court has recognized that within a broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co.*, 370 U.S. at 325, 82 S.Ct. 1502, (1962); *Cardinal Health, Inc.*, 12 F.Supp.2d at 47 (concluding that "the services provided by wholesalers in fact comprise a distinct submarket within the larger market of drug delivery."); *See e.g.* *Sysco*, 113 F.Supp.3d at 40 (holding that "the ordinary factors that courts consider in defining a market the *Brown Shoe* practical indicia and the Merger Guidelines' SSNIP test—support a finding that broadline distribution to national customers is a relevant product market."); *see also* ***127** *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970) ("[I]t is the cluster of products and services ... that as a matter of trade reality makes commercial banking a distinct" market).

As discussed in Section IV.A.2.a-c *supra*, the nature of how large B-to-B customers operate, including the services they demand, supports a finding that they are a targeted customer market for procurement of consumable office supplies. There is overwhelming evidence in this case that large B-to-B customers constitute a market that Defendants could target for price increases if they are allowed to merge. Significantly, Defendants themselves used the proposed merger to pressure B-to-B customers to lock in prices based on the expectation that they would lose negotiating leverage if the merger were approved. *See e.g.*, PX05236 (ODP) at 001 ("This offer is time sensitive. If and when the purchase of Office Depot is approved, Staples will have no reason to make this offer."); PX05249 (ODP) at 001 ("[The merger] will remove, your ability to evaluate your program with two competitors. There will only be one."); PX05514 (ODP) at 003 ("Today, the FTC announced 45 days for its final decision. You still have time! You would be able to leverage the competition, gain an agreement that is grandfathered in and drive down expenses!").

D. Conclusions regarding the definition of the relevant market

The "practical indicia" set forth by the Supreme Court in *Brown Shoe* and Dr. Shapiro's expert testimony support the conclusion that Plaintiffs' alleged market of consumable office supplies (a cluster market) sold and distributed by Defendants to large B-to-B customers (a targeted market) is a relevant market for antitrust purposes. The *Brown Shoe* factors support Plaintiffs' argument that the sale and distribution of consumable office supplies to large B-to-B customers is a proper antitrust market because the evidence supports the conclusion that: (1) there is industry or public recognition of the market as a separate economic entity; (2) B-to-B customers demand distinct prices and demonstrate a high sensitivity to price changes; and (3) B-to-B customers require specialized vendors that offer value-added services. Dr. Shapiro's unrebutted testimony also supports Plaintiffs' alleged market definition because, in his opinion, "the elimination of competition would lead to a significant price increase to large customers," which implies the HMT is satisfied. Finally, for the reasons discussed in detail in Section IV.C *supra*, Defendants arguments against Plaintiffs' market definition fail.

E. Analysis of the Plaintiffs' arguments relating to probable effects on competition based on market share calculations

Having concluded that Plaintiffs have carried their burden of establishing that the sale and distribution of consumable office supplies to large B-to-B customers in the United States is the relevant market, the Court now turns to an analysis of the likely effects of the proposed merger on competition within the relevant market. "If the FTC can make a *prima facie* showing that the acquisition in this case will result in a significant market share and an undue increase in concentration" in the relevant market, then "a presumption is established that [the merger] will substantially lessen competition." *Swedish Match*, 131 F.Supp.2d at 166. The burden is on the government to show that the merger would "produce a firm controlling an undue percentage share of the relevant market" that would result in a "significant ***128** increase in the concentration of firms in that market." *Heinz*, 246 F.3d at 715.

The Plaintiffs can establish their *prima facie* case by showing that the merger will result in an increase in market concentration above certain levels. *Id.* "Market concentration is a function of the number of firms in a market and their respective market shares." *Arch Coal*, 329 F.Supp.2d at 123. The Herfindahl-Hirschmann Index ("HHI") is a tool used by economists to measure changes in market concentration. Merger Guidelines § 5.3. HHI is calculated by "summing the squares of the individual firms' market shares," a calculation that "gives proportionately greater weight to the larger market shares." *Id.* An HHI above 2,500 is considered "highly concentrated"; a market with an HHI between 1,500 and 2,500 is considered "moderately concentrated"; and a market with an HHI below 1,500 is considered "unconcentrated". *Id.* A merger that results in a highly concentrated market that involves an increase of 200 points will be presumed to be likely to enhance market power." *Id.*; *see also* *Heinz*, 246 F.3d at 716–17.

1. Concentration in the sale and distribution of consumable office supplies to large B-to-B customers

Dr. Shapiro estimated Defendants' market shares by using data collected from Fortune 100 companies ("Fortune 100 sample" or "Fortune 100"). Shapiro Report at 017. During the data collecting process, 81 of the Fortune 100 companies responded with enough detail to be used in Dr. Shapiro's sample. *Id.; see also* Hrg Tr. 2294:3-19. The critical data provided by the companies was fiscal year 2014 information on: (1) their overall spend on consumable office supplies; (2) the amount spent on consumable office supplies from Staples; and (3) the amount spent on consumable office supplies from Office Depot. Shapiro Report, Exhibit 5A. Some Fortune 100 companies have an established primary vendor relationship with Staples or Office Depot. *Id.* For example, Staples has 100 percent of the market share relating to [redacted text].'s spend on consumable office supplies and Office Depot has 100 percent of the market share relating to [redacted text]'s spend on consumable office supplies. *Id.*

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Other Fortune 100 customers purchase office supplies from a mix of vendors. For example, Staples accounted for twenty-seven percent of [redacted text]'s spend on consumable office supplies in 2014 and Office Depot accounted for twenty-one percent. *Id.*

Defendants' market share of the Fortune 100 sample as a whole is striking: Staples captures 47.3 percent and Office Depot captures 31.6 percent, for a total of 79 percent market share. Shapiro Report at 017 and Ex. 5B. The pre-merger HHI is already highly concentrated in this market, resting at 3,270. *Id.* at 021. Put another way, Staples and Office Depot currently operate in the relevant market as a "duopoly with a competitive fringe." *Id.* If allowed to merge, the HHI would increase nearly 3,000 points, from 3,270 to 6,265. *Id.* This market structure would constitute one dominant firm with a competitive fringe. *Id.* Staples' proposed acquisition of Office Depot is therefore presumptively illegal because the HHI increases more than 200 points and the post-merger HHI is greater than 2,500. Shapiro Report at 021; *see also* *Heinz*, 246 F.3d at 716 (noting that the pre-merger HHI for baby food was 4775, "indicative of a highly concentrated industry" and the 500 point post-merger HHI increase "creates, by a wide margin, a presumption that the merger will lessen competition in the domestic jarred baby food market.")

***129 F. Defendants' arguments in opposition to Plaintiffs' Market Share Calculations**

Defendants make several arguments in opposition to Dr. Shapiro's market share methodology and calculation. *See* Defs.' FOF ¶¶ 125-131. Defendants argue that: (1) the Fortune 100 sample overstates Defendants' actual market share; (2) treatment of Tier 1 diversity suppliers and paper manufacturers was error; [12] and (3) Dr. Shapiro underestimates leakage, inflating Defendants' market shares. *Id.* However, despite significant time spent cross-examining Dr. Shapiro with regard to his methodology, Defendants produced no expert evidence during the hearing to rebut that methodology. Moreover, it is significant that Defendants' final 100-page brief devotes only seven paragraphs to challenging Dr. Shapiro's market share calculations. *Id.*

1. The Fortune 100 is a trustworthy sample to calculate Defendants' market shares

Defendants' first argument in opposition to Dr. Shapiro's focus on the Fortune 100 is that his failure to take a sample of the other approximate 1100 companies in the relevant market is error because it results in "dramatically inflated market shares." *Id.* ¶ 126. Dr. Shapiro conceded that the data he analyzed is imperfect because it does not include all large B-to-B customers. Shapiro Report at 017. However, Dr. Shapiro was confident that "there is no reason to believe [the market shares] are biased when it comes to estimating the market shares of Staples and Office Depot." *Id.* To test whether his analysis of the Fortune 100 might have overstated Defendants' market shares because the Fortune 100 companies are especially large, Dr. Shapiro measured the market share of the top half of his sample separate from the bottom half. *Id.* at 018. The range of spending on consumable office supplies among the companies analyzed in Dr. Shapiro's analysis is vast: from less than $200,000 per year on the low end, to more than $33 million per year on the high end. *Id.*, Ex. 5A. The combined market share for Defendants is seventy-nine percent among the top half of the Fortune 100 and eighty-nine percent among the bottom half. *Id.* at 018. Thus, Dr. Shapiro states that he is "confiden[t] that the market shares for Staple[s] and Office Depot reported in Exhibit 5B are not overstated." *Id.*

Defendants' second challenge relating to the Fortune 100 sample focuses on the fact that only eighty-one of the 100 companies responded with enough data to be included in Dr. Shapiro's analysis. Defendants argue that the nineteen omitted "are the most likely to purchase supplies from vendors other than Staples and Office Depot." *Id.* ¶ 125. Defendants highlight Costco as an example, a company that charges each department with procuring its own office supplies, whether from Costco or other vendors. *Id.* The fact that Costco is able to purchase office supplies from Costco itself makes that company's procurement of office supplies an anomaly. Because Defendants did not present a case, they do not provide the Court with an analysis of the nineteen Fortune 100 companies excluded from Dr. Shapiro's analysis to show that their exclusion skewed Defendants' market shares in a way favorable to Plaintiffs. Antitrust economists rely on data from third parties through surveys, and therefore the measure of market shares is "normally imperfect." *Id.*, fn 43. Perhaps Judge ***130** Mehta said it best: "The FTC need not present market shares and HHI estimates with the precision of a NASA scientist." *Sysco*, 113 F.Supp.3d at 54; *see also* *H & R Block*, 833 F.Supp.2d at 72 (stating that a "reliable, reasonable, close approximation of relevant market share data is sufficient."). For

all of these reasons, and in view of the absence of expert testimony offered by the Defendants, the Court is persuaded that Dr. Shapiro's analysis of the Fortune 100 represents a reasonable and reliable approximation of the Defendants' market share.

2. Dr. Shapiro's treatment of Tier 1 diversity suppliers and paper manufacturers who rely on Defendants is consistent with commercial realities

Next, Defendants challenge the manner in which Dr. Shapiro dealt with Tier 1 diversity suppliers and paper manufacturers. Defs.' FOF ¶ 127. Defendants contend that the sales made by Tier 1 diversity suppliers and paper manufacturers are improperly attributed to Defendants. *Id.*

In the normal course, Defendants treat accounts served by Tier 1 diversity partners toward their own revenue. Pls.' FOF 102. Moreover, Tier 1 diversity suppliers cannot serve large B-to-B customers without partnering with Defendants. *Id.* For these reasons, Dr. Shapiro attributed Tier 1 revenues to Defendants. Hrg Tr. 2309:11-2310:6; 2795:2-2796:3; *See also* Hrg Tr. 379 (McDonalds) ("Our understanding is that Tier Is are generally regional players and may not have the size or scale to handle large geographically-distributed business.")

With regard to paper manufacturers, some large companies purchase paper through Defendants and others purchase directly from a manufacturer. *Id.* 2305-06. Dr. Shapiro included sales of paper that are made through Defendants toward Defendants' revenue. *Id.* In these situations, Staples or Office Depot distributes the paper. *Id.* at 2306. "In cases where the paper manufacturer directly sells and delivers the paper to the customer," Dr. Shapiro "attribute[d] the sales to the paper manufacturer." *Id.* Thus, the Court is satisfied that Dr. Shapiro's treatment of Tier 1 diversity suppliers and some paper manufacturer's revenue is consistent with commercial realities and does not overstate Defendants' market shares.

3. Dr. Shapiro accounted for leakage in his analysis

Finally, Defendants contend that Dr. Shapiro did not adequately account for "leakage" in his market share analysis. *Id.* ¶ 129. Leakage refers to unreported discretionary employee purchases of office supplies. Shapiro Report at 018. Dr. Shapiro requested an estimate of leakage from the Fortune 100. Shapiro Report at 019. Of the eighty-one companies included in his market-share analysis, twenty-six reported on leakage. *Id.* Appendix E. Twelve of the twenty-six indicated that leakage spend was "*de minimis*" or "immaterial". PX06300, Ex. RC2. In these cases, Dr. Shapiro assumed that one percent of the companies' spend on office supplies was leakage. Defs.' FOF ¶ 129.

Testimony from fact witnesses during the hearing made it clear that even the largest companies in the world are either not concerned enough about leakage to track it or do not have a reliable way of tracking it. *See e.g.* Hrg Tr. 344:2-4 (AEP: "We have a methodology [to track leakage] which is an audit process which is ran [sic] on a monthly basis. We choose not to include office supplies every month."); 464-65 (McDonalds became aware of how to track leakage through "P-card" spend during communications with the FTC in this case; and "data for the P-cards really wasn't available to procurement, at least ***131** we weren't aware of that."). [13] These same companies have tremendous incentive to ensure that their employees spend on contract. Purchases made by employees online or from a brick and mortar store are [redacted text] to [redacted text] percent higher than the contract price paid by large companies. Shapiro Report at 019. Most companies with a primary-vendor contract have an official policy that requires employees to purchase office supplies through the contract. *See e.g.*, Hrg Tr. 464-65 (McDonalds' policy is that corporate stores must purchase on contract through Office Depot). Best Buy produced a video to educate employees about the benefits of buying on contract. *Id.* 1212-1214.

For all of these reasons, the Court is confident that Dr. Shapiro accounted for any impact leakage has on Defendants' market shares in this case.

G. Conclusion regarding Plaintiffs' market share analysis

Plaintiffs have met their burden of showing that the merger would result in "undue concentration" in the relevant market of the sale and distribution of consumable office supplies to large B-to-B customers in the United States. The relevant HHI would increase nearly 3,000 points, from 3270 to 6265. These HHI numbers far exceed the 200 point increase and post-merger concentration level of 2500 necessary to entitle Plaintiffs to a presumption that the merger is illegal. The Court rejects Defendants' arguments in opposition to Dr. Shapiro's market analysis for the reasons discussed in detail in Section IV.F *supra*. Nevertheless, to strengthen their *prima facie* case, Plaintiffs presented additional evidence of harm, which the Court analyzes next.

H. Plaintiffs' evidence of additional harm

Sole reliance on HHI calculations cannot guarantee litigation victories. *Baker Hughes*, 908 F.2d at 992. Plaintiffs therefore highlight additional evidence, including bidding data ("bid data"), ordinary course documents, and fact-witness testimony. This additional evidence substantiates Plaintiffs' claim that this merger, if consummated, would result in a lessening of competition.

Mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition. See Merger Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."); *see also* *Heinz*, 246 F.3d at 717–19; *Swedish Match*, 131 F.Supp.2d at 169; *Staples*, 970 F.Supp. at 1083. Plaintiffs' evidence supports the conclusion that Defendants compete head-to-head for large B-to-B customers.

1. Bidding Data

Dr. Shapiro analyzed five sets of bid data including: (1) Defendants' win-loss data; (2) data on Defendants' top wins and top losses; and (3) Fortune 100 bid data. Pls.' FOF ¶ 109. Defendants often bid against each other for large B-to-B contracts. *See, e.g.*, PX05028 (ODP) at 001 (of five bids for [redacted text]'s RFP, Staples and Office Depot had the best bids); PX05255 (ODP) at 001 ("It is down to OD and Staples"); PX02167 (Orszag Dep. 173:11-18, 194:23-195:10) ("We do observe in the data that [Staples and Office Depot] are often the last two bidding against each ***132** other for the—for large customers as well.").

The bid data also shows that Defendants win large B-to-B customer bids more frequently than other bidders. Hrg Tr. 2334:10-21. The B-to-B contract market accounts for approximately thirty-five percent of Defendants' sales. Compl. ¶¶ 29 and 30. According to Dr. Shapiro, the sale of consumable office supplies accounts for about [redacted text] percent of Defendants' B-to-B customer revenues. Shapiro Report at 006. Staples CEO Mr. Sargent describes the B-to-B contract business as a "cornerstone" of Staples' business. PX04023 (SPLS) at 005 ("This year, [B-to-B sales] will account for almost 40% of company sales ..."); PX 04630 (SPLS) at 007 (for B-to-B, Staples is the "clear industry leader <u>and</u> gaining share") (emphasis in original). In fact, seventy-eight percent of Office Depot bid losses are to Staples. PX06500 (Shapiro Demonstrative) at 048. Similarly, eighty-one percent of Staples' bid losses were to Office Depot. *Id.* at 049. Defendants compete aggressively for the others' business, exemplified by Staples' 2014 "Operation Take Share," a campaign that sought to capture some of Office Depot's market share. PX04432 (SPLS) at 003.

2. Ordinary Course Documents

Defendants' own documents created in the ordinary course of their business show that Defendants view themselves as the most viable office supply vendors for large businesses in the United States. *See, e.g.* PX04082 (SPLS) at 029 ("[T]here are only two real choices for them. Us or Them."); PX04042 (SPLS) at 024; PX05311 (ODP) at 001. Not surprisingly, Defendants

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view themselves as each other's fiercest competition. *See, e.g.*, PX04322 (SPLS) at 001 (identifying only Office Depot as "Key Competitor[ ]"); PX04414 (SPLS) at 008 ("For core office supplies we often compare ourselves to our most direct competitor, ODP"); PX05229 (ODP) at 149 (stating that Staples is Office Depot's "[t]oughest and most aggressively priced national competitor.").

Defendants consistently compete head-to-head with each other to win large B-to-B contracts. For example, in early 2015, HPG began negotiations with Staples. Hrg Tr. 1896:9-1898:14, 1901:2-16. Staples' initial price reduction was retracted until Office Depot was invited to bid. *Id.* Pitting Defendants against each other, HPG received substantial price concessions from both. *Id.* In November 2014, Staples increased its up-front payment to [redacted text] to $[redacted text] to prevent [redacted text] from switching to Office Depot. PX04034 (SPLS) at 001. In March 2014, [redacted text] engaged the Defendants in multiple rounds of bidding. PX05234 (ODP) at 001). Ultimately, Office Depot could not meet the six percent core list savings necessary to win the contract from Staples. *Id.*

3. Fact Witness Testimony

Large B-to-B customers view Defendants as their best option for nationwide sale and delivery of consumable office supplies. *See e.g.* Hrg Tr. 225:25-226:5 (AEP: "Q: And after Office Depot and Staples, what's the—what's the next best option after that? A: Then we're in trouble. We don't have a good-I don't think we have a good option after that."); 1205:17-20 (Best Buy "Q: So today Best Buy has a contract with Office Depot. Who does Best Buy consider to be its next best option for general office supplies and copy paper? A: Staples."); 1938:14-1939:18 (HPG "There's two nationally capable office supply vendors, from our perspective. One is Staples and one is Depot. And they control, roughly—when I say control, they own 80 percent of the market in terms of revenue."); 361:2-21, 373:9-15; 492:3-7 (McDonalds' ***133** noting its consideration of Staples and Office Depot, but ultimately did not invite Staples to submit an RFP because the company was able to "recognize immediate savings" by not going through an expensive bid process.); 1018:1-13 (Select Medical, a company that contracts with Office Depot, testified that it has concerns about the merger going through because "I believe it's important to have that competition to be able to properly service our national footprint, our national presence, and to also be able to provide the best possible pricing."). This testimony shows that absent Office Depot, large B-to-B customers would lose tremendous leverage and likely have to pay higher prices for consumable office supplies. Shapiro Report at 009-10.

This additional evidence strengthens Plaintiffs' claim that harm will result in the form of loss of competition if Staples is permitted to acquire Office Depot.

I. Defendants' response to Plaintiffs' *prima. facie* case

Defendants' sole argument in response to Plaintiffs' *prima facie* case is that the merger will not have anti-competitive effects because Amazon Business, as well as the existing patchwork of local and regional office supply companies, will expand and provide large B-to-B customers with competitive alternatives to the merged entity. Defs.' FOF ¶¶ 132-203. Plaintiffs argue that there is no evidence that Amazon or existing regional players will expand in a timely and sufficient manner so as to eliminate the anticompetitive harm that will result from the merger. Pls.' FOF ¶¶ 152-207. For the reasons discussed below, Defendants' argument that Amazon Business and other local and regional office supply companies will restore the competition lost from Office Depot is inadequate as a matter of law.

"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." Merger Guidelines § 9. Even in highly concentrated markets, Plaintiffs' *prima facie* case may be rebutted if there is ease of entry or expansion such that other firms would be able to counter any discriminatory pricing practices. *Cardinal Health*, 12 F.Supp.2d at 54–55. Defendants carry the burden of showing that the entry or expansion of competitors will be "timely, likely and sufficient in

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its magnitude, character, and scope to deter or counteract the competitive effects of concern." *H & R Block*, 833 F.Supp.2d at 73. The relevant time frame for consideration in this forward looking exercise is two to three years. Hrg Tr. 2660-2662 (Dr. Shapiro confirming that two to three years is the relevant temporal scope for the Court to consider the effects of new entrants or expansion of existing competitors).

1. Amazon Business

Defendants seize on Amazon's lofty vision for Amazon Business to be the "preferred marketplace for all professional, business and institutional customers worldwide" to support their contention that Amazon not only wants to take over the office supply industry, but desires to "take over the world." Hrg Tr. 3010 (Ms. Sullivan's Closing Argument). Amazon Business may eventually transform the B-to-B office supply space. *See e.g.* DX05284 at 43 (Mr. Wilson's 2016 presentation in Baltimore: "It's still Day One." Amazon Business plans to "improve with: more selection; an increasing number of produce and business products [sic]; better personalization; a purchasing experience even better tailored for businesses."); Hrg ***134** Tr. 2662: 9-14. The Court's unenviable task is to assess the likelihood that Amazon Business will, within the next three years, replace the competition lost from Office Depot in the B-to-B space as a result of the proposed merger.

Amazon Business has a number of impressive strengths. For example, Amazon Business already enjoys great brand recognition and its consumer marketplace has a reputation as user-friendly, innovative and reliable. Amazon Business' strategy documents also reveal a number of priorities that, if successful, may revolutionize office supply procurement for large companies. For example, [redacted text] DX05033 at 4. [redacted text] Hrg Tr. 710:22-23. Amazon is also working, [redacted text] among other innovative technologies. Hrg Tr. 567:23-568:2; 724:11-25; 744:1-23.

However, several significant institutional and structural challenges face Amazon Business. Plaintiffs point to a long list of what they view as Amazon Business' deficiencies, including, but not limited to: (1) lack of RFP experience; (2) no commitment to guaranteed pricing [redacted text]; (3) lack of ability to control third-party price and delivery; (4) inability to provide customer-specific pricing; (5) a lack of dedicated customer service agents dedicated to the B-to-B space; (6) no desktop delivery; (7) no proven ability to provide detailed utilization and invoice reports; and (8) lack of product variety and breadth. Pls.' FOF ¶ 191. Although Amazon Business may successfully address some of these alleged weaknesses in the short term, the evidence produced during the evidentiary hearing does not support the conclusion that Amazon Business will be in a position to restore competition lost by the proposed merger within three years.

First, despite entering the office supply business fourteen years ago, large B-to-B customers still do not view Amazon Business as a viable alternative to Staples and Office Depot. PX07518 (Amazon) at 001 ("Our customers tell us that [redacted text]."). Moreover, Amazon Business' participation in RFPs has been "limited." Hrg Tr. 546:18-547:4; *see also* 1943:14-1947:9 (HPG) (noting that HPG's membership and advisory board would require proof of Amazon Business' demonstrated success in serving large B-to-B customers before considering Amazon Business as a primary vendor). Signficantly, Amazon Business also has yet to successfully bid to be a large B-to-B customer's primary vendor. Hrg Tr. 551:11-13; *see also* Hrg Tr. 206-207 (AEP) (testifying that Amazon Business did not have all services required to be its primary vendor when it was considered by AEP in 2015). When Amazon Business has participated in RFPs, [redacted text]. *Id.* 551:11-552:5; 851:21-852:8; McDevitt Dep. 186:6-16 (Amazon's prices to [redacted text] were [redacted text]% higher than lowest bid).

The Court has considered whether Amazon Business' newly energized focus on the B-to-B space could transform the office supply industry for B-to-B customers in such a dramatic way that the RFP process may be "what dinosaurs do" in the future. Hrg Tr. 2693:19-2694:9 (Ms. Sullivan's cross of Dr. Shapiro: "You know Dr. Shapiro, [Amazon Business] intends to make the RFP process obsolete.). However, during Mr. Wilson's deposition, he testified that Amazon Business does not seek to change the RFP process. PX02125 (Wilson Dep. 193:10-194:1). During cross-examination, Defendants addressed this point with Mr. Wilson directly:

Ms. Sullivan: And anybody that's been watching what's been going on in the world understands that the way the old companies are doing things, running ***135** around, trying to get RFPs and a contract is kind of the old world. The new world is going to be procurement officers sitting at their desks using platforms like the one you're developing?

Mr. Wilson: I don't know—I mean, that's maybe one vision of what may happen. We'll see how the technology sort of evolves and where things land.

Ms. Sullivan: But that's your plan, that that's going to be the new world?

Mr. Wilson: Well, our plan is to bring Amazon Business shopping experience to customers. And we would like for them to be able to—to leverage it, and we would like to create a solution that they like.

Hrg Tr. 692:11-25. Mr. Wilson's testimony does not support the conclusion that Amazon Business seeks to make the RFP process obsolete. Defendants did not offer testimony from other industry experts or offer any other credible evidence that the RFP process will become obsolete within the next three years. The evidence before the Court simply does not support a finding that Amazon Business will, within the next three years, either compete for large RFPs in the same way that Office Depot does now, or so transform the industry as to make the RFP process obsolete.

Second, Amazon Business' marketplace model is at odds with the large B-to-B industry. Similar to Amazon's consumer marketplace, half of all sales on Amazon Business are serviced by Amazon directly, while the other half are serviced by third-party sellers. Hrg Tr. 552. Amazon does not control the price or delivery offered by third-party sellers. *Id.* 842:14. Mr. Wilson confirmed that this will not change. *Id.*: 7-9 ("Q: You have no plans to force the third parties to offer particular prices? A: No, we'll never do that. No."). Amazon Business' lack of control over the price offered by third-party sellers contributes to Amazon Business' inability to offer guaranteed pricing. Mr. Wilson also testified that Amazon Business will not [redacted text]. Hrg Tr. 849:9-12 [redacted text]). The evidence thus shows that Amazon Business' [redacted text], guaranteed pricing is not feasible at this time, and [redacted text]. Absent these features, which are fundamental to the current office supply industry for large B-to-B customers, the record is devoid of evidence to support the proposition that large business would shift their entire office supply spend to Amazon Business in the next three years.

Finally, although Amazon Business' 2020 revenue projection is an impressive $[redacted text], only [redacted text] percent of that is forecast to come from the sale of office supplies. Hrg Tr. 856:5-16; PX 06300 (Shapiro Reply) at 028. This level of revenue for office supplies would give Amazon Business only a very small share in the relevant market. Shapiro Hrg Tr. 2432:11-19; 2436:15-19 (Dr. Shapiro: "So, in the end, no, I don't think over the next two years or so that they will-are likely to step in and provide sufficient additional competition to protect large customers ...."). Further, Amazon Business' 2020 forecast [redacted text], in part because [redacted text] Hrg Tr. 579:15-581:4; 719:25-720:3; 720:22-721:24, 856:5-13. Even the launch of [redacted text] is uncertain due to [redacted text]. Park Dep. [redacted text] Hrg 731:17-732:1 (testifying that [redacted text]).

At the conclusion of Mr. Wilson's testimony, the Court asked whether, [redacted text] Hrg Tr. 859:10-16. Mr. Wilson answered "[redacted text]" *Id.* at 859:22-23. Similarly, during Mr. Wilson's testimony about Amazon Business' ability to compete for RFPs, the Court engaged in this exchange:

THE COURT: So, if one were to predict—if a vice president were to predict ***136** five years from now, you'd be in a much better position to respond, just predicting?

THE WITNESS: That's our point, yes.

THE COURT: Right. And that—the strength of that prediction is based upon what?

THE WITNESS: Investment in resources.

THE COURT: Right. And that's something that, I guess from a business point of view, you plan to do?

THE WITNESS: I plan to request the resources.

THE COURT: Right. Because you want to be as successful as you possibly can and compete, right?

THE WITNESS: Absolutely.

Hrg Tr. 553:1-17.

Critically, however, when the Court asked whether Mr. Wilson [redacted text] *Id.* at 860 1-3. This answer, considered in light of Amazon Business' lack of demonstrated ability to compete for RFPs and the structural and institutional challenges of its marketplace model, leads the Court to conclude that Amazon Business will not be in a position to compete in the B-to-B space on par with the proposed merged entity within three years. Just as it would be "pure speculation" for an Amazon Business employee to give a date certain for [redacted text], it would be sheer speculation, based on the evidence, for the Court to conclude otherwise. If Amazon Business was more developed and Mr. Wilson [redacted text], the outcome of this case very well may have been different. [14]

2. WB Mason and other competitors

Brief discussion is necessary with regard to the ability of existing competitors to fill the competition gap that would be left in the wake of this merger. WB Mason is the third largest office supply company in the U.S., but is a distant third behind Defendants, retaining less than one percent market share in the relevant market. PX03021 (WB Mason Decl.) ¶ 6. WB Mason has nine customers in the Fortune 1000. Hrg Tr. 1611:21-1611:24. WB Mason and other regional and local office supply vendors are at a competitive disadvantage because they do not have the resources to serve large customers nationwide. *Id.* at 1601: 3-8, 1687:13-22, 1697:2-8. Although WB Mason is confident in its ability to compete with Staples in Masonville, it does not bid on large RFPs outside of Masonville. Hrg Tr. (Meehan "We'll respond to RFPs that are inside of Masonville, that are headquartered in Masonville, that the majority of the business is inside of Masonville.").

It is significant that WB Mason does not have the desire or the ability to compete with the merged entity outside of Masonville. Pls.' FOF ¶ 44. As WB Mason's CEO Mr. Meehan testified, "we don't have any plans to expand [outside of Masonville] ... We're going to focus on Masonville." Hrg Tr. Meehan, 1671. After establishing that it would take [redacted text] for WB Mason to expand nationwide, the Court asked Mr. Meehan "If [Defendants] gave you $[redacted text], would you accept it to be competitive with them?" He answered "I ***137** don't know if I would. That's a big challenge. I mean, that's if I even want to do this, right? Become this. I—no, I would definitely think about it, Your Honor."*Id.* 1790.

Like WB Mason, other regional and local office supply companies also face the structural disadvantage of purchasing from wholesalers instead of manufacturers. *Id.* Hrg Tr. 1584:23-1585:2. This means their costs are higher than those of Defendants. Further, because their overall volumes are lower, they cannot offer the deep discounts that Defendants are able to offer. Pls.' FOF ¶ 168. There was simply no other evidence presented during the hearing that supports Defendants' assertion that utilizing a collection of regional or local office supply companies would meet the needs of large B-to-B customers.

J. Weighing the Equities

Although Plaintiffs are entitled to a presumption in favor of injunctive relief for the reasons discussed, Section 13(b)'s "public interest" standard still requires the Court to weigh the public and private equities of enjoining the merger. *Heinz*, 246 F.3d at 726. The public interests to be considered include: (1) the public interest in effectively enforcing antitrust laws; and (2) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial. *See e.g.* *Sysco*, 113 F.Supp.3d at 86. Both factors weigh in favor of granting Plaintiffs' Motion for Preliminary Injunction.

First, the "principle public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in the effective enforcement of the antitrust laws." *Swedish Match*, 131 F.Supp.2d at 173. Because the law is clear that this merger is likely to lessen competition in the relevant market, it is in the public's interest for the merger to be enjoined. Second, preserving the FTC's ability to order effective relief after the administrative hearing also weighs in favor of enjoining the proposed merger. As discussed at some length during the parties' summations, it is "impossible to recreate pre-merger competition" if the parties are allowed to merge pending the administrative hearing. *Sysco*, 113 F.Supp.3d at 87 (quoting *Swedish Match*, 131 F.Supp.2d at 173); *see also* Hrg Tr. (Ms. Reinhart: "There's no doubt about it, the eggs would be scrambled. Once that happens, it's very difficult to get the companies apart."). Thus, the second public interest consideration also weighs in favor of enjoining the merger.

Defendants argue that the equities favor allowing the merger to proceed because "it is undisputed that the overwhelming majority (more than 99%) of B2B customers and *all* retail customers will benefit—or at least not be harmed—from this merger." Defs.' FOF ¶ 297. This argument is the same as Defendants' argument in opposition to Plaintiffs' alleged relevant market, for which Defendants cite no persuasive authority. The Court rejects the argument for the same reasons discussed in Section IV.C.2. *supra*.

Because Defendants have not made a showing of public equities that favor allowing the merger to proceed immediately, the Court should go no further because "[w]hen the Commission demonstrates a likelihood of ultimate success, a counter showing of private equities alone [does] not suffice to justify denial of a preliminary injunction barring the merger." *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1050 (D.C.Cir.2008) (quoting *F.T.C. v. Weyerhaeuser*, 665 F.2d 1072, 1083 (D.C.Cir.1981)). [15]

***138 V. Conclusion**

As Judge Mehta observed in *Sysco*, "There can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market." 113 F.Supp.3d at 88 (quoting J. Tatel in *Whole Foods*, 548 F.3d at 1043). The Court concludes that Plaintiffs have met their burden of showing by a "reasonable probability" that Staples' acquisition of Office Depot would lessen competition in the sale and distribution of consumable office supplies in the large B-to-B market in the United States. The evidence offered by Defendants to rebut Plaintiffs' showing of likely harm was inadequate as a matter of law. Plaintiffs have therefore carried their ultimate burden of showing that they are likely to succeed in proving, after a full administrative hearing on the merits, that the proposed merger "may be substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act.

For the reasons discussed herein, Plaintiffs' Motion for Preliminary. Injunction is GRANTED. A separate order accompanies this Memorandum Opinion.

SO ORDERED.

All Citations

190 F.Supp.3d 100, 2016-1 Trade Cases P 79,627

Footnotes

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1 Defendants requested an expedited decision by no later than a date certain so that financing could be secured to hold their deal together. December 17, 2015 Tr., Docket 107 at 39. The Court committed to ruling on the merits of this controversy by no later than May 10, 2016. *Id.*

2 As the Court stated during the hearing: "Let me extend my appreciation to [the paralegals]. They're the unsung heroes and never get the credit that they deserve. I know how hard you work to make us look good, I know that. So on behalf of everyone, thank you very much." Hrg Tr. 158:8-13.

3 As the Court expressed many times during these proceedings, the lack of meaningful appellate review on the merits is an unfortunate reality of antitrust statutes. Because the administrative process before the FTC is so time consuming, most corporations, like Defendants in this case, cannot secure financing to keep the deal together pending the administrative trial on the merits. *See, e.g.* *FTC v. Sysco Corporation*, 113 F.Supp.3d 1, 15 (D.D.C.2015) (noting that the Defendants announced that they will not proceed with the merger if the Court grants the requested injunction.)

4 The Court appreciates the tremendous amount of time, money and effort Defendants put into this case, and understands that they genuinely believe this merger would be best for their companies, the industry and the public. While the Court's decision is surely a great disappointment to Defendants, the Court is optimistic that Defendants will find ways to innovate, evolve and remain relevant in the rapidly changing office supply industry.

5 Dr. Shapiro, Plaintiffs' expert economist, is a Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley. Shapiro Expert Report ("Shapiro Report"), PX06100-003. In addition to teaching, Dr. Shapiro has served in government in various capacities during his professional career, including as a member of the President's Council of Economic Advisers from 2011 to 2012, and as an advisor at the Department of Justice from 1995 to 1996 and again from 2009 to 2011. *Id.* Dr. Shapiro testifies for Plaintiffs and Defendants in antitrust matters. *Id.*

6 Amazon's marketplace is an online shopping experience where customers can browse for items and make online purchases. Hrg Tr. 552. Amazon makes approximately half of all sales through the marketplace. *Id.* Millions of other companies—"third-party sellers,"—make the remaining sales through the marketplace. *Id.*

7 In contrast, the typical preliminary injunction standard requires a plaintiff to show: (1) irreparable harm; (2) probability of success on the merits; and (3) a balance of equities favoring the plaintiff. *F.T.C. v. Sysco Corporation*, 113 F.Supp.3d 1, 22 (2015) (citing *Heinz*, 246 F.3d at 714)).

8 Defendants' economic expert, Johnathan Orszag, produced several expert reports for Defendants but was not called to testify.

9 Although the Merger Guidelines are not binding on this Court, the D.C. Circuit has relied on them for guidance in other merger cases. *Sysco*, 113 F.Supp.3d at 38 (citing *Heinz*, 246 F.3d at 716 n.9).

10 In Plaintiffs' complaint, they alleged that the relevant market was limited to large B-to-B customers, including, but not limited to "those that buy $1 million annually of consumable office supplies for their own use." *Id.* ¶¶ 41, 45. For analytical purposes, Dr. Shapiro drew the line at large B-to-B's that spend $500,000 or more on office supplies. Hrg Tr. 2154:16-2155:14(Dr. Shapiro noting that 90 percent of Enterprise customers spend at least $500,000 on office supplies and that there is no "magic place that's the right place" to draw the line, but necessary for practical analytical purposes).

11 The Court is aware of the academic observation that "the rationale for market definition in *Brown Shoe* was very different from and at odds with the rationale for market definition in horizontal merger cases today." Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION at 237 (CCH, Inc. 2015).

> Today the concern is that the post-merger firm might be able to raise prices without causing too much output to be lost to its rivals. In contrast, the *Brown Shoe* concern was that by reducing its price (or improving quality at the same price), the post-merger firm could deprive rivals of output, thus forcing them out altogether or relegating them to niche markets.

Id. at 240. Nevertheless, the Court finds the *Brown Shoe* factors a useful analytical tool, and as Judge Amit P. Mehta recognized in *Sysco*, "*Brown Shoe* remains the law, and this court cannot ignore its dictates." *Sysco*, 113 F.Supp.3d at n. 2.

12 Tier 1 diversity suppliers are minority or veteran owned businesses that are regional in nature and generally rely on large nationwide office supply companies like Staples and Office Depot to service their customers. Hrg Tr. 1379 (PDME).

13 "P-Cards" or "procurement cards" are the equivalent of company credit cards that allow goods to be purchased without using a traditional purchasing process.

14 Throughout the hearing Defendants argued that the FTC's declaration drafting process, especially as it pertained to Mr. Wilson, was "wrong." Hrg Tr. 3016:11-14. As is routine in antitrust cases, the FTC began drafting declarations based on the interviews that were conducted. The companies and the FTC then engaged in a back-and-forth process of edits. Some companies found the FTC's drafts to be accurate, others, like Amazon, sought significant edits. Although the Court expressed its concern about this process at various times during the hearing, no evidence of an improper motive on the part of the FTC was ever presented. Hrg Tr. 3016-3018.

15 Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger and that their claimed efficiencies are: (1) merger specific; and (2) reasonably verifiable by an independent party. *H & R Block*, 833 F.Supp.2d at 89. Because Defendants rested at the close of Plaintiffs' case-in-chief and called no witnesses to support their arguments related to remedies or efficiencies, they have not met their burden.

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113 F.Supp.3d 1
United States District Court, District of Columbia.

FEDERAL TRADE COMMISSION, et al., Plaintiffs,
v.
SYSCO CORPORATION, et al., Defendants.

Civil No. 1:15–cv–00256 (APM)
|
Signed June 23, 2015

Synopsis
Background: Federal Trade Commission (FTC) and several states brought action against two merging foodservice distributors, seeking injunctive relief to prevent proposed merger pending administrative hearing to determine if merger violated Clayton Act's anti-monopoly provision. FTC moved for preliminary injunction.

Holdings: The District Court, Amit P. Mehta, J., held that:

broadline distribution was a relevant product market for evaluating proposed merger;

broadline distribution to national customers was a relevant product market for evaluating merger;

relevant geographic market for broadline foodservice to national customers was nationwide;

relevant local geographic markets were areas of overlap resulting from FTC expert's 75-percent draw methodology;

FTC created rebuttable presumption that merger would substantially lessen competition in nationwide and local markets;

additional studies by FTC's expert indicated that merger would harm competition in nationwide and local markets;

neither proposed divestiture of certain assets, nor existing regional competition, nor entry of new competitors and expansion by existing competition remedies anticompetitive effects of merger;

estimated efficiencies of merged entity were not merger-specific costs savings substantial enough to overcome presumption that merger would substantially lessen competition; and

equities favored preliminary injunction.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

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MEMORANDUM OPINION

Amit P. Mehta, United States District Judge

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INTRODUCTION

Americans eat outside of their homes with incredible frequency. The U.S. Department of Commerce, for instance, recently reported, for the first time since it began tracking such data, that Americans spent more money per month at restaurants and bars than in grocery stores.[1] Of course, Americans eat out at many other places, too—sports arenas, school and workplace cafeterias, hotels and resorts, hospitals, and nursing homes, just to name a few. The foodservice distribution industry supplies food and related products to all of these locations. Foodservice distribution is big business. In 2013, the market grew to $231 billion. By some estimates, there are over 16,000 companies that compete in the foodservice distribution marketplace.

***15** The two largest foodservice distribution companies in the country are Defendants Sysco Corporation ("Sysco") and U.S. Foods, Inc. ("USF"). Both are primarily "broadline" foodservice distributors. As the name implies, a broadline foodservice distributor sells and delivers a "broad" array of food and related products to just about anywhere food is consumed outside the home. In 2013, Sysco's broadline sales were over $[Redacted] billion and USF's were over $[Redacted] billion.

In December 2013, Sysco and USF announced that they had entered into an agreement to merge the companies. Fourteen months later, in February 2015, Sysco and USF announced that they intended to divest 11 USF distribution facilities to the third largest broadline foodservice distributor, Performance Food Group, Inc., if the merger received regulatory approval.

On February 20, 2015, the Federal Trade Commission ("FTC") and a group of states filed suit in this court seeking an injunction to prevent the proposed merger. Specifically, under Section 13(b) of the Federal Trade Commission Act, the FTC asked this court to halt the proposed merger until the FTC completes an administrative hearing—scheduled to begin on July 21, 2015—to determine whether the proposed combination would violate Section 7 of the Clayton Act.

The precise question presented by this case is whether the court should enjoin Sysco and USF from merging until the proposed combination is reviewed by an FTC Administrative Law Judge. The real-world impact of the case, however, is more consequential. Sysco and USF have announced that they will not proceed with the merger if the court grants the requested injunction.

The proceedings in this case have been extraordinary. The FTC investigated the proposed merger for more than a year before filing suit. Then, within a two-month period, the parties worked tirelessly to exchange millions of documents, depose dozens of witnesses, and secure over a hundred declarations. The court heard live testimony for eight days in early May 2015. Counsel for the parties have done all of this work while exhibiting the highest degree of skill and professionalism.

Congress passed the Clayton Act to enable the federal government to halt mergers in their incipiency that likely would result in high market concentrations. Congress was especially concerned with large combinations that would impact everyday consumers across the country. The court has considered all of the evidence in this case and has reached the following conclusion: The proposed merger of the country's first and second largest broadline foodservice distributors is likely to cause the type of industry concentration that Congress sought to curb at the outset before it harmed competition. The court finds that the FTC has met its burden under Section 13(b) of the Federal Trade Commission Act of showing that the requested injunction is in the public interest. The court, therefore, grants the FTC's motion for preliminary injunctive relief.

BACKGROUND

I. *THE FOODSERVICE DISTRIBUTION INDUSTRY*

A. Overview

Defendants operate in a $231 billion foodservice distribution industry, where over 16,000 companies battle daily to sell food and related products to restaurants, resorts, hotels, hospitals, schools, company cafeterias, and so on—everywhere food is served outside the home. Hr'g Tr. 1324; DX–00329 at 17. The types of customers served by the foodservice distribution industry come in all shapes and sizes. They ***16** range from independent restaurants, to well-known quick-service and casual dining chains (*e.g.,* Five Guys, Subway, and Applebee's), to hospitality procurement companies and hotel chains (*e.g.,* Avendra, Hilton Supply Management, and Starwood Hotels and Resorts), to government agencies (*e.g.,* the U.S. Department of Veterans Affairs), to foodservice management companies (*e.g.,* Aramark, Sodexo, and Compass Group), to healthcare group purchasing organizations (*e.g.,* Premier, Novation, and Navigator).

The industry recognizes four general categories of foodservice distribution companies: (i) broadline distributors, (ii) systems distributors, (iii) specialty distributors, and (iv) cash-and-carry and club stores. Customers commonly purchase from foodservice distributors in one or more of these different categories, or "channels," mixing and matching to suit their needs. For example, customers may purchase products directly from a broadline distributor; they may contract with a brand-named food manufacturer (*e.g.,* Tyson Foods for chicken or Kellogg's for cereal) and use a broadline or systems distributor for warehousing and delivery; they may use specialty distributors for select items such as produce or seafood; or they may make their purchases at a cash-and-carry or club store (*e.g.,* Restaurant Depot or Costco).

Understanding these different channels of distribution and the different customers they serve is central to the antitrust analysis that this case demands. The court, therefore, describes below the sellers and buyers of foodservice distribution in the United States.

B. Channels of Foodservice Distribution

1. Broadline Distributors

Broadline distribution is characterized by several key features, including: (i) product breadth and depth; (ii) availability of private-label products; (iii) frequent and flexible delivery, including next-day service; and (iv) "value-added" services, such as menu and nutrition planning.

Broadline distributors offer thousands of distinct items for sale—known as "stock keeping units" ("SKUs") for inventory management purposes—in a wide array of product categories, including canned and dry goods, dairy, meat, poultry, produce, seafood, frozen foods, beverages, and even janitorial supplies such as chemicals, cleaning equipment, and paper goods. Broadliners also sell "private label" goods, which are akin to "Trader Joe's" or "Safeway" brand products found in those grocery stores. "Private label" products are often comparable in quality to their name-brand counterparts, but are cheaper in price. Because they are able to offer such a diverse array of products, broadline distributors market themselves to customers as a "one-stop shop," by virtue of their ability to supply most—if not all—food and related products needed by their customers. Customers value the breadth of product offerings and the opportunity to aggregate a substantial portion of their purchases with one distributor, allowing them to save costs. They also appreciate broadliners' high level of customer service, which usually includes next-day and emergency deliveries. Focusing heavily on individualized customer service, broadline distributors employ much larger salesforces than the other channels.

Broadline distributors come in different sizes. The largest, by any measure, are Sysco and USF. In 2013, Sysco and USF made $[Redacted] billion and $[Redacted] billion in broadline sales, respectively. PX09350–236, Table 44. The next largest broadliner made less than $6 billion. *Id.* ***17** Sysco and USF are also the only two broadliners with true nationwide service capability. Sysco and USF have 72 and 61 distribution centers, respectively—each with more than twice the number of distribution centers operated by the next-largest broadliners. Because of their nationwide footprint, Sysco and USF are often referred to as "national" broadliners. Combined, Defendants employ over 14,000 sales representatives. No other broadliner employs more than 1,600. Defendants together operate over 13,000 trucks. The next largest broadliners have just over 1,600.

The next tier of companies are "regional broadliners," so called because their distribution capabilities are concentrated in discrete regions of the United States. The largest regional broadliner, Performance Food Group ("PFG"), is the country's third-largest broadliner in terms of sales. PFG operates 24 broadline distribution facilities, mainly in the eastern and southern parts of the country and, in 2013, earned $6 billion in broadline revenue. The next five largest regional broadline distributors, in order of 2013 revenues, are: (i) Gordon Food Service, which has 10 distribution centers mainly in the Midwest, Florida, and Texas; (ii) Reinhart Foodservice, which has 24 distribution centers, primarily in the East and Midwest; (iii) Ben E. Keith Company, which has seven distribution centers in Texas and bordering states; (iv) Food Services of America, which has 10 distribution centers, concentrated in the Northwest; and (v) Shamrock Foods, which has four distribution centers in the Southwest and southern California. These regional broadliners had 2013 revenues ranging from approximately $[Redacted] billion to $[Redacted] billion.

The last tier of broadliners have five or fewer distribution centers and 2013 revenues of less than $1.1 billion. Many of these operate in a single locality or region, like Shetakis Wholesalers, which has one distribution center in Las Vegas, Nevada.

Regional broadline distributors have formed consortiums to compete for customers with multi-regional distribution needs. The largest consortium is Distribution Market Advantage ("DMA"). DMA is a supply chain sales and marketing cooperative owned by nine independent regional distributors, which are also its members, including Gordon Food Service, Ben E. Keith, and Reinhart Foodservice. DMA does not own any trucks or distribution facilities; rather, its purpose is to coordinate the bidding, contracting, and operational processes of its members to meet the needs of large customers that require a distributor with extensive geographic coverage. Another consortium is Multi–Unit Group ("MUG"), an alliance of 19 broadline distributors who are part of UniPro Foodservice, a larger consortium that includes distributors in different channels. As explained later, these regional consortia have had mixed results in competing for large, geographically dispersed customers.

2. Systems Distributors

Systems distributors, also referred to as "custom" or "customized" distributors, primarily serve fast food, quick service, fast casual, and casual chain restaurants (*e.g.,* Burger King, Wendy's, and Applebee's), which have fixed or limited menus. Unlike broadliners, systems distributors do not carry a large, diverse number of SKUs. Rather, their inventory profile is a small number of proprietary SKUs, which are manufactured specifically for the customer. For instance, the systems distributor for Wendy's carries and delivers the food products needed for Wendy's' menu and does not make those products available to others. As a result, systems distributors typically provide only warehousing and ***18** transport services. They do not offer private label products or value-added services such as menu planning, and they have very small salesforces, if any. Systems distributors make large, limited-SKU deliveries on a fixed, limited schedule, and typically do not offer next-day or emergency deliveries.

Some foodservice distribution companies operate both systems and broadline divisions. For instance, Sysco operates SYGMA, a systems distribution division. SYGMA is run by a different set of executives and, for the most part, operated out of separate distribution centers. PFG offers systems distribution through PFG Customized, which is run separately from its broadline division.

3. Specialty Distributors

Specialty distributors offer a limited and focused grouping of products within one or more product categories—typically fresh produce, meat, seafood, dairy or baked goods. Other specialty distributors focus on a specific type of cuisine, such as Italian fare. Many customers, especially independent restaurants, use specialty distributors to supplement their purchases from broadline distributors because the specialty distributor offers higher quality or fresher products than the broadline distributor or provides unique products that the broadline distributor does not carry, such as products from local farmers. Both in terms of number of SKUs and geographic coverage, specialty distributors are typically smaller than broadline distributors.

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To compete with specialty distributors, some broadliners operate specialty divisions. Sysco, for instance, operates several specialty divisions separately from its broadline division. So, too, does PFG, which operates Roma, a specialty division for Italian food products.

4. Cash–and–Carry and Club Stores

Cash-and-carry stores offer a "self-service" model of food distribution, in which customers make purchases at the store and transport the purchased goods themselves. Club stores like Costco and Sam's Club also fall within this distribution channel. With limited exceptions, cash-and-carry stores do not deliver. They also offer fewer products than broadline distributors. For example, the largest cash-and-carry store, Restaurant Depot, only carries up to [Redacted] SKUs. Additionally, cash-and-carry stores do not have sales personnel dedicated to individual customers. Because of these features, the prices offered by cash-and-carry stores are significantly lower than those offered by broadliners. The typical cash-and-carry customer is an independent restaurant that either does not meet broadline distributors' minimum purchase requirements or needs to supplement its broadline deliveries.

C. Foodservice Distribution Customers

Foodservice distribution customers are a heterogeneous group. The largest customers, such as group purchasing organizations and foodservice management companies, buy hundreds of millions of dollars of product a year, whereas a single independent restaurant buys a small fraction of that amount. Some customers choose to buy from a single line of distribution; others mix distribution channels. Some customers demand fixed pricing, whereas others buy based on daily market rates. Generally speaking, however, customers can be grouped into several categories.

1. Group Purchasing Organizations

Group purchasing organizations, or GPOs, are entities that, through the collective buying power of their members, obtain lower prices for foodservice products. ***19** GPOs negotiate direct contracts with food manufacturers and thereby secure lower prices than a member could individually.

GPOs do not have their own distribution capabilities. Rather, they contract with broadline distributors for warehousing, delivery, and operational services. When a member purchases a GPO-contracted good, the member pays the broadliner on a "cost-plus" basis: it pays for the "cost" of the product based on the GPO's contract with the manufacturer, "plus" the distributor's markup, which is negotiated between the GPO and distributor. GPOs also contract with broadliners to allow their members to purchase products from broadline distributors (rather than from manufacturers), in which case they pay the broadline distributor both the distribution margin (markup) and the cost for the product set by the distributor. GPO members also buy from specialty distributors.

GPOs are prominent in the healthcare and hospitality industries. The largest healthcare GPOs include Premier, Novation, and Navigator. One of the largest hospitality GPOs is Avendra. These companies annually spend hundreds of millions of dollars on broadline distribution.

2. Foodservice Management Companies

Foodservice management companies operate cafeterias or other dining facilities at educational institutions, sports venues, and workplaces. Like GPOs, foodservice management companies negotiate contracts with food manufacturers and rely on

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broadliners for storage and delivery; they also purchase directly from broadliners and specialty distributors. Sodexo, Compass Group, and Aramark are among the country's largest foodservice management companies. Those three companies each spend approximately $[Redacted] billion annually on broadline distribution.

3. Hospitality Chains

Hospitality chains are also large purchasers. Hilton Hotels, for example, uses a system similar to a GPO. It has a subsidiary, Hilton Supply Management LLC, which negotiates contracts on behalf of over 4,000 members to obtain food and related items at a discounted price. Other hospitality companies, such as Hyatt Hotels, purchase most of their foodservice products through Avendra, the largest hospitality GPO. Starwood Hotels and Interstate Hotels & Resorts, on the other hand, directly manage food procurement and distribution contracts for their properties. Regardless of the food purchasing model, hospitality chains also buy food directly from broadliners and rely on them for their storage and delivery needs. These companies spend hundreds of millions of dollars annually on broadline distribution. Individual hotels and resorts also buy directly from specialty distributors, as needed.

4. Restaurant Chains

Restaurant chains come in many sizes with a wide variety of characteristics. This customer category includes nationwide fast food or quick service restaurants such as Burger King and Subway, each with thousands of locations in all regions of the country. It also includes regional fast casual restaurant chains such as Culver's (primarily in the Midwest) and Zaxby's (primarily in the Southeast), as well as nationwide sit-down restaurant chains, such as Applebee's and Cheesecake Factory. The channel of distribution a chain restaurant uses depends, in part, on the number of locations and menu variety. The greater the number of locations and the fewer the menu items, the more amenable the chain restaurant is to systems distribution.

***20** *5 .Government Agencies*

Some government agencies, notably the Defense Logistics Agency and the U.S. Department of Veterans Affairs, are large buyers of broadline distribution services. Those agencies, for instance, spend hundreds of millions of dollars each year on broadline foodservice.

6. “Street” Customers

Customers with only one location, or a handful of locations, are referred to in the industry as “street,” “local,” or “independent” customers. Examples of this type of customer include independent restaurants and resorts. Unlike the types of customers identified above, street customers usually do not have written contracts with broadliners; instead, they negotiate prices on a weekly or other short term basis. They also tend to diversify their purchases among multiple distribution channels. Indeed, according to a study conducted by an industry trade group, the International Foodservice Distributors Association, the typical independent customer uses up to twelve different supply sources. DX–00293 at 29.

I. *CASE HISTORY*

A. Sysco and USF

Defendant Sysco is a publicly-traded corporation headquartered in Houston, Texas. As the largest North American foodservice distributor, Sysco distributes food to approximately 425,000 customers in the United States, generating sales of about $46.5

billion in fiscal year 2014. Compl. for TRO and Prelim. Inj. Pursuant to Section 13(b) of the FTC Act, ECF No. 3 at ¶ 24 [hereinafter Compl.]. Sysco's business is divided into three divisions: (i) Broadline (81 percent of revenue); (ii) SYGMA, which provides systems distribution (13 percent of revenue); and (iii) “Other,” which provides, among other things, specialty produce distribution (6 percent of revenue). *Id.* ¶ 25. Sysco's broadline division operates out of 72 distribution centers located across the United States. *Id.*

Defendant U.S. Foods, Inc., is a privately-held corporation based in Rosemont, Illinois, and is a wholly owned subsidiary of Defendant USF Holding Corp. USF is controlled by the investment funds of Clayton, Dubilier & Rice, Inc., and KKR & Co., L.P. The second-largest foodservice distributor in the United States, USF operates 61 broadline distribution centers across the country and serves over 200,000 customers nationwide. *Id.* ¶ 27. In fiscal year 2013, USF generated approximately $22 billion in revenue. *Id.*

B. History of the Merger

On December 8, 2013, Sysco and USF signed a definitive merger agreement, whereby Sysco agreed to acquire all shares of USF for $500 million in cash and $3 billion in newly issued Sysco equity. Sysco also agreed to assume $4.7 billion in USF's existing debt, for a total transaction value of $8.2 billion. The merger agreement expires on September 8, 2015.

After announcing the merger, Defendants filed a notification regarding the merger as required by the Hart–Scott–Rodino Antitrust Improvements Act, 15 U.S.C. § 18a. As a result of this filing, the FTC commenced an investigation to determine the effects of the proposed combination. The FTC is an administrative agency of the United States federal government that derives its authority from the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 41 *et seq.* Among other duties, the FTC is vested with authority and responsibility for enforcing Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

***21** During the FTC's investigation, and with the hope of gaining regulatory approval, on February 2, 2015, Sysco and USF announced an asset purchase agreement with regional broadline distributor Performance Food Group, Inc. (“PFG”), to sell 11 of USF's 61 distribution centers to PFG, contingent upon the successful completion of the merger. The 11 USF distribution centers—intended to increase PFG's geographic footprint—are, for the most part, located within the western half of the country, where PFG at present has only one distribution center. Currently, the 11 distribution centers account for approximately $4.5 billion in broadline sales. PX09250–011. The parties also executed a Transition Services Agreement. Under the two agreements, PFG would acquire all assets and employees at the 11 distribution centers, all customers under those contracts (assuming the customers consent), and the right to use USF private label products at those facilities for up to three years.

C. History of these Proceedings

On February 19, 2015, the Commissioners of the FTC voted 3–2 to authorize the filing of an administrative complaint in the FTC's Article I court to block the proposed merger, based on a finding that there was reason to believe that the merger would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. Trial before an Administrative Law Judge is scheduled to begin on July 21, 2015.

Also, on February 19, 2015, the Commission authorized the FTC staff to seek a preliminary injunction in federal court under Section 13(b) of the FTC Act in order to prevent Defendants from completing the merger. The FTC filed this action on February 20, 2015, seeking a temporary restraining order (“TRO”) and preliminary injunction to maintain the status quo until the conclusion of the administrative trial. The FTC is joined in this action by the District of Columbia and the following states: California, Illinois, Iowa, Maryland, Minnesota, Nebraska, North Carolina, Ohio, Tennessee, Pennsylvania, and Virginia (collectively, the “Plaintiff States”). By and through their respective Attorneys General, the Plaintiff States have joined with the

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FTC in this action pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, in their sovereign or quasi-sovereign capacities as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states.

On February 24, 2015, Defendants stipulated to a TRO, agreeing not to merge until three calendar days after this court rules on the FTC's Motion for Preliminary Injunction. The court entered the stipulated TRO on February 27, 2015. Defendants have since represented that they will abandon the transaction if this court grants the preliminary injunction.

On March 4, 2015, the court scheduled a preliminary injunction hearing to start on May 5, 2015. The parties' counsel accomplished an extraordinary amount of work in the two months leading up to the evidentiary hearing. They exchanged approximately 14.8 million documents and took 72 depositions. Moreover, in addition to the more than 90 industry participant declarations that accompanied the FTC's motion for preliminary injunction, Defendants obtained 65 new declarations or counter declarations, while the FTC obtained an additional 25 new or counter declarations. During the eight-day evidentiary hearing, the court heard testimony from 20 witnesses, either live or via video deposition. The parties submitted a total of 185 declarations into evidence, as well as over 3,500 exhibits and excerpts of ***22** over 70 depositions. The court heard closing arguments on May 28, 2015.

LEGAL STANDARD

I. *SECTION 7 OF THE CLAYTON ACT*

Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." 15 U.S.C. § 18. When the FTC has "reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act," it may seek a preliminary injunction under Section 13(b) of the FTC Act to "prevent a merger pending the Commission's administrative adjudication of the merger's legality." *FTC v. Staples, Inc.,* 970 F.Supp. 1066, 1070 (D.D.C.1997) (citing 15 U.S.C. § 53(b)). "Section 13(b) provides for the grant of a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 714 (D.C.Cir.2001) (citing 15 U.S.C. § 53(b)).

II. *SECTION 13(B) STANDARD FOR PRELIMINARY INJUNCTIONS*

The Section 13(b) standard for preliminary injunctions differs from the familiar equity standard applied in other contexts. As the Court of Appeals explained in *Heinz*: "Congress intended this standard to depart from what it regarded as the then-traditional equity standard, which it characterized as requiring the plaintiff to show: (1) irreparable damage, (2) probability of success on the merits and (3) a balance of equities favoring the plaintiff." 246 F.3d at 714 (internal citation omitted). The court continued: "Congress determined that the traditional standard was not 'appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.' " *Id.* (quoting H.R.Rep. No. 93–624 at 31 (1971)); *see also* *FTC v. Exxon Corp.,* 636 F.2d 1336, 1343 (D.C.Cir.1980) ("In enacting [Section 13(b)], Congress further demonstrated its concern that injunctive relief be broadly available to the FTC by incorporating a unique 'public interest' standard in 15 U.S.C. [§] 53(b), rather than the more stringent, traditional 'equity' standard for injunctive relief.").

Under Section 13(b)'s "public interest" standard, "[t]he FTC is not required to *establish* that the proposed merger would in fact violate section 7 of the Clayton Act." *Heinz,* 246 F.3d at 714. Rather, to demonstrate the likelihood of success on the merits, "the government need only show that there is a reasonable probability that the challenged transaction will substantially impair competition." *Staples,* 970 F.Supp. at 1072 (citation omitted) (internal quotation marks omitted).

A trial court evaluating a demand for injunctive relief therefore must "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger 'may be substantially to lessen competition, or to tend to create a monopoly' in violation of section 7 of the Clayton Act.' " *Heinz,* 246 F.3d at 714 (quoting 15 U.S.C. § 18). The FTC satisfies this standard if it "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." ***23** *Id.* at 714–15 (citations omitted) (internal quotation marks omitted). This standard reflects Congress' use of the words *"may* be substantially to lessen competition" in Section 7, as Congress' concern "was with probabilities, not certainties" of decreased competition. *Id.* at 713 (citing *Brown Shoe Co. v. United States,* 370 U.S. 294, 323, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)) (other citations omitted).

Though more relaxed than the traditional equity injunction standard, Section 13(b)'s public interest standard nevertheless demands rigorous proof to block a proposed merger or acquisition. "[T]he issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy." *Exxon,* 636 F.2d at 1343 (citations omitted) (internal quotation marks omitted). That is because "the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." *Id.* "Given the stakes, the FTC's burden is not insubstantial...." *FTC v. Arch Coal,* 329 F.Supp.2d 109, 123 (D.D.C.2004), *case dismissed,* No. 04–5291, 2004 WL 2066879 (D.C.Cir. Sept. 15, 2004). "[A] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief." *Id.* (citation omitted) (internal quotation marks omitted).

III. BAKER HUGHES BURDEN–SHIFTING FRAMEWORK

In *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 982–83 (D.C.Cir.1990), the Court of Appeals established a burden-shifting framework for evaluating the FTC's likelihood of success on the merits. *See* *Heinz,* 246 F.3d at 715 (applying *Baker Hughes* "to the preliminary injunctive relief stage"). Under the *Baker Hughes* framework, the FTC bears the initial burden of showing that the merger would lead to "undue concentration in the market for a particular product in a particular geographic area." *Baker Hughes,* 908 F.2d at 982; *see also* *Heinz,* 246 F.3d at 715 (quoting *United States v. Phila. Nat'l Bank,* 374 U.S. 321, 363, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)) ("[T]he government must show that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market." '). Such a showing establishes a "presumption" that the merger will substantially lessen competition. *Baker Hughes,* 908 F.2d at 982.

The burden then shifts to the defendant to rebut the presumption by offering proof that "the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition in the relevant market." *Heinz,* 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank,* 422 U.S. 86, 120, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975)) (internal quotation marks omitted); *see also* *Baker Hughes,* 908 F.2d at 991 ("[A] defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition."). "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes,* 908 F.2d at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.*

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

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Id. at 983. "[A] failure ***24** of proof in any respect will mean the transaction should not be enjoined." *Arch Coal,* 329 F.Supp.2d at 116. The court must also weigh the equities, but if the FTC is unable to demonstrate a likelihood of success, the equities alone cannot justify an injunction. *Id.*

DISCUSSION

I. *THE RELEVANT MARKET*

Merger analysis starts with defining the relevant market. *United States v. Marine Bancorp.,* 418 U.S. 602, 618, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974) (Market definition is " 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (quoting *United States v. E.I. du Pont De Nemours & Co.,* 353 U.S. 586, 593, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957)); *see also* *FTC v. Swedish Match,* 131 F.Supp.2d 151, 156 (D.D.C.2000). The relevant market has two component parts. "First, the 'relevant product market' identifies the product and services with which the defendants' products compete. Second, the 'relevant geographic market' identifies the geographic area in which the defendant competes in marketing its products or service." *Arch Coal, Inc.,* 329 F.Supp.2d at 119; *see also* *FTC v. CCC Holdings Inc.,* 605 F.Supp.2d 26, 37 (D.D.C.2009) (same). "Defining the relevant market is critical in an antitrust case because the legality of the proposed merger[ ] in question almost always depends upon the market power of the parties involved." *FTC v. Cardinal Health, Inc.,* 12 F.Supp.2d 34, 45 (D.D.C.1998).

Market definition has been the parties' primary battlefield in this case. According to the FTC, the relevant product market is broadline foodservice distribution. Compl. ¶ 40. Because broadline distribution is defined by a number of distinct attributes—such as a vast array of product offerings, private label offerings, next-day delivery, and value-added services—the FTC contends that the other modes of distribution are not reasonable substitutes for broadline distribution and thus must be excluded from the product market.

The FTC further contends that, within the product market for broadline distribution, there is another product market for foodservice distribution sold to "national" customers. *Id.* ¶ 44. These customers, the FTC asserts, are distinct from "local" or "street" customers in multiple respects. National customers have a nationwide or multi-regional footprint and, because of that footprint, typically contract with a broadliner that has geographically dispersed distribution centers; they usually make purchases under a single contract that offers price, product, and service consistency across all facilities; and they award contracts through a request for proposal or bilateral negotiations. National customers include, among others, GPOs, foodservice management companies, hospitality chains, and national chain restaurants. By contrast, the FTC says, the typical "local" or "street" customer is an independent restaurant, which does not require multiple, geographically dispersed distribution centers; purchases in smaller quantities; and ordinarily does not have a contract with its foodservice distributor(s) as it negotiates purchases on a weekly or other short-term basis. The FTC contends that for national customers the geographic market is nationwide. For local customers, it argues that the geographic market is localized near Defendants' distribution centers.

Defendants counter that the foodservice distribution market cannot be sliced and diced as advocated by the FTC. According to Defendants, the relevant market is the entire $231 billion foodservice distribution industry, consisting not only of broadline food distributors, but also specialty ***25** distributors, systems distributors, and cash-and-carry stores. All of these modes of distribution, Defendants argue, compete for foodservice distribution customer spending. Based on this market definition, Defendants assert that together, they make up approximately 25 percent of total foodservice distribution sales. They also dispute that there is a product market for "national customers," asserting that such a market has been created by the FTC out of whole cloth to artificially inflate Defendants' market shares. According to the FTC, Defendants combined have, at least, a 59 percent share of the national customer product market.

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A. Broadline Distribution as a Relevant Product Market

1. Legal Principles Affecting the Definition of the Relevant Product Market

The Supreme Court in *Brown Shoe* set forth the general rule for defining a product market: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502. Stated another way, a product market includes all goods that are reasonable substitutes, even though the products themselves are not entirely the same. *Cardinal Health,* 12 F.Supp.2d at 46; *Staples, Inc.,* 970 F.Supp. at 1074 (stating the question as "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other").

Whether goods are "reasonable substitutes" depends on two factors: functional interchangeability and cross-elasticity of demand. "Functional interchangeability" refers to whether buyers view similar products as substitutes. *See* *id.* ("Whether there are other products available to consumers which are similar in character or use to the products in question may be termed 'functional interchangeability.' ") "If consumers can substitute the use of one for the other, then the products in question will be deemed 'functionally interchangeable.' " *Arch Coal,* 329 F.Supp.2d at 119; *see also* *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 393, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)) ("Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another."). "Courts will generally include functionally interchangeable products in the same product market unless factors *other than* use indicate that they are not actually part of the same market." *Arch Coal,* 329 F.Supp.2d at 119.

As for cross-elasticity of demand, there the question turns in part on price. *E.I. du Pont De Nemours,* 351 U.S. at 400, 76 S.Ct. 994 ("An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other."). If an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market. *See* *id.* ("If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication ... that the products compete in the same market."); *Arch Coal,* 329 F.Supp.2d at 120. Price is not, however, the only variable in determining the cross-elasticity of demand between products. Cross-elasticity of demand also depends on the "ease and speed with which customers can substitute [the product] and ***26** the desirability of doing so." *FTC v. Whole Foods Market, Inc.,* 548 F.3d 1028, 1037 (D.C.Cir.2008) (Brown, J.). Thus, substitution based on a reduction in price will not correlate to a high cross-elasticity of demand unless the switch can be accomplished without the consumer incurring undue expense or inconvenience. *See* *Phila. Nat'l Bank,* 374 U.S. at 358, 83 S.Ct. 1715 (observing that "[t]he factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries").

Three other established principles are critical to defining the relevant product market in this case. The first is that the "product" that comprises the market need not be a discrete good for sale. As the Supreme Court has made clear: "We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities." *United States v. Grinnell Corp.,* 384 U.S. 563, 572, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Phila. Nat'l Bank,* 374 U.S. at 356, 83 S.Ct. 1715 (citation omitted) (finding that "the cluster of products ... and services ... denoted by the term 'commercial banking'... composes a distinct line of commerce"). Thus, what is relevant for consideration here is not any particular food item sold or delivered by Defendants, but the full panoply of products and services offered by them that customers recognize as "broadline distribution."

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Second, "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *Staples,* 970 F.Supp. at 1075; *Cardinal Health,* 12 F.Supp.2d at 47 (same). That is because market definition hinges on whether consumers view the products as "reasonable substitutes." *Cardinal Health,* 12 F.Supp.2d at 46. So, for example, fruit can be bought from both a grocery store and a fruit stand, but no one would reasonably assert that buying all of one's groceries from a fruit stand is a reasonable substitute for buying from a grocery store. *See* *Whole Foods,* 548 F.3d at 1040 (Brown, J.) ("The fact that a customer might buy a stick of gum at a supermarket or at a convenience store does not mean there is no definable groceries market."). Thus, as applicable here, the fact that buyers may cross-shop between modes of food distribution does not necessarily make them part of the same market for the purpose of merger analysis.

Third, market definition is guided by the "narrowest market" principle. *Arch Coal,* 329 F.Supp.2d at 120. That is, "a relevant market cannot meaningfully encompass [an] infinite range [of products]. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times–Picayune Publ'g Co. v. United States,* 345 U.S. 594, 612 n. 31, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). Judge Bates in *Arch Coal* succinctly described the "narrowest market" principle in practice as follows:

> The analysis begins by examining the most narrowly-defined product or group of products sold by the merging firms to ascertain if the evidence and data support the conclusion that this product or group of products constitutes a relevant market. If not, the analysis shifts to the next broadest product grouping to test whether that is a relevant market. This process continues until a relevant market is identified.

Arch Coal, 329 F.Supp.2d at 120; *see also* *United States v. H & R Block, Inc.,* 833 F.Supp.2d 36, 58–60 (D.D.C.2011) (explaining "the principle that the relevant product ***27** market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test").

The critical question here, therefore, is whether broadline food distribution qualifies as the relevant product market, or whether the product market should be expanded to include other modes of distribution.

2. The Brown Shoe "Practical Indicia"

Courts look to two main types of evidence in defining the relevant product market: the "practical indicia" set forth by the Supreme Court in *Brown Shoe* and testimony from experts in the field of economics. The court turns first to the *Brown Shoe* factors.

According to *Brown Shoe,* "[t]he boundaries of [a product market] may be determined by examining such practical indicia as industry or public recognition ..., the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502. "These indicia seem to be evidentiary proxies for direct proof of substitutability." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 (D.C.Cir.1986); *H & R Block,* 833 F.Supp.2d at 51. Courts have relied on the *Brown Shoe* factors

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in a number of cases to define the relevant product market. [2] *See, e.g., Staples,* 970 F.Supp. at 1075–80; *Cardinal Health,* 12 F.Supp.2d at 46–48; *Swedish Match,* 131 F.Supp.2d at 159–64; *CCC Holdings,* 605 F.Supp.2d at 39–44; *H & R Block,* 833 F.Supp.2d at 51–60.

The court finds that the *Brown Shoe* factors support the FTC's position that broadline foodservice distribution is the relevant product market for evaluating the proposed merger. As discussed below, an analysis of those factors demonstrates that other modes of foodservice distribution are not functionally interchangeable with broadline foodservice distribution.

a. *Product breadth and diversity*

The most distinguishing feature of broadline distribution is its product breadth and diversity. Broadliners stock thousands of SKUs across every major food and food-related category in their distribution centers. *See Staples,* 970 F.Supp. at 1078 (comparing SKU selections among different sales outlets). The average Sysco or USF distribution center carries over [Redacted] SKUs. Regional broadliners carry fewer SKUs than Defendants, but still maintain between 6,000 to 19,000 SKUs in their distribution centers. PX093 50–215, Table 22. Broadliners also offer "private label" products, which are a broadliner's branded products. Sysco has over [Redacted] private-label SKUs, and USF has over[Redacted]. PX09350–219, Table 32. This product breadth and diversity enables broadliners to serve a wide variety of customers and to be a one-stop shop, if the customer wishes. As USF's Executive Vice President of Strategy David Schreibman testified at the FTC's Investigational Hearing: "[W]e have such a broad selection of SKUs because that is a key consideration of our customer base, you have to have what they want." Investig'l Hr'g Tr., PX00590–006 at 24.

The other distribution channels pale in comparison to broadline in terms of product ***28** breadth and diversity. Systems distributors carry a limited number of SKUs—usually only a few thousand—in their distribution centers. PX09350–215, Table 22. These SKUs are ordinarily proprietary in nature and used only by the customers for which they were developed, meaning that systems products are not readily sellable to other customers. Specialty distributors also carry a limited number of SKUs, usually for niche products—such as fresh produce, meat, seafood, dairy, or bakery items—which tend to complement broadline offerings. As Sysco's CEO William DeLaney explained: "We own [specialty] to create great traction with our customers, ... we felt we had some gaps in our [broadline] product offerings, whether it was special produce, special cut steaks...." Investig'l Hr'g Tr., PX00580–010 at 38. Cash-and-carry stores likewise do not have the same breadth and diversity of products as broadline distributors. One of the largest cash-and-carry stores, Restaurant Depot, carries SKUs. USF's CHEF'STORE carries [Redacted] less than 4,000. PX09350–216, Table 26. A number of customer declarants stated that cash-and-carry store products tended to be less uniform and inferior in quality to products carried by broadliners.

b. *Distinct facilities and operations*

No one entering a systems, specialty, or cash-and-carry outlet would mistake it for a broadline distribution facility. *See Staples,* 970 F.Supp. at 1079 ("No one entering a Wal–Mart would mistake it for an office superstore.... You certainly know an office superstore when you see one."). Broadline distribution centers are massive. The average size of a Sysco distribution center is over 380,000 square feet; for USF, it is over 270,000 square feet. Some regional distributors also have distribution centers ranging from 200,000 to 400,000 square feet. PX09350–215, Table 25. Non-broadline facilities are generally smaller in size and cannot readily be converted into a broadline facility or accommodate broadline customers.

Broadline facilities also have large salesforces attached to them. Broadline facilities typically have dozens of sales representatives, while systems distributors have few sales representatives at their facilities. PX09350–215, Table 23. Cash-and-

carry stores generally do not have dedicated account representatives at all. Because the model of distribution is self-service, cash-and-carry sales representatives do not learn the individualized needs of their customers in a systematic manner.

Additional proof that broadline foodservice distribution is a separate product market comes from the corporate structure of large foodservice distributors. Major foodservice distributors offer distribution in other channels besides broadline, but they run those businesses separately from their broadline businesses. *See, e.g., H & R Block,* 833 F.Supp.2d at 56 (observing that digital do-it-yourself tax preparation was a distinct product market from assisted tax preparation because H & R Block ran them as "separate business units"). Sysco runs its systems distribution business, SYGMA, as a separate division. So, too, does PFG, which runs a systems business known as PFG Customized. Sysco also runs separate specialty divisions, such as Fresh Point, a fresh produce supplier. So, too, does PFG, which has its own specialty division, Roma, which supplies Italian restaurants and pizza parlors. And USF runs a separate cash-and-carry operation, CHEF'STORE. This type of corporate structuring shows that those who run and manage foodservice companies view broadline as distinct from other modes of distribution.

***29** c. *Delivery*

Timely and reliable delivery is critical in the food distribution industry. Unless customers can get the food they want when they need it, their businesses are at risk of losing clients and money. Broadliners have the capacity—due in large part to their extensive fleet of service vehicles, PX09350–217, Table 29—to offer frequent and flexible delivery schedules to meet customer needs, including next-day delivery. Ample evidence shows that, for a wide array of broadline customers—from large GPOs to individually-owned restaurants—next-day delivery is crucial to meeting their needs.

Neither systems distributors nor cash-and-carry stores offer the same degree of frequency and flexibility of delivery as broadliners. [3] Systems distributors tend to make large, limited-SKU deliveries on a fixed schedule. Also, systems fleets, on average, travel longer distances than broadline fleets to make deliveries. Carry-and-carry stores, for the most part, do not deliver. Rather, their primary model is self-service—that is, the customer transports the merchandise on her own. Some cash-and-carry outlets do offer delivery options. Costco, for example, offers limited-mileage delivery from some of its stores, and Restaurant Depot leases refrigerated trucks to its best customers. But those programs are quite limited and cannot substitute for the comprehensive and flexible delivery networks offered by broadliners to all of their customers.

d. *Customer service and value-added services*

Another distinguishing feature of broadline distributors is their high degree of customer service and value-added service offerings. For example, broadliners offer menu and nutritional-meal planning services to, among others, healthcare, hospitality, and restaurant customers. They also offer value-added services at their distribution facilities, such as food safety training and new product updates. Other modes of delivery do not generally offer comparable value-added services.

e. *Distinct customers*

Due in large part to the breadth of their product and service offerings, broadliners are capable of serving a wide range of customers, including classes of customers that the other channels cannot reach. Systems is a more efficient and cost-effective mode of distribution for fast food and quick service restaurants. Specialty distributors can provide higher quality and fresher products in certain categories, but have limited product offerings and charge higher prices than broadliners. Cash-and-carry stores are less expensive and more accessible for buyers such as independent restaurants, but their lack of delivery service makes them unsuitable for the large majority of foodservice customers.

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These other channels, therefore, simply cannot and do not serve as wide an array of customers as broadliners do. The largest broadline customers, such as GPOs, foodservice management companies, and hospitality providers, cannot use systems or cash-and-carry for their needs. They purchase only modest quantities of product from specialty distributors. Even most independent restaurants cannot use cash-and-carry stores as a reasonable substitute ***30** for their broadliner, even though such stores offer lower prices.

f. *Distinct pricing*

Broadliners generally compete only against other broadliners on pricing. PFG's President and CEO, George Holm, who has over 37 years of industry experience, testified that systems and specialty distributors do not significantly affect the pricing and services that PFG offers to its customers. Hr'g Tr. 575–76, 643. And, although broadliners recognize that cash-and-carry stores provide lower prices, the record does not show broadliners benchmarking their prices against cash-and-carry stores or lowering prices to compete with them. To the contrary, as USF's Executive Vice President of Strategy David Schreibman succinctly stated in an email comparing pricing between USF as a broadliner and its own cash-and-carry division, CHEF'STORE: “In the store, we will be competitive with [Redacted] on a similar cost model. On the truck, we will be competitive with broadline distributors on a similar cost model.” PX03114–003.

g. *Industry or public recognition*

Overwhelmingly, the evidence shows that players in the foodservice distribution industry—both its suppliers and customers—recognize broadline, systems, specialty, and cash-and-carry to be distinct modes of distribution. *See* *Rothery Storage,* 792 F.2d at 219 n. 4 (“The ‘industry or public recognition of the submarket as a separate economic’ unit matters because we assume that economic actors usually have accurate perceptions of economic realities.”). The court received both live and out-of-court sworn testimony from Defendants' executives; executives from other broadline distributors; officers of non-broadline companies; and customers, large and small. They uniformly observed that these modes of distribution are distinct in the variety of ways described above. In short, the industry widely recognizes that broadline distributors offer a unique cluster of products and services that is not functionally interchangeable with other modes of distribution.

h. *Defendants' response to Brown Shoe “practical indicia”*

Defendants do not, for the most part, contest the above-described distinctions between broadline and other channels of distribution. Instead, Defendants contend that defining the relevant market to include only broadliners “misunderstands consumer behavior.” Memo of Defs. Sysco Corp., USF Holding Corp. and U.S. Foods, Inc., in Opp'n to Pls.' Mot. for A Prelim. Inj., ECF No. 130 at 19 [hereinafter Defs.' Opp'n Br.]. They argue “customers simultaneously can, and routinely do, choose to patronize competitors of all stripes offering fungible goods through different but overlapping distribution channels.” *Id.* What matters, Defendants claim, is that nonbroadliners are able to constrain a broadliner's pricing by competing for customers who are able to move their entire purchasing, or portions of their purchasing, between channels. *Id.* at 19 (“Whether a substitute channel is a ‘comprehensive’ substitute is irrelevant to that question.”). Defendants offer as one compelling example the burger chain Five Guys, which recently reallocated over $300 million in annual business from USF to a collection of regional broadliners and systems distributors.

Defendants are indisputably correct that customers buy across channels, especially independent restaurants. They are also unquestionably correct that some customers, particularly quick service and fast food restaurant chains, are capable of moving large segments of business from broadline to systems. But the fact that Defendants sometimes compete against other channels of distribution in the larger marketplace ***31** does not mean that those alternative channels belong in the relevant product market

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for purposes of merger analysis. *See* *Staples,* 970 F.Supp. at 1075 ("[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes."); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 565b (4th ed. 2014) ("[I]t would be improper to group complementary goods into the same relevant market just because they occasionally substitute for one another. Substitution must be effective to hold the primary good to a price near its costs[.]").

Two key decisions from this jurisdiction, *Whole Foods* and *Staples,* support this conclusion. In *Whole Foods,* the question was whether there existed a product market for premium natural and organic supermarkets ("PNOS") separate from ordinary supermarkets. The Court of Appeals' ultimate decision was fractured—each judge issued a separate opinion, leaving no controlling opinion from the Court. Two judges, however, concluded that PNOS is a separate product market from ordinary supermarkets, even though there was evidence that customers "cross-shopp[ed]" between the two. 548 F.3d at 1040 (Brown, J.); *id.* ("But the fact that PNOS and ordinary supermarkets 'are direct competitors in some submarkets ... is not the end of the inquiry.' ") (quoting *United States v. Conn. Nat. Bank,* 418 U.S. 656, 664 n. 3, 94 S.Ct. 2788, 41 L.Ed.2d 1016 (1974)); *id.* at 1048 (Tatel, J.) ("That Whole Foods and Wild Oats have attracted many customers away from conventional grocery stores by offering extensive selections of natural and organic products thus tells us nothing about whether [they] should be treated as operating in the same market as conventional grocery stores."). Both judges agreed that just because customers were able to buy some categories of grocery products from both outlets—similar to how broadline customers are able to purchase some products from other modes of distribution—did not mean that PNOS was in the same product market as grocery stores. *See* *id.* at 1040 (Brown, J.) (citing testimony that "Whole Foods competes actively with conventional supermarkets for dry groceries sales, even though it ignores their prices for high-quality perishables"); *id.* at 1049 (Tatel, J.) ("As Judge Brown's opinion explains, this suggests that any competition between Whole Foods and conventional retailers may be limited to a narrow range of products that play a minor role in Whole Food's profitability.").

The court in *Staples* held much the same. There, the question was whether consumable office supplies sold by office superstores constituted a separate product market from office supplies sold elsewhere. *See* *Staples, Inc.,* 970 F.Supp. at 1073. The court acknowledged that no matter who sells them, office supply products—to some extent, like food products—are "undeniably the same." *Id.* at 1075. The court nevertheless held that the sale of office supplies through superstores constituted the relevant product market. "[T]he unique combination of size, selection, depth and breadth of inventory offered by the superstores distinguishes them from other retailers." *Id.* at 1079. Those words apply with equal force to broadline distributors relative to other food distribution channels. *See also* *Cardinal Health,* 12 F.Supp.2d at 47 (concluding that the wholesale drug industry "provide[s] customers with an efficient way to obtain prescription drugs through centralized warehousing, delivery, and billing services that enable the customers to avoid carrying ***32** large inventories, dealing with large number of vendors, and negotiating numerous transactions").

Defendants have not convincingly distinguished *Whole Foods* or *Staples.* [4] Instead, they urge the court to look to *United States v. Sungard Data Sys., Inc.,* 172 F.Supp.2d 172 (D.D.C.2001), as an analogous case. There, the question was whether different types of disaster recovery services for computer data comprised the same product market. *Id.* at 183. The court rejected the government's product market definition as limited only to shared hotsite services because "the government's market contains an extremely heterogeneous group of customers," *id.* at 182, who "are simply too varied and too dissimilar to support any generalizations," *id.* at 193. Here, it is unquestionably true that foodservice distribution customers are incredibly varied in their needs, buying habits, and price sensitivities. But *Sungard* differs in one critical respect. The court there

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observed that “the striking heterogeneity of the market, particularly as reflected by the *conflicting evidence relating to customer perceptions and practices,*” undercut the government's market definition. *Id.* at 182–83 (emphasis added). Here, that simply is not the case. Though the customers may be varied, the court has little doubt that the industry, from the perspective of both sellers and buyers, perceives broadline to be a separate mode of food distribution. Witnesses of all stripes had little trouble distinguishing among the different channels of distribution, and Defendants offered no evidence of any industry confusion among them. Those facts make this case fundamentally different from *Sungard*. *See* *id.* at 183 (“Customer responses were also often vague and confused” and product definitions were “consistently unclear.”).

Defendants also argue that the FTC's definition of broadline as the relevant market improperly excludes other modes based on “a small number of customers' subjective preferences for broadline distribution.” Defs.' Opp'n Br. at 17 (footnote omitted). But the evidence, as it relates to broadline versus other distribution channels, is hardly selective. Defendants' own executives acknowledged the fundamental differences between broadline and other modes of distribution. [5] So, too, did ***33** executives of regional broadliners, such as PFG, [6] Shamrock, [7] Reinhart Foodservice, [8] and Shetakis [9]; consortiums, such as UniPro [10]; systems distributors, such as Maines [11]; and cash-and-carry stores, such as Restaurant Depot. [12] Likewise, customers of every size recognized the differences between broadline and the other food distribution modes. In short, this is not the kind of case in which the testimonial evidence failed to demonstrate a consensus among the industry's players regarding the boundaries of the product market.

3. Expert Testimony

Having concluded that the *Brown Shoe* “practical indicia” support a product market for broadline foodservice distribution, the court turns next to the second type of evidence that courts consider in product market definition: expert testimony in the field of economics. One of the primary methods used by economists to determine a product market is called the “hypothetical monopolist test.” This test asks whether a hypothetical monopolist who has control over a set of substitutable products could profitably raise prices on those products. If so, the products may comprise the relevant product market. *See* *H & R Block,* 833 F.Supp.2d at 51–52. The theory behind the test is straightforward. If enough consumers are able to substitute away from the hypothetical monopolist's product to another product and thereby make a price increase unprofitable, then the relevant market cannot include only the monopolist's product and must also include the substitute goods. On the other hand, if the hypothetical monopolist could profitably raise price by a small amount, even with the loss of some customers, then economists consider the monopolist's product to constitute the relevant market.

The hypothetical monopolist test, which courts have applied, is set forth in the U.S. Department of Justice and FTC's Horizontal Merger Guidelines. *See* U.S. Dep't of Justice & FTC Horizontal Merger Guidelines § 4.1.1 (2010) [hereinafter Merger Guidelines]; *H & R Block,* 833 F.Supp.2d at 51–52; *CCC Holdings,* 605 F.Supp.2d at 40; *Arch Coal,* 329 F.Supp.2d at 120 & n. 7. As stated in the Merger Guidelines:

> [T]he test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ... likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market, including at least one product sold by one of the merging firms.

***34** Merger Guidelines § 4.1.1. The SSNBP "is intended to represent a 'small but significant' increase in the prices charged by firms in the candidate market" and is typically assumed to be "five percent of the price paid by customers for the products or services to which the merging firms contribute value." Merger Guidelines § 4.1.2.

As applied to this case, the hypothetical monopolist test asks: If there was only one broadline food distributor, could it profitably raise price by five percent, or would that price increase result in a substantial number of customers moving enough of their spend to other modes of distribution—systems, specialty, or cash-and-carry—such that the price increase would be unprofitable? If the price increase would be profitable, then the relevant product market is broadline distribution; if unprofitable, it means that the relevant market must include at least one other channel of distribution. Each side presented expert testimony from economists who performed the hypothetical monopolist test but who came to different results.

a. *Dr. Mark Israel*

For its expert economic evidence, the FTC presented the testimony of Dr. Mark Israel, who received a doctorate in economics from Stanford University and now serves as Executive Vice President at Compass Lexecon, a consulting firm. Dr. Israel's testimony served two primary functions. First, he acted as a *de facto* summary witness, synthesizing the mass of testimonial and documentary evidence gathered by the FTC. Dr. Israel's summary of that evidence parallels the discussion in the above sub-sections, so the court does not revisit it here. Second, Dr. Israel conducted a SSNIP test, using what is known as an "aggregate diversion analysis." Its purpose is to determine the amount of sales that a hypothetical monopolist of broadline distribution could lose before a price increase becomes unprofitable. *See* *Swedish Match,* 131 F.Supp.2d at 160 (describing the related methodology of "critical loss analysis"); *H & R Block,* 833 F.Supp.2d at 63 (same). A detailed recitation of Dr. Israel's aggregate diversion analysis is necessary because Defendants challenge the basic elements of his work.

Aggregate diversion analysis has three basic steps. The first is to determine the threshold aggregate diversion ratio, which is the percentage of customers that would need to stay within the broadline market to make a price increase profitable. *See* *H & R Block,* 833 F.Supp.2d at 63. This is strictly a mathematical step, with the aggregate diversion ratio a function of the subject product's gross margin. The gross margin is defined as the price of selling one additional product minus the cost of selling the additional product. [13] The second step is to determine the *actual* aggregate diversion—that is, the actual percentage of customers of a single broadliner that would switch to another broadliner after a price increase. "Since these lost sales are recaptured within the proposed market, they are not lost to the hypothetical monopolist." *Id.* As will be seen, this step involved an analysis of Defendants' actual sales data. The final step is to compare the two: if the actual aggregate diversion is greater than the threshold ratio, then the hypothetical monopolist could profitably raise prices and the candidate market is the relevant product market. *See* *id.* In other words, as applied here, if the percentage of customers of a single broadliner who would switch to another broadliner (as opposed to another mode of ***35** distribution) in response to a price increase is greater than the percentage of customers needed to stay within the market to make a price increase profitable, then the relevant product market is properly defined as broadline distribution.

At step one of his aggregate diversion analysis, Dr. Israel assumed a gross margin of 10 percent, a figure lower than the gross margin contained in the parties' financial reporting. [14] A 10 percent gross margin, according to Dr. Israel, yields a 50 percent threshold aggregate diversion ratio based on a formula devised by two economists, Michael Katz and Carl Shapiro. [15]

Next, Dr. Israel calculated the actual aggregate diversion based on three different data sets. He constructed the first two data sets from national and regional requests for proposals ("RFPs") and "bidding" summary information and documents produced by each Defendant to the FTC. Based on this information, Dr. Israel built a database for each company that tracked, for each

bidding opportunity, the incumbent distributor, the winning distributor, and the competing bidders. PX09350–104. Based on Sysco's RFP/bidding data, he found that, when Sysco lost a bid, [over 70%] of the time (based on potential revenue from sales opportunities) it was to another broadliner; the remaining losses were to another mode of distribution. PX09350–056. Based on USF's RFP/bidding data, the percentage was even higher—USF lost to other broadliners[over 70%] of the time. *Id.*

Dr. Israel constructed his third data set from USF's "Linc" database. Linc is a customer relations management tool that USF local sales representatives used until recently to track sales opportunities. The Linc database contains fields that sales representatives can complete to describe a sales opportunity, including a "main competition" field. Dr. Israel assumed that, if USF did not win an opportunity, it was won by the identified "main competitor." The Linc database contained hundreds of thousands of observations, about a third of which included information on the "main competitor." Based on this data, Dr. Israel concluded that [over 70%] of the local sales opportunities lost by USF (again, based on potential revenue of those sales opportunities) were lost to other broadliners. PX09350–056.

At the third step, Dr. Israel compared the aggregate diversion ratio of 50 percent to the actual diversion percentages derived from the three data sets. He concluded that, because each of the three actual diversion percentages was higher than the 50 percent threshold aggregate diversion ratio, broadline distribution was the relevant product market. In other words, Dr. Israel found that only 50 percent of broadline customers would need to remain within the broadline market to make a price increase profitable, while according to three different data sets, the actual percentage of customers who would remain within the broadline market (by switching to another broadliner) was greater than 50 percent. Therefore, Dr. Israel's calculations indicated that broadline distribution was the relevant product market.

***36** b. *Defendants' experts*

Defendants mounted an aggressive challenge to Dr. Israel's work through their own expert witnesses. Defendants first presented Dr. Jerry Hausman, a professor of economics at Massachusetts Institute of Technology. Dr. Hausman testified, in short, that Dr. Israel's aggregate diversion analysis was wrong because (i) he used the wrong gross margin and (ii) he used the wrong mathematical formula to calculate the threshold aggregate diversion ratio. According to Dr. Hausman, Dr. Israel excluded certain variable costs from his gross margin. The actual gross margin was not 10 percent, according to Dr. Hausman, but between [Redacted] percent and [Redacted] percent. Also, Dr. Hausman testified that the aggregate diversion formula Dr. Israel used was incorrect and led to an overly narrow market definition. [16] Using the proper margins and the correct formula, Dr. Hausman opined, the aggregate diversion ratio is not 50 percent, but rather over 100 percent, which is an impossibility (*i.e.*, more than 100 percent of customers cannot switch in response to a price increase). Thus, he concluded, the relevant product market is not broadline, but all channels of food distribution.

While Dr. Hausman challenged Dr. Israel's calculation of the threshold aggregate diversion ratio, Defendants' other expert, Dr. Timothy Bresnahan, a professor of economics at Stanford University, critiqued Dr. Israel's use of the RFP/bidding and Linc data sets to calculate the actual aggregate diversion. Regarding the RFP/bidding data, Dr. Bresnahan described the data as contrived and unreliable—a point that Defendants consistently articulated to the FTC during the investigation phase. Dr. Bresnahan explained that the companies do not keep comprehensive RFP or bidding data in the ordinary course of business and that the information Dr. Israel relied upon was pulled together at the insistence of the FTC, in part based on employees' unreliable notes and memories. As for the Linc data, it too was flawed, Dr. Bresnahan suggested, because it is a prospective sales database, not an actual transactions database in which USF sales personnel were accurately recording wins and losses. Moreover, neither the RFP/bidding data nor the Linc data describes whether Sysco or USF lost a customer for a price-based reason or some reason having nothing to do with price.

c. *The court's finding as to the expert testimony*

Having weighed the competing expert testimonies and considered them in light of the evidentiary record as a whole, the court finds Dr. Israel's aggregate diversion analysis and conclusion to be more persuasive than that advanced by Defendants' expert, Dr. Hausman. [17] Dr. Israel's ***37** reliance on the RFP/bidding and Linc data sets for calculating the aggregate diversion is problematic for the reasons Defendants have identified and, for those reasons, the court hesitates to rely on Dr. Israel's precise aggregate diversion percentages. But, when evaluated against the record as a whole, Dr. Israel's conclusions are more consistent with the business realities of the food distribution market than Dr. Hausman's. *See* *Cardinal Health,* 12 F.Supp.2d at 46 (stating that "the determination of the relevant market in the end is 'a matter of business reality—[ ] of how the market is perceived by those who strive for profit in it.' " (alteration in original) (quoting *FTC v. Coca–Cola Co.,* 641 F.Supp. 1128, 1132 (D.D.C.1986), *vacated as moot,* 829 F.2d 191 (D.C.Cir.1987)); *Arch Coal,* 329 F.Supp.2d at 116 ("[A]ntitrust theory and speculation cannot trump facts[.]"); *H & R Block,* 833 F.Supp.2d at 65 (bearing in mind the shortcomings of the expert's analysis and treating the analysis as "another data point" in determining the relevant market, rather than as conclusive).

The court finds Dr. Hausman's conclusion—that the actual aggregate diversion ratio is greater than 100 percent—inconsistent with business reality. On cross-examination, Dr. Hausman admitted that his conclusion meant that a hypothetical monopolist who had control over *every single broadline distributor* in the country could *not* profitably impose a SSNIP on customers, because enough customers would switch to other channels of distribution. Hr'g Tr.2003–04. Yet many industry leaders testified either that other channels of distribution did not constrain the prices charged by broadliners or that other channels were not substitutes for broadline distribution. For instance, PFG's President and CEO, George Holm, testified that systems and specialty distributors do not significantly affect the pricing and services that PFG's broadline division offers to its customers. Hr'g Tr. 575–76. He also testified that systems and specialty distributors were not substitutes for broadliners. Hr'g Tr. 573. Such evidence from industry leaders, [18] which the court credits, contradicts Dr. Hausman's conclusion that a hypothetical monopolist of broadline services would not be able to impose a SSNIP because enough customers would switch to other channels of distribution.

4. Conclusion as to the Broadline Product Market

In conclusion, based on the vast record of evidence the parties have presented, the court finds that the FTC has carried its burden of demonstrating that broadline distribution is the relevant product market.

B. National Broadline Distribution as a Relevant Product Market

The FTC asserts that, within the broader product market for broadline distribution, there is a narrower but distinct product market for "broadline foodservice distribution services sold to National Customers." Compl. ¶ 44. According to the FTC, "[d]ue to [their] geographic dispersion, ***38** National Customers typically contract with a broadline foodservice distributor that has distribution centers proximate to all (or virtually all) of their locations." *Id.* ¶ 42.

> National Customers typically contract with a broadliner that can provide—across all of their locations—product consistency and availability, efficient contract management and administration (e.g., centralized ordering and reporting, a single point of contact, and consistent pricing across all locations), volume discounts from aggregated purchasing, and the ability to expand geographically with the same broadline foodservice distributor.

Id. National customers include healthcare GPOs; foodservice management companies; and large hotel and restaurant chains. *Id.* ¶ 41. The FTC contends that Sysco and USF "are the only two single-firm broadline distributors with national geographic reach and, as such, are best positioned to serve National Customers." *Id.* ¶ 63.

Defendants vigorously dispute that there is such a thing as a "National Customer." They contend that a product market built around so-called national customers is "contrived," Defs.' Opp'n Br. at 16, and that the FTC's distinction between national and local customers is "factually and economically meaningless," *id.* at 13. They counter that the national-local distinction is not, as the FTC claims, built on differentiating customer characteristics, but is improperly based on an administrative distinction as to whether the customer prefers to be managed at the corporate level (making it a "national" customer) or at the local distribution center (making it a "local" customer). *Id.* at 12–15. The so-called national customer category, they also argue, is improperly based on a "few core customers who say they prefer the merging parties." *Id.* at 13. In addition, Defendants assert that Dr. Israel did not perform a SSNIP test to assess the existence of a national customer market. *Id.* at 12.

1. Legal Basis for Defining Relevant Product Market Based on Customer Type

Before turning to the evidence, the court first considers the legal basis for defining a product market based on a type of customer. Neither side comprehensively addressed this issue. Admittedly, defining a *product* market based on a type of *customer* seems incongruous. After all, one ordinarily thinks of a customer as purchasing a product in the market, and not as the product market itself. But, in this case, according to the FTC, the national customer and broadline product converge to define a market for broadline products sold to national customers. Broadline distributors must offer a particular kind of "product"—a cluster of goods and services that can be delivered across a broad geographic area—to compete for national customers. In that sense, the customer's requirements operate to define the product offering itself.

The clearest articulation of this approach to product market definition comes from the Merger Guidelines. The Merger Guidelines are not binding, but the Court of Appeals and other courts have looked to them for guidance in previous merger cases. *See, e.g., Heinz,* 246 F.3d at 716 n. 9; *H & R Block,* 833 F.Supp.2d at 52 n. 10. Section 4.1.4 of the Merger Guidelines provides that "[i]f a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP." Merger Guidelines ***39** § 4.1.4. Markets to serve targeted customers are also known as "price discrimination markets" *Id.* Professors Areeda and Hovenkamp have endorsed market definition of this kind, as well: "Successful price discrimination means that the disfavored geographic or product class is insulated from the favored class and, if the discrimination is of sufficient magnitude, should be counted as a separate relevant market." 2B Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 534d (3d ed. 2007). The concern underlying price discrimination markets is that certain types of captured or dedicated customers could be targeted for monopolist pricing even if a price increase for all customers would not be profitable. *See* Merger Guidelines § 3; Areeda & Hovenkamp 3d ed., *supra,* ¶ 533d ("[S]ellers may be able to discriminate against buyers who have fewer alternatives or for whom the product performs a more valuable function[.]").

Defining a market around a targeted customer, as the FTC urges here, is not free from controversy, as the different opinions in *Whole Foods* demonstrate. [19] Relying on an earlier version of the Merger Guidelines that recognized price discrimination against "targeted buyers," Judge Brown explained that "core consumers"—in that case, those committed to premium and natural organic supermarkets—"can, in appropriate circumstances, be worthy of antitrust protection." *Whole Foods,* 548 F.3d at 1037 (Brown, J.) (citing DOJ and FTC, 1992 Horizontal Merger Guidelines § 1.12, 57 Fed.Reg. 41,552, 41,555 (1992)). Judge Brown went on to say:

> In particular, when one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central group of customers for whom "only [that package] will do." ... Such customers may be captive to the sole supplier, which can then, by means of

price discrimination, extract monopoly profits from them while competing for the business of marginal customers.

Whole Foods, 548 F.3d at 1038 (Brown, J.) (quoting *Grinnell,* 384 U.S. at 574, 86 S.Ct. 1698) (alteration in original).

Judge Kavanaugh, in dissent, rejected defining a market around a "core customer." *Whole Foods,* 548 F.3d at 1062 (Kavanaugh, J., dissenting). According to Judge Kavanaugh, "there is no support in the law for that singular focus on the core customer. Indeed, if that approach took root, it would have serious repercussions because virtually *every* merger involves some core customers who would stick with the company regardless of a significant price increase." [20] *Id.* The relevant question for market definition, according to Judge Kavanaugh, is not whether a die-hard ***40** group of core customers would be impacted by a substantial price increase, but whether the merged company "could increase prices by five percent or more without losing so many marginal customers as to make the price increase unprofitable." *Id.*

2. Evidence Supporting a National Broadline Product Market

Ultimately, the court here need not resolve the *Whole Foods* disagreement over defining a market around a "core" customer. That is because the ordinary factors that courts consider in defining a market—the *Brown Shoe* practical indicia and the Merger Guidelines' SSNIP test— support a finding that broadline distribution to national customers is a relevant product market. *See, e.g,* Areeda & Hovenkamp 3d ed., *supra,* ¶ 533d ("If the defendant *can* profit by charging pharmacies a price significantly over its cost, then the pharmacy sales are a relevant market[.]").

a. *Industry and public recognition*

Among the most compelling evidence supporting a product market for national customers is the fact that regional broadliners have formed cooperatives, such as DMA and MUG, to compete for customers with a geographically dispersed footprint. Regional distributors, because of their limited footprints, do not have the capacity to serve customers with multi-regional needs across all of their locations. Only Sysco and USF have that capacity. These cooperatives were formed specifically to compete against Sysco and USF, by enabling regional competitors to combine to provide nationwide or multi-regional delivery and, importantly, to offer a single point of contact for the customer. Dan Cox, the President and CEO of DMA, explained that DMA was formed in 1988 as a competitive response to Sysco's merger with another company, Continental. *See* PX00565–051 at 202. He explained that "[w]hen that industry event took place, it was the first time that there was truly a national platform for foodservice distribution." *Id.* Put simply, business ventures like DMA would not exist if there were not a separate market for customers who have national or multi-regional distribution needs. *See* *Rothery Storage,* 792 F.2d at 218 n. 4 (stating that courts must "assume that economic actors usually have accurate perceptions of economic realities").

Equally compelling evidence of the national-local distinction comes from a report done by the management consulting firm, McKinsey & Co., whom Sysco hired to assist with merger integration. After closely analyzing the two companies' operations, McKinsey prepared a presentation in July 2014, titled "National, Intermediate, and Field Coverage Models." The presentation observed that "Sysco and U.S. Foods have different approaches to *grouping customers* and determining service models.... Both companies effectively operate two service models with distinct capabilities to serve *two types of customers.*" PX09010–002 (emphasis added). The presentation described "National Customers" as those who "use complex contracts with margin schedules, make online purchases of proprietary products, require auditing support, and coordinate across multiple markets." *Id.* By contrast, "Field Customers" were those who "make weekly purchases through in-person consultations, receive specialist

support tailored to independent restaurants, require minimal auditing support, and operate in 1 or few markets." *Id.* McKinsey further observed that national customers' "requirements" included "[s]et margin schedule contract[s]"; "[e]fficient ordering across multiple locations"; "[l]arge number[s] of deviated, proprietary and close-coded ***41** products"; "[r]egulatory and audit support"; "[i]n-depth reporting"; and "[c]onsistency of service, pricing and products across multiple [m]arkets." PX09010–004. Field customers' "requirements," on the other hand, included the "[a]bility to make decisions each week along with consultation"; "[a]ccess to national, commodity, and some proprietary products"; "[f]ull business, culinary, and product support for independent businesses"; and "minimal" "[c]oordination across geographies." *Id.* McKinsey ultimately recommended that the companies recognize and build a new service model around a third kind of customer—an "Intermediate" customer—who would be identifiable based on five variables: (i) national contract/no contract; (ii) nature of industry; (iii) number of markets; (iv) number of regions; and (v) size of annual sales. PX09010–007. The McKinsey presentation identified as "conclusively" national those customers who operate in three or more markets or two or more regions. *Id.*

McKinsey is not the only industry analyst or expert to acknowledge that national customers form a market distinct from local buyers. Cleveland Research Company, an investment research firm, produced an analyst report on Sysco after the merger's announcement and recognized that Sysco and USF serve a distinct group of national customers. One of the report's conclusions was that "Sysco/USF will [be] able to keep most of their larger contracted and *national account customers* for the near- and medium-term due to national scale and existing contracts.... Based on our research, most national operators prefer to deal with one distributor because it is more efficient and less expensive than dealing with several regional players." PX09332–006 (emphasis added).

The industry's trade group, the International Food Distributors Association ("IFDA"), also recognizes a distinction between national and local customers. IFDA produces a Quarterly Operations survey that reports separate sales figures for "national" and "street" accounts. PX00570–004 at 78. IFDA's President, Mark Allen, explained that IFDA distinguishes between the two because "the dynamics between the two [types of] businesses might be a little bit different. The operating metrics might be a little bit different." *Id.* at 80.

Defendants' ordinary course documents also recognize the national-local distinction and tout their strategic advantage as to the former. *See* *H & R Block,* 833 F.Supp.2d at 52 ("When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents."). A Sysco "Investor Day" presentation from 2010 distinguishes the company's "Contract Sales (Broadline)" from "Street Sales," PX03101–010, and separates its "Key Competitors—National," from regional competitors, PX03101–020. Similarly, a presentation entitled "Board of Directors Strategy Sessions," dated July 2010, distinguishes between Sysco's market size for "corporate contracts"—defined to include "major foodservice management (FSM) sales, major group purchasing organization (GPO) sales, and major chain sales (non FSM or GPO)"—and "Street" business. PX01008–006.

USF has similar documents. An internal USF presentation, titled "Business Overview," describes "[USF's] Customers" as falling into three categories: (i) "Street: Independent restaurants or small local chains"; (ii) "National Accounts: Contracted customers located across the country," including acute and long-term healthcare facilities, hotels and the hospitality industry, ***42** schools, and U.S. military and government agencies; and (iii) "National Chain Restaurants: Fast food and quick-serve establishments." PX03122–004. *See also* PX03034–006 (similarly categorizing the company's customers). A USF "Investor Presentation" from November 2012 describes USF as the "2nd largest national broadline distributor," PX03000–006, and touts its "[a]bility to leverage our national scale to cost effectively service customers nationally," PX03000–014. Further, it distinguishes between "National Scale," where "US Foods is the second-largest broadline foodservice distributor in the U.S.," and "Local Scale," where "US Foods is estimated # 1 or # 2 position in [Redacted] of served markets," PX03000–014. *See also* PX03007–007 (internal document in which KKR & Co., one of USF's private equity owners, distinguishes between "Street and National Account customer segments").

Other key players in the industry also recognize that national customers are different. For instance, the President and CEO of PFG, George Holm, agreed that "Sysco and U.S. Foods are the only two distributors for broadline with the capability to

serve national broadline customers with locations dispersed throughout the United States," including foodservice management companies, GPOs, large healthcare systems, and certain restaurant chains. Hr'g Tr. 596. Representatives of DMA and Reinhart likewise referred to national customers as those that are geographically dispersed and need a single point of contact. *See* PX00412–002–003; PX00415–004.

b. *Distinct customer needs*

There is ample record evidence that national customers' needs differ from those of local customers. The McKinsey analysis described above concisely summarized those distinctions. PX09010–004.

For starters, national customers, because of their dispersed geographic presence, often require a broadliner to meet their foodservice needs in more than one region. As a result, the number of distribution centers in a broadliner's network is often an important factor for such customers. In sharp contrast, according to Sysco, "all, or almost all," of its "local contract customers" are served by only one distribution center. PXO1400–001.

The Defendants' ordinary course documents highlighted their comprehensive distribution networks as a competitive advantage for serving national customers. *See, e.g.,* PX03000–014 (USF presentation touting its "[a]bility to leverage our national scale to cost effectively service customers nationally"); PX00247–001–002 (USF email communication to [Redacted] describing the "US Foods Value Proposition" as including "Privately held National Distribution footprint company"; "Single IT operating platform nationally"; and a "Single Point of Contact"); PX01062–005 (Sysco presentation to Aramark highlighting that Sysco's "national footprint, strong service approach and our breadth of product offerings is what differentiates us from our competition"). As USF's David Schreibman acknowledged during the evidentiary hearing, "US Foods['] leading national market position is due to U.S. Foods['] geographic presence that includes 62 distribution centers across the United States." Hr'g Tr. 1520–21. He also acknowledged that Sysco was the only company with greater scale than USF. *Id.* at 1522.

In addition to multi-regional distribution capabilities, national customers generally demand a set margin contract that applies across multiple locations. As PFG's George Holm testified, a single contract enables customers to simplify contract administration and to reduce administrative ***43** costs. *Id.* at 600–02. Additionally, national customers often use RFPs and/or bilateral negotiations to award broadline foodservice distribution contracts. *Id.* at 1595–97. In sharp contrast, pricing for local or "street" customers, according to Sysco, "[is] ultimately the result of individual negotiations between the customer and [broadliner]" and "can vary on a weekly and even daily basis." PX06057–032.

National customers also seek a single technology platform for handling their purchases. Consolidating purchasing through a single ordering platform creates efficiencies and cost savings, particularly as it relates to managing direct contracts with manufacturers and administering price changes. The importance of this feature is evidenced by DMA's development of a single ordering platform that enables customers to purchase from its members. Indeed, DMA promotes its technology platform as superior to Sysco's and USF's. PX00565–006 at 23–24. If national customers had not demanded such a feature, DMA would not have developed it.

Finally, product consistency is a factor for some national customers, particularly for those who wish to purchase private label products. *See* PX09010–004 (McKinsey report identifying as a "Customer requirement[ ]" for "National" customers "consistency of service, pricing, and products across multiple Markets"). Large customers can achieve a high degree of product consistency through direct contracting with product manufacturers or by purchasing proprietary brands stocked by Defendants. DX–01359 at 73 (Dr. Bresnahan report observing that "one way customers that value consistency achieve it is through direct negotiation with manufacturers to create propriety products" and that "[c]ustomers can also rely on national brands to ensure consistency"). However, because private label goods offer a strong value benefit, if a national customer wishes to purchase such goods and have them available across all of its locations, it can do so most efficiently through a broadliner with national

geographic scope. *See* Hr'g Tr. 600 (George Holm of PFG stating that one reason national customers prefer to contract with Sysco or USF is that "[w]here they have a preference for a private brand, [ ] it is the same product [across] their system").

c. *Defendants' Operations*

Both Sysco and USF operate dedicated sales groups from their national headquarters that are responsible for negotiating and managing contracts with customers who use multiple distribution centers. *See* *Grinnell,* 384 U.S. at 572–74, 86 S.Ct. 1698 (holding that centralized station security services operated on a national level is a relevant product market). Sysco refers to these customers as "corporate multi-unit customers," or CMUs. USF refers to them as "national sales customers." According to USF's Senior Vice President for National Sales, Tom Lynch, each national customer in his group has a single USF representative who is responsible for that customer. The largest customers are assigned a full-time dedicated employee to manage the account. PX00517–014–015 at 56–58.

d. *SSNIP Test*

Contrary to what Defendants contend, Dr. Israel did perform a SSNIP test to determine whether there is a separate product market for national customers. That SSNIP test was performed as an element of the SSNIP test that Dr. Israel used to assess whether broadline distribution was a relevant product market. As Dr. Israel testified, he applied to national customers the same 10 percent gross margin that he used to calculate the aggregate diversion ratio for all customers. Hr'g Tr. 1005 (stating that he used a 10 percent ***44** gross margin "to both local and national customers"). He derived the actual diversion for national customers based on the RFP/bidding data provided by the defendant companies. *Id.* at 1009 (describing the "RFP/bidding data" as "really national [customer] data"). Using the same methods discussed above, Dr. Israel calculated the actual diversion for Sysco's national customers to be [over 70%] and the actual diversion for USF's national customers to be [over 70%] In other words, over [70%] of the time (based on potential revenue from sales opportunities), when Sysco or USF lost a bid opportunity for a national customer, it was to another broadliner. Because these percentages were greater than the aggregate diversion ratio of 50 percent, Dr. Israel concluded that broadline service to national customers was a relevant market. In other words, Dr. Israel found that only 50 percent of national broadline customers would need to remain within the broadline market to make a price increase profitable, while the actual percentage of national customers who would remain within the broadline market (by switching to another broadliner) was greater than 50 percent. Dr. Israel's calculations, therefore, indicated that broadline distribution to national customers was the relevant product market.

The court already has expressed its reservations about relying on the RFP/bidding data to precisely calculate the aggregate diversion ratio. But, as before, the court finds that the ultimate conclusion of the SSNIP test—that broadline foodservice to national customers is a relevant product market—is supported by the weight of the evidence. Numerous national customer witnesses testified that other channels of distribution were not adequate substitutes for broadline distribution.[21] Although Defendants have shown that some national customers who were served by broadliners are now served by systems or systems-like distributors—most notably, Subway and Five Guys—those are the exceptions. Subway and Five Guys, because of their limited menus, are more amenable to substituting to a systems model. The same simply cannot be said of other large national customers, like GPOs, foodservice management companies, and hospitality chains, which rely heavily on broadliners.

e. *Defendants' arguments against a national customer market*

Asserting that there is no separate product market for national broadline customers, Defendants first argue that the national-local distinction is "arbitrary" because it is based on nothing more than customer preference about account management. Defendants' executives testified that Sysco's CMU customers and USF's national customers are so designated, not because

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of any particular characteristic or group of characteristics, but purely because the customer prefers to have its ***45** account managed by the headquarters sales team, instead of by its local distribution center. The FTC's and Dr. Israel's reliance on the companies' administrative designation, Defendants argue, leads to arbitrary classifications. For example, some of Defendants' customers who use a small number of distribution centers are counted by the FTC as "national" customers. As Dr. Hausman demonstrated, 37 percent of Sysco's CMU customers use five or fewer distribution centers and 55 percent use ten or fewer. And, for USF, 51 percent of their national customers use five or fewer distribution centers and 67 percent use ten or fewer. Hr'g Tr.1976. Additionally, similarly situated customers—in terms of size, number of distribution centers, revenues, etc.—are sometimes treated differently. One customer may be identified as national and another as local, simply because one prefers to be managed from headquarters and the other from the local distribution center.

Defendants are correct that their "national" customer lists are over-inclusive—not every customer on those lists has multi-regional distribution needs. And they are also correct that the FTC could have more accurately defined a class of "national" customers by testing each candidate national customer against specific "national" criteria, such as the number of distribution centers used. But, ultimately, for the purpose of defining a product market, the court finds that the parties' "national" customer designation is a useful proxy for customers requiring geographically dispersed distribution and attendant services.

As the graphic below prepared by Dr. Israel shows, if the merger were to occur, a significant proportion of the combined company's national customer revenues would come from customers who use a large number of distribution centers. PX09375–077, Figure 3. National customers using more than 35 distribution centers would account for [Redacted] percent of a merged Sysco-USF's revenue; national customers using more than 24 distribution centers would account for [Redacted] percent of revenue; and national customers using at least 10 distribution centers would account for [Redacted] percent of revenue. Those figures demonstrate that Defendants' national-customer designations capture those key customers (based on revenues) who use a large number of distribution centers. The "national" designation includes, among others, the largest GPOs, like Premier, Novation, and MedAssets, each of whom uses over [Redacted] distribution centers; the largest foodservice management companies, like Sodexo, Aramark, and Compass, each of whom uses more than [Redacted] distribution centers; the largest hotel management company, Hilton, which uses [Redacted] distribution centers; and the second largest government customer, the U.S. Department of Veterans Affairs, which uses [Redacted] distribution centers (the largest is the U.S. Department of Defense, which uses [Redacted] distribution centers). PX09375–076, Table 5. Thus, for these customers, the label "national" is not merely administrative; it accurately reflects this high revenue-generating group's actual needs. The fact that some smaller customers are included among the Defendants' "national" designations does not mean that the designation lacks evidentiary value for defining a market for national customers.

Figure 3

Sysco and USF 2013 Revenues by Number of Distribution Centers Used

[Redacted]

Next, Defendants assert that defining a price discrimination market around national customers is untenable because the FTC ***46** failed to show that so-called national customers shared any objectively observable characteristics that would enable the combined company to price discriminate against that group. *See* Merger Guidelines § 3 (stating that "differential pricing" is an essential element of price discrimination, which "may involve" offering different pricing to different types of customers "based on observable characteristics"). In other words, they argue that this grouping of customers is so heterogeneous that there is no common, identifiable characteristic that could serve as a proxy for determining which customers in the broadline market have inelastic demand.

Defendants are undoubtedly correct that, even among their largest customers, there is great variety in the customers' servicing needs and requirements. But price discrimination can occur even when customers do not have common observable

characteristics. As the Merger Guidelines state, markets for targeted customers may exist "when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product." Merger Guidelines § 4.1.4; *see also* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,* 77 Antitrust L.J. 49, 93 (2010) (observing that, in markets for intermediate goods and services, "prices typically are negotiated and price discrimination is common").

Here, the evidence is clear that Defendants engage in individual negotiations with their national customers and possess substantial information about them. Indeed, the fact that Defendants employ substantially more sales representatives than other broadliners, PX09350–218, Table 30, and assign full-time dedicated employees to some of their largest customers is indicative of the "know-your-customer" philosophies of both firms. Defendants, therefore, already have substantial customer information that would allow them to predict which of their customers have inelastic demand and which do not. Price discrimination can occur in such a marketplace, even if the targeted customers do not share specific identifiable traits.

Finally, Defendants contend that a product market of targeted national customers does not comport with business realities. This argument has two main elements. First, they assert that, contrary to what the FTC contends, Compl. ¶¶ 5, 42, national customers do not require a broadline foodservice distributor that is national in scope. Rather, they argue, even at current prices, many large customers spread their distribution needs over multiple regional suppliers. For instance, Defendants cite GPOs, like [Redacted], [Redacted], Amerinet, and large government agencies, like the Defense Logistics Agency, as using a regional contracting approach. Defs.' Opp'n Br. at 15. They also refer to one of the largest foodservice management companies, Sodexo, which splits its distribution into [Redacted] regions. *Id.* And, then there is Subway and Five Guys, two large chain restaurants that have regionalized and purchase from multiple suppliers. *Id.* at 15–16. Because these types of customers can regionalize or credibly threaten to regionalize. Defendants argue, the merged company would not be able to discriminate against them on price.

But Defendants' argument founders when faced with the actual purchasing habits of the industry's largest customers. The evidence shows that the bulk of the broadline purchasing done by most geographically dispersed broadline customers is still done through Sysco and USF. Of Avendra's members' broadline spend, [Redacted] ***47** percent is with Sysco and USF. Pl.'s Collected Proposed Findings of Fact and Conclusions of Law, ECF No. 173 at 114 [hereinafter PFF]. Members of other GPOs similarly purchase a large percentage of their goods from Sysco and USF. The total broadline spend of Premier, [22] Novation, MedAssets, and HPSI members with Sysco and USF is, respectively, [Redacted] percent, [Redacted] percent, [Redacted] percent, and [Redacted] percent. *Id.* at 113–15; FTC Closing Arg. Slides at 35. Large foodservice management companies similarly make the bulk of their broadline purchases from Sysco and USF. Sodexo, Aramark, Compass, and Centerplate, respectively, spend [Redacted] percent, [Redacted] percent, [Redacted] percent, and [Redacted] percent of their broadline foodservice distribution dollars with Sysco and USF. PFF at 113–16; FTC Closing Arg. Slides at 35. The story is similar for large hospitality customers. Two of the largest, Hilton and Interstate, allocate [Redacted] percent and [Redacted] percent of their broadline spend, respectively, to the two companies. PFF at 114, 116; FTC Closing Arg. Slides at 35. Even the Defense Logistics Agency, which contracts regionally, dedicates [Redacted] percent of its broadline spend to Sysco and USF. PFF at 116; FTC Closing Arg. Slides at 35.

The court infers from this evidence that geographically dispersed customers view Sysco and USF as having significant comparative advantages over regional distributors, particularly because of their far-reaching distribution networks. Though some customers have spread their business over multiple broadliners, a significant portion (as measured by total revenues) have not. Indeed, PFG's George Holm observed that the *"clear trend* amongst national broadline customers is to move toward a single nationwide provider." Hr'g Tr. 598 (emphasis added); PX09081–002 (letter from PFG's counsel to FTC, dated November 14, 2014, stating the same). *See* *Brown Shoe,* 370 U.S. at 332, 82 S.Ct. 1502 (footnote omitted) ("Another important factor to consider is the trend toward concentration in the industry."). Mr. Holm further admitted that either Sysco or USF essentially wins every RFP issued by a national customer. Hr'g Tr. 598–99. And PFG acknowledged by letter to the FTC that, even as the country's third-largest broadliner, "PFG has difficulty competing for national broadline accounts because it does not have a nationwide footprint of broadline distribution centers." PX09081–001. Other large regional broadliners have said the same

about their own businesses models. [23] Defendants' contention—that a product market defined around national customers does not comport with business reality because such customers have regionalized or can regionalize—is thus belied by the record evidence.

Second, Defendants argue that margin data shows that, as a merged entity, they would not be able to price discriminate against national customers. Dr. Hausman demonstrated that Defendants' margin on sales to customers who use fewer distribution centers is actually *higher* than their margin on sales to those who use more. DX–01355 at 58–61. Defendants contend ***48** that under the FTC's theory, they presently have a duopoly as to national customers, yet they do not earn duopoly profits on that customer class. Defendants thus maintain that, just as they cannot today price discriminate to earn duopoly profits, they would not be able to price discriminate after the merger to earn monopoly profits.

Defendants' argument, however, is unconvincing. Defendants' present inability to earn duopoly profits on national customers is probably because large customers can keep prices down by leveraging the defendant companies against one another. As the Cleveland Research Company observed: "Based on our research, **we believe both Sysco and U.S. Foods have priced each other down competing for larger national/regional contract accounts** over the last several years." PX09332–004. The ability of large buyers to keep prices down, functioning as what is known in antitrust literature as "power buyers," *see* *Cardinal Health,* 12 F.Supp.2d at 58–59; Merger Guidelines § 8, depends on the alternatives these large buyers have available to them, *see* Shapiro, *supra,* at 95; Areeda & Hovenkamp 3d ed., *supra,* ¶ 943a. If a merger reduces alternatives, the power buyers' ability to constrain price and avoid price discrimination can be correspondingly diminished. *See* Merger Guidelines § 8 ("Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer."). Thus, the fact that Defendants are currently unable to price discriminate against national customers does not mean that they would be unable to do so as a merged firm.

C. Product Market Summary

Having considered and weighed the parties' arguments and evidence, the court concludes that the FTC has carried its burden of showing that, for purposes of merger analysis, (i) broadline foodservice distribution is a relevant product market, and (ii) broadline foodservice distribution to national customers is also a relevant product market.

D. Relevant Geographic Market

The court now turns to the second part of defining the relevant market, which involves determining the relevant geographic market. The Supreme Court has stated that, for Section 7 of the Clayton Act, the relevant geographic market is "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." *Marine Bancorp.,* 418 U.S. at 620–21, 94 S.Ct. 2856. Stated differently, "[t]he proper question to be asked ... [is] where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Phila. Nat. Bank,* 374 U.S. at 357, 83 S.Ct. 1715; *see also* *Cardinal Health,* 12 F.Supp.2d at 49 (citation omitted) (internal quotation marks omitted) (stating that the relevant geographic market is "the area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition"). Like the product market, the geographic market must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe,* 370 U.S. at 336–37, 82 S.Ct. 1502 (footnote omitted) (internal quotation marks omitted). The Supreme Court has recognized that an "element of 'fuzziness would seem inherent in any attempt to delineate the relevant geographical market,' " and therefore "such markets need not—indeed cannot—be defined with scientific precision." *Conn. Nat. Bank,* 418 U.S. at 669, 94 S.Ct. 2788 (quoting *Phila. Nat'l Bank,* 374 U.S. at 360 n. 37, 83 S.Ct. 1715). That said, the ***49** relevant geographic market "must be sufficiently defined so that the [c]ourt understands in which part of the country competition is threatened." *Cardinal Health,* 12 F.Supp.2d at 49.

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The FTC contends that there are two relevant geographic markets in this case. For national broadline customers, the relevant geographic market is nationwide. For local broadline customers, the relevant geographic markets are localized around Defendants' distribution centers.

With regard to national customers, for essentially the same reasons that the FTC asserts that there is a product market for broadline distribution to national customers, the FTC asserts that the geographic market for those customers is nationwide. The FTC relies on the fact that Defendants plan on a national level and have "national account" teams dedicated to national customers; their contractual pricing and service terms with national customers apply across regions; and their competition for national customers is largely other broadliners with nationwide coverage.

As for local customers, as discussed in more detail below, the FTC's local geographic markets were constructed by Dr. Israel and are premised on customers' proximity to Defendants' distribution centers. The basic idea is that, for local customers, distance to a distribution center is a key service factor and, for Defendants, distance traveled from a distribution center to make deliveries is a critical cost component. The FTC alleges that the merger threatens to harm competition in 32 local geographic markets where Sysco and USF together currently have dominant market shares. Compl. ¶ 60.

Defendants dispute that there is a nationwide geographic market for the same reasons that they contend that there is no national customer product market. As for the local geographic markets, Defendants aggressively challenge the methodology that Dr. Israel used in defining local markets. Their primary criticism is that the geographic areas are drawn so narrowly that they exclude actual competition from the relevant market. This results, they contend, in local market concentrations that artificially inflate Defendants' market shares.

1. National Market

Although the physical act of delivering food products occurs locally, for national customers the relevant geographic area for competitive alternatives is nationwide, primarily because of their geographically dispersed footprint. Defendants compete within this market by touting their nationwide distribution capabilities to these customers; bidding against other broadliners with multi-regional capabilities (which is to say, against each other and the regional cooperatives); coordinating the marketing, negotiating, and managing of these customers through their "national account" teams; and entering with these customers into a single contract whose terms, including pricing, apply across regions. For these reasons, the court finds that the relevant geographic market for broadline foodservice to national customers is nationwide. *See* *Grinnell,* 384 U.S. at 575–76, 86 S.Ct. 1698 (finding a national geographic market where central station services "operated on a national level," and there was "national planning," a nationwide schedule of prices, and nationwide contracting for multi-state businesses); *Cardinal Health,* 12 F.Supp.2d at 50 (finding a national geographic market where evidence showed that "GPOs negotiate contracts with several wholesalers, making the same prices available throughout the country to all of their members—local, regional, or national").

***50** *2 .Local Markets*

Defining the local geographic market presents a far greater challenge. Not surprisingly, there is no industry standard for delineating the area that makes up a local geographic market for broadline distribution. Each local market has its own unique attributes. Customer composition and concentration differs across markets; so does the demand for products, with SKU variations reflecting local tastes and palettes. Average driving distances for foodservice distributors vary depending on the density of the area, with longer hauls more common in rural parts of the country and shorter trips more prevalent in urban areas. And, of course, the competitors vary from market to market.

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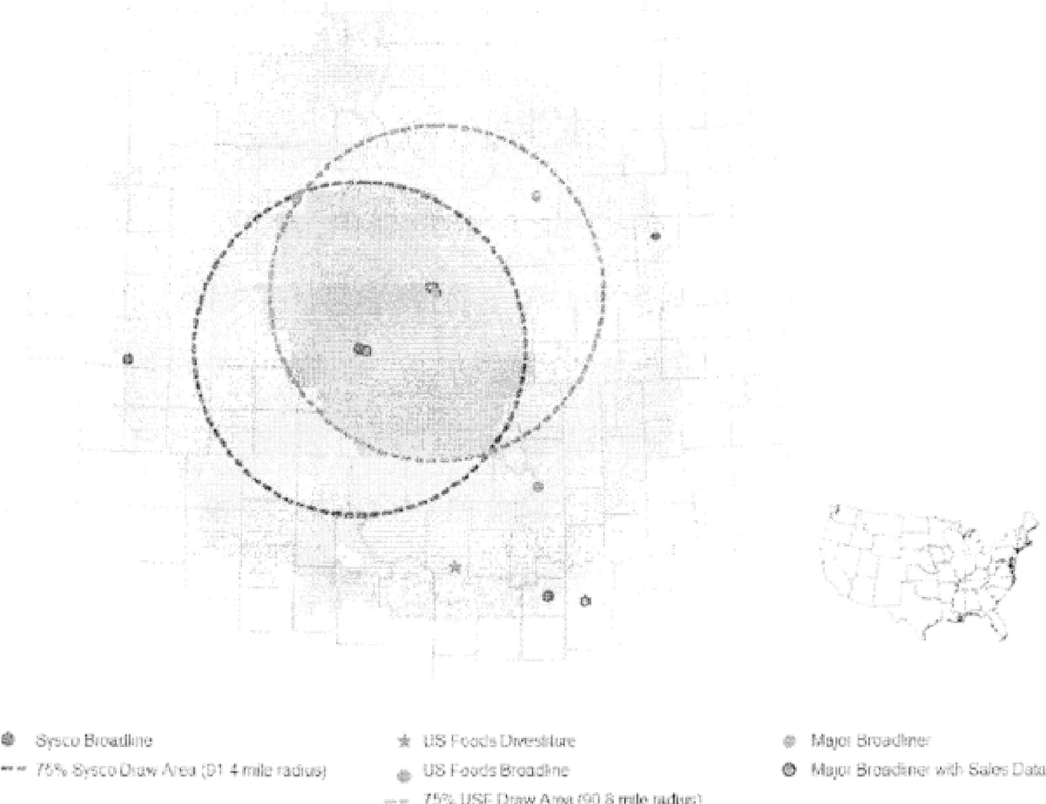
The FTC tasked Dr. Israel with defining the local geographic markets. He constructed them as follows. In his first step, Dr. Israel drew circles around the location of each Sysco and USF distribution center. To determine the size of each circle, Dr. Israel used a radius, referred to as the "draw distance," that, on average, captured 75 percent of the distribution center's sales to local customers. The length of each distribution center's 75 percent draw radius differed. For example, the 75 percent draw distance around Sysco's Billings, Montana, facility was 262 miles, whereas the 75 percent draw distance around Sysco's Jersey City, New Jersey, facility was only 24 miles. PX09350–221–224, Table 38. What that means is Sysco drives over 200 miles further to capture 75 percent of its local sales in Billings than it does in Jersey City. That disparity makes sense, as more populated areas correspond to higher customer concentrations and shorter delivery distances.

In his second step, Dr. Israel identified each company's local customers that fell within an area of intersection between the draw circle around the Sysco distribution center and the draw circle around the USF distribution center. This area of intersection was termed the "overlap area." These "overlap customers," according to Dr. Israel, were the customers most likely to suffer harm from the merger, because these were the customers who would be left with one less alternative supplier after the merger. Exhibit 40 from Dr. Bresnahan's report, which is reproduced below, shows Dr. Israel's methodology in the Omaha, Nebraska, area. The blue-dotted circle corresponds to Sysco's 75 percent draw area, and the green-dotted circle corresponds to USF's. The dark gray area corresponds to the "overlap customers." DX–01359, Ex. 40.

EXHIBIT 40

DISTRIBUTION CENTERS LOCATED NEAR THE FTC'S CONTESTED LOCAL AREAS OMAHA, NE/COUNCIL BLUFFS, IA

***51**



In his third step, Dr. Israel identified the broadline distributors who could compete for the customers in the overlap area. To do this, Dr. Israel drew circles around each overlap customer using the 75 percent draw radius. This created a larger circle that

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moved the outer boundaries of the overlap area by the same radius as the 75 percent draw area, which is represented by the light gray area in Exhibit 40 above. According to Dr. Israel's analysis, the light gray area is the area to which customers can practically turn for alternative sources of broadline distribution. All of the competitors located within the light gray area were factored into Dr. Israel's local market share computations.

Defendants attack Dr. Israel's "circle drawing exercise" as "arbitrary" and not reflective of industry realities. Defs.' Opp'n Br. at 27. Specifically, they assert that Dr. Israel's methodology is flawed because it assumes that competitors will drive no greater distance than Sysco's or USF's 75 percent draw radius to serve customers. Defendants point to competitor declarations and testimony showing that in many of the 32 local markets in which the FTC claims Defendants have a dominant market share, competitors are willing to, and do, drive distances greater than the 75 percent draw radius to compete for and deliver to customers.

Notwithstanding this criticism, the court finds that there is nothing inherently "arbitrary" about Dr. Israel's methodology in defining the local markets. To the contrary, given the absence of an industry standard for defining a local market, Dr. Israel's methodology provides a practical approach and solution to an otherwise thorny problem. Dr. Israel's premise in defining these markets—that driving distance matters—is amply supported by the record and common sense. Customers who are farther away from a distribution center cost more to service. Longer distances ***52** correspond to, among other things, higher gas usage, more labor hours, and increased wear and tear on trucks. Given that the geographic market need not be defined by "metes and bounds," *Conn. Nat'l Bank,* 418 U.S. at 669, 94 S.Ct. 2788 (citation omitted) (internal quotation marks omitted), Dr. Israel's 75 percent draw methodology identifies "the area of competitive overlap, [where] the effect of the merger on competition will be direct and immediate," *Phila. Nat'l Bank,* 374 U.S. at 357, 83 S.Ct. 1715. *See also Conn. Nat'l Bank,* 418 U.S. at 670 n. 9, 94 S.Ct. 2788 (remanding to the district court to define the local market and observing that the "federal bank regulatory agencies define a bank's service area as the geographic area from which the bank derives 75% of its deposits"). The court therefore concludes that the relevant local geographic markets are the areas of overlap resulting from Dr. Israel's 75 percent draw methodology.

Ultimately, what really troubles Defendants about Dr. Israel's "circle drawing exercise" is not the resulting geographic areas, but what those areas mean for calculating Defendants' local market shares. The court considers those arguments in the next section.

II. ***THE PROBABLE EFFECTS ON COMPETITION***

Having concluded that the FTC has carried its burden of establishing a relevant market—both a nationwide market for broadline foodservice to national customers and various local markets for broadline foodservice to local customers—the court turns next to "the likely effects of the proposed [merger] on competition within [those] market[s]." *Swedish Match,* 131 F.Supp.2d at 166. As the Court of Appeals explained in *Heinz,* the government "must show that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market.' " 246 F.3d at 715 (quoting *Phila. Nat'l Bank,* 374 U.S. at 363, 83 S.Ct. 1715). "Such a showing establishes a 'presumption' that the merger will substantially lessen competition." *Id.* (citation omitted).

The Court of Appeals has held that the FTC can establish its *prima facie* case by showing that the merger will result in an increase in market concentration above certain levels. *Id.* "Market concentration is a function of the number of firms in a market and their respective market shares." *Arch Coal,* 329 F.Supp.2d at 123. A common tool used to measure changes in market concentration is the Herfindahl–Hirschmann Index (HHI). *Heinz,* 246 F.3d at 716; *see also* Merger Guidelines § 5.3. HHI figures are "calculated by summing the squares of the individual firms' market shares," a calculation that "gives proportionately greater weight to the larger market shares." Merger Guidelines § 5.3. "Sufficiently large HHI figures establish the FTC's prima

facie case that a merger is anti-competitive." *Heinz,* 246 F.3d at 716. The Merger Guidelines, which provide "a useful illustration of the application of HHI," *FTC v. PPG Indus., Inc.,* 798 F.2d 1500, 1503 n. 4 (D.C.Cir.1986), state that a market with an HHI above 2,500 is considered "highly concentrated"; a market with an HHI between 1,500 and 2,500 is considered "moderately concentrated"; and a market with an HHI below 1,500 is considered "unconcentrated," Merger Guidelines § 5.3. Furthermore, a merger that results in "highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.* In *Heinz,* the Court of Appeals recognized that an increase in ***53** HHI by 510 points "creates, by a wide margin, a presumption that the merger will lessen competition." 246 F.3d at 716.

A. Concentration in the National Broadline Customer Market

1. Dr. Israel's National Broadline Customer Market Shares Calculations

In some cases the merging parties' market shares and post-merger HHIs are seemingly uncontroversial. *See, e.g., Staples,* 970 F.Supp. at 1081–82; *H & R Block,* 833 F.Supp.2d at 71–72. Not so here. Because there are no industry-recognized market shares for national broadline customers, the FTC tasked Dr. Israel with calculating the market shares and the HHIs. Not surprisingly, Defendants vigorously contested his methodology and conclusions.

Dr. Israel calculated Defendants' national customer shares as follows. As his first step, he identified Defendants' individual sales to national broadline customers, *i.e.,* the numerator for the market share calculation. Those sales figures came directly from the parties' "national" customer designations: for Sysco, its sales to CMU customers, and for USF, its sales to national customers.

Next, Dr. Israel determined the total sales by all broadline distributors to national customers, *i.e.,* the denominator for the national share calculation. Again, because there is no industry-recognized figure for such sales, Dr. Israel estimated them. He did so in two ways. First, he aggregated the national sales of the three principal competitors for national customers—Sysco, USF, and DMA—and added in another share equal to DMA's. This total comprised the denominator for his "baseline" shares calculation. PX09350–074. The addition of another DMA-sized share to the denominator was premised on his observation from the RFP/bidding data that the size of sales to national customers by all broadliners other than Sysco, USF, and DMA was about the same as DMA's.

Dr. Israel also used a second method to calculate the total sales to national customers. He aggregated the national sales reported by the largest 16 broadliners, including DMA and MUG, in response to the FTC's civil investigative demands. This data is referred to as CID data. Dr. Israel ran several "sensitivities" on this sum, adding in sales to account for variations in CID responses (*e.g.,* some distributors did not segregate "national" from total sales). Dr. Israel also aggregated the national sales of Sysco, USF, DMA, and MUG, plus an estimate of national sales for *all* other responding distributors based on the assumption that each distributor's national-local sales ratio was the same as Defendants' ratio. Dr. Israel's various approaches yielded a total national broadline sales estimate of $28 to $30 billion. Hr'g Tr. 1177–78; *see also* PX09060–006 (PFG business plan estimating the size of the national customer market to be approximately $20 billion).

As his last step, Dr. Israel adjusted his market shares to account for the divestiture to PFG. The chart below reflects Dr. Israel's post-merger, post-divestiture market share and HHI calculations. For his "baseline" calculation, Dr. Israel determined that the parties' post-merger national broadline customer market share would be 71 percent with an HHI increase of nearly 2,000 points. His CID data-based calculations, shown as (i) through (vi) in the chart, also yielded high post-merger shares and significantly increased HHIs. Dr. Israel's most conservative approach, in which he assumed that the top 16 broadliners had national to local sales ratios that were equal to Defendants' ratio ***54** of such shares—(iv) in the chart below—resulted in a post-merger market share of 59 percent and an HHI increase of 1,500 points. PX09350–186, Table 18.

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Table 18

Shares of Sales to National Broadline Customers; After Accounting for the Proposed Divestiture

	Post-Divestiture Shares	Post-Divestiture HHI's	
	Combined Share	HHI	Δ HHI
Baseline	71%	5,119	1,966
(i) National	68%	4,935	1,953
(ii) National + Imputed National	65%	4,549	1,799
(iii) National + Regional	66%	4,614	1,822
(iv) National + Systems	62%	4,217	1,643
(v) National + Regional + Systems	61%	4,087	1,590
(vi) Parties' Ratio of National	59%	3,809	1,500

2. Defendants' Arguments

Defendants raise a host of objections to the reliability of Dr. Israel's methodology and calculations. They contend that his use of their "national" sales in the numerator was arbitrary because, as discussed above, not all of Defendants' "national" sales are to customers with a multi-regional footprint. The inclusion of those sales, they contend, overstated Defendants' national market share. They also argue that Dr. Israel's numerator included some sales to systems-like customers, such as to Five Guys, but his denominator excluded competitors' systems sales. This asymmetry, they assert, also resulted in an overstatement of Defendants' share. They further contend that the denominator used in Dr. Israel's "baseline" calculation is unreliable because it relies on the flawed RFP/bidding data set. And, finally, they argue that the denominator in the CID data calculation excludes over $30 billion in sales—though the source of this number is unclear. [24] They contend that these errors in developing the numerator resulted in biased market share calculations.

None of these arguments ultimately persuade the court that Dr. Israel's methodology or his market shares and HHI calculations are unreliable. The FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The "closest available approximation" often will do. *PPG,* 798 F.2d at 1505 (citation omitted); *see also* *H & R Block,* 833 F.Supp.2d at 72 (stating that a "reliable, reasonable, close approximation of relevant market share data is sufficient"). Indeed, in *PPG,* the FTC presented, and the Court of Appeals accepted, share calculations for "every market the evidence suggests is remotely possible," which "yield[ed] results of similar magnitudes in market concentration." 798 F.2d at 1506. Similarly, Dr. Israel ran multiple variants of his market shares and concentration analysis, using two different data sets and modifying one of these data sets, the CID data, in six different ways. Most convincing to the court was Dr. Israel's final method of calculating shares using the CID data, which assumed that all 16 of the top broadliners had the same national-local sales ratio as Defendants did. That approach yielded a ***55** low-end market share of 59 percent and an HHI increase of 1,500 points—almost three times the 510 points that the Court of Appeals in *Heinz* found created a presumption of harm by a "wide margin." 246 F.3d at 716. This variation almost certainly *underestimated* Defendants' market shares, as smaller broadliners are unlikely to have a ratio of national-local sales comparable to Defendants' ratio.

Another reason Defendants' arguments do not sway the court is that other evidence in the record supports Dr. Israel's calculations. As discussed above, the largest customers for broadline distribution in the country—healthcare GPOs, foodservice management companies, hospitality companies, and large government agencies—make the vast majority of their broadline purchases from Defendants. These customers individually spend hundreds of millions of dollars (or more) on broadline distribution—totaling

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approximately half of the national broadline market (based on Dr. Israel's calculation of a total market of $28 to $30 billion). *See* FTC Closing Arg. Slides at 35. If the largest customers are presently spending between 60 to 100 percent of their total food budget with Defendants, *id.* then Dr. Israel's low-bound, post-merger combined market share of 59 percent is consistent with market realities.

In addition, the only independent market share analysis of the broadline industry identified by the parties corroborates Dr. Israel's conclusions. The foodservice industry research firm Technomic collected 2014 sales data from the country's 43 largest broadliners. DX02016. Taken together, Technomic estimated total broadline sales to be $125 billion. Of that total, Sysco accounted for $35.7 billion and USF $23 billion, for a combined sum of $58.7 billion—nearly 47 percent of U.S. sales. *See id.*; *see also* PX09045–015 (PFG presentation to FTC stating that "[t]he two largest broadliners (Sysco and U.S. Foods) accounted for 51% of all broadline sales in 2010," based on a study by Hale Group, "Focus on Foodservice Distribution," dated April 11, 2013); PX09045–014 (PFG presentation to FTC highlighting a 2011 Technomic study showing that Sysco and USF had a combined market share of 58 percent among the top 10 broadline food distributors).

Technomic's 47 percent combined market share estimate for *total broadline* sales is consistent with Dr. Israel's low-end, post-divestiture estimate of 59 percent for *national broadline* sales. The Technomic data did not segregate national and local broadline customers. However, because the largest customers buy disproportionately from Sysco and USF, it stands to reason that the companies' combined market share for national customers would be greater than 47 percent, as Dr. Israel found. Even a combined market share of 47 percent (admittedly, a pre-divestiture number) can give rise to a presumption of harm. *See* *Phila. Nat'l Bank,* 374 U.S. at 364, 83 S.Ct. 1715 ("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.").

3. The Court's Finding as to National Broadline Customer Market Shares

The court thus finds that the FTC has shown, through Dr. Israel's testimony and other evidence, that a merger of Sysco and USF will result in a significant increase in market concentration in the market for national broadline customers. The FTC therefore has established a rebuttable presumption that the merger will substantially lessen competition in the market for national broadline distribution.

***56 B. Concentration in the Local Markets**

1. Dr. Israel's Local Broadline Customer Market Shares Calculations

In addition to the market for national customers, the FTC also contends that the merged firm would create highly concentrated local markets for broadline foodservice distribution. To be precise, the FTC asserts that, in 32 different local markets, the merger between Sysco and USF would result in dramatic increases in HHIs, thereby substantially lessening the competition in those markets. Compl. ¶ 60, App. A. The FTC also maintains that the divestiture to PFG will not resolve Defendants' post-merger local market dominance.

As with the market for national customers, there is no industry study of local market shares. *See* PX09045–019 ("PFG is not aware of any systematic industry market share data."). The FTC again relied on Dr. Israel for those numbers. His starting point for calculating local share percentages was his 75 percent draw area methodology for defining the local geographic markets. *See* PX09350–058. As already discussed, Dr. Israel first identified the 75 percent overlap area in each local market and then identified the competitors that could serve those customers by drawing a circle with a radius equal to the 75 percent draw distance around each overlap customer. Next, to calculate the overall local market shares, Dr. Israel calculated a customer-specific market share. That is, for each customer in the overlap area, he calculated the market shares for the competitors who were located within the customer's 75 percent draw distance radius. Dr. Israel then aggregated each of these customer-specific

shares to the local level, using weighted averages across all overlap customers. The consequence of this methodology was that, the greater the competitor's distance from the center of the overlap area, the less weight that competitor would receive in the overall local market share calculations. Stated differently, because these distant competitors' market shares would only come into the calculation due to customers on the borders of the overlap area, those competitors' shares would be smaller than the shares of competitors whose distribution centers were closer to the middle of the overlap area—namely, Sysco and USF.

When calculating market shares, Dr. Israel used three different metrics: (i) square footage of distribution centers; (ii) local broadline sales; and (iii) number of sales representatives. Dr. Israel used the first and third variables as proxies for revenues and as a way to confirm the market share calculations that were based on the second variable, sales revenues. To calculate shares based on revenues, Dr. Israel used the Defendants' sales data for the numerator. For the denominator, he used the sales numbers, where available, for local broadliners. For those local competitors for whom he did not have actual sales data, he estimated the sales revenue based on the size of the distribution center. PX09350–134 at n.410. Based on those metrics, in local markets with the 20 highest increases in pre-divestiture HHIs, Defendants' combined market shares ranged from 100 percent in San Diego, California, to over 65 percent in multiple markets. The HHI increases in each of top 20 markets were over 2,000 points. PX09350–135–137.

Dr. Israel also calculated post-divestiture market concentrations and HHI increases. According to the table below, in Memphis, Tennessee; Omaha, Nebraska; Sacramento, California; and Charleston, South Carolina, the post-divestiture combined markets shares remain above 80 ***57** percent with HHI increases in excess of 4,100, 1,400, 2,900, and 2,900 points, respectively. PX09350–213, Table 21. In seven other local markets, Dr. Israel calculated the post-divestiture combined market shares to be between 57 percent and 76 percent, with HHI increases in each case in excess of 1,500 points. *Id.*

Table 21

Examples of Areas with Large Change in HHI despite Divestitures

CBSA	Post-Merger Combined Share	Delta HHI
Omaha-Council Bluffs, NE-IA	90.3%	1,410
Sacramento--Roseville--Arden-Arcade, CA	88.6%	2,974
Durham-Chapel Hill, NC	75.4%	2,807
Charleston-North Charleston, SC	80.2%	2,947
Birmingham-Hoover, AL	57.5%	1,542
Jackson, MS	66.0%	2,155
Memphis, TN-MS-AR	93.8%	4,123
Columbia, SC	72.8%	2,315
Raleigh, NC	71.3%	2,188
Lynchburg, VA	63.3%	1,588
Rochester, NY	63.7%	1,574

2. Defendants' Arguments

Defendants attack Dr. Israel's local market share calculations in much the same way they did his national market share calculations—by contesting his methodology and inputs. Defendants assert that Dr. Israel's methodology was premised on the unreliable assumption that no competitor would drive a greater distance than Sysco or USF currently does to provide broadline services. In other words, they criticize Dr. Israel's use of the same draw radius to identify the relevant local competition as he did to identify the overlap area. As a result, they argue, Dr. Israel's local market share calculations excluded sales from broadliners who travel greater distances and thereby overstated Defendants' combined market shares.

To demonstrate this point, Dr. Bresnahan presented an analysis of the Omaha, Nebraska market. He testified that, according to Dr. Israel's analysis, Defendants had combined sales in Omaha of $95 million and a combined market share of 90 percent. According to Dr. Bresnahan, Dr. Israel's methodology did not factor in at least $[Redacted] million in sales by another local distributor, Cash–Wa, whose distribution facility is 129 miles west of Omaha—farther out than the 91–mile 75 percent draw radius that Dr. Israel had used for the area. Dr. Bresnahan based his conclusion on sales data per zip code produced by Cash–Wa, which Dr. Israel had not considered in his analysis. According to Dr. Bresnahan, the zip code data showed that in 2013, Cash–Wa made sales to customers in zip codes within the 75 percent overlap area—at least $[Redacted] million worth—which Dr. Israel did not account for because of his driving distance assumption. Had these Cash–Wa sales been taken into account, Defendants' combined market shares and increase in HHIs would have been lower. As illustrated by his Omaha study, Dr. Bresnahan concluded that Dr. Israel's local market share methodology produced unreliable results.

Dr. Bresnahan's Omaha study convincingly demonstrated that Dr. Israel's 75 percent draw area methodology resulted in underreported competitor sales in the ***58** Omaha market. But what it did not show convincingly was by *how much.* Dr. Bresnahan's initial expert report stated that Cash–Wa's sales in the overlap area were over $[Redacted] million. DX01359–139. At the evidentiary hearing, however, he said that Cash–Wa's sales into that area were "at least $[Redacted] million," DX–05029 at 42, and he did not explain why that number differed from his report.[25] More fundamentally, Dr. Bresnahan's reliance on zip code data had its limits. As Dr. Bresnahan conceded, the zip code data did not differentiate between local and national customers or broadline and systems customers. Hr'g Tr. 2186. Dr. Israel explained that he did not use the zip code data for that very reason, as well as the additional reason that he did not have zip code data for all local market competitors. In addition, Cash–Wa does substantial business selling tobacco products; however, the zip code data does not segregate those sales. *Id.* As a result, although the court agrees with Defendants that Dr. Israel's methodology excluded some local broadline sales in Omaha, the court cannot reliably determine the extent of the underestimation. And, notably, even if Dr. Bresnahan's $[Redacted] million figure consisted entirely of local broadline sales, Defendants would still have a high combined local market share of [Redacted] percent ($95 million/($[Redacted] million + $95 million) = [Redacted] percent).

Ultimately, the court finds that Dr. Israel's specific local market calculations is informative, but not conclusive evidence, of the merger's potential harm to local broadline customers. As the Omaha study showed, because Dr. Israel's 75 percent draw methodology excluded some competitor sales and because each local market has nuances that cannot be captured by his methodology, the court cannot rely conclusively on Dr. Israel's precise local share calculations as a measure of competitive harm.

The court, however, finds variations on Dr. Israel's 75 percent draw methodology to provide persuasive evidence of the merger's impact on local markets. Dr. Israel did more than calculate local share percentages based on 75 percent draw areas. He also used a 90 percent draw area and a weighted 95 percent draw area. Those increased draw areas captured some of the competitor sales that the 75 percent draw area excluded.[26] Dr. Israel then aggregated the local market share figures across all overlap customers in all markets, using distribution center square footage, adjusted revenues, and number of sales representatives to estimate market share. PX09350–137–139. As shown in the table below,[27] these alternative approaches—designated ***59** as variations (i) and (ii)—demonstrate that for half of the customers in overlap areas, Defendants would have a post-merger combined local market share of more than 50 percent and the HHI would increase at least 1,300 points. PX09350–139, Table 7. A quarter of the overlap customers would face even greater market concentrations: Defendants post-merger would have at least 68 percent in combined local market share and the HHI would increase by at least 2,000 points. And, 10 percent of the overlap customers would face a combined market share north of 74 percent and an HHI increase of greater than 2,500 points. The picture that clearly emerges from these numbers is that, in many areas across the country, USF and Sysco already control a substantial share of the market for local broadline distribution. A merger between the two would lead to a significant increase in market concentration in many areas.

Table 7

Summary Statistics for Local Market Shares under Alternative Methodologies

	Combined Share			Δ HHI		
	Median	75th Pctile	90th Pctile	Median	75th Pctile	90th Pctile
Square footage shares						
Baseline	59.8%	71.8%	81.5%	1.763	2.375	3.169
(i) 90% distribution distance	58.3%	68.3%	75.3%	1.557	2.149	2.621
(ii) Continuous distribution distance	55.7%	68.3%	82.6%	1.369	2.013	2.765
(iii) All local CBSA customers	58.9%	70.4%	80.9%	1.603	2.364	3.081
(iv) All overlap CBSA customers*	60.9%	70.6%	78.3%	1.851	2.420	2.775
Adjusted revenue shares**						
Baseline	62.6%	74.7%	86.0%	1.574	2.778	3.094
(i) 90% distribution distance	57.2%	71.6%	79.2%	1.471	2.342	2.886
(ii) Continuous distribution distance	54.6%	70.6%	83.3%	1.208	1.849	3.000
(iii) All local CBSA customers	59.8%	74.6%	85.7%	1.327	2.614	2.974
(iv) All overlap CBSA customers*	66.7%	80.2%	86.1%	1.962	2.886	3.598
Sales representative shares						
Baseline	62.5%	70.8%	80.8%	1.854	2.406	3.152
(i) 90% distribution distance	58.0%	68.0%	74.8%	1.594	2.217	2.531
(ii) Continuous distribution distance	52.7%	70.5%	86.5%	1.345	2.039	2.655
(iii) All local CBSA customers	61.1%	70.4%	80.3%	1.595	2.308	3.099
(iv) All overlap CBSA customers*	61.6%	69.8%	79.4%	1.777	2.306	2.749

*Includes all customers.

**For variation (iv), unadjusted revenues are used.

Defendants' combined strength in local markets is corroborated by documents compiled during the Defendants' ordinary course of business. For example, in an Investor Presentation, dated November 2012, USF represented that it “estimated [having the] # 1 or # 2 position in [Redacted] of served markets.” PX03000–014. Mr. Schreibman's investigational hearing testimony confirmed the present-day accuracy of that statement. Investigat'l Hr'g Tr., PX00515–017 at 65. He also confirmed that, in many of those markets, Sysco occupied the number one or two market position. *Id.*

Another USF document, a strategy document created in 2011, shows USF and Sysco with sizeable “market penetrations” in many local markets. PX03073–023–030. Mr. Schreibman testified that “market penetration” was different from “market share,” as the former reflected the percentage of customers that purchased even $1 of product, whereas the latter reflected percentages of overall sales volumes. Hr'g Tr. 1508–09. But even if “market penetration” and “market share” have different ***60** definitions, both concepts are a measure of market strength, and the “market penetration” percentages show USF and Sysco to be first and second in numerous markets. Indeed, the very same strategy document lists 54 separate markets and identifies Sysco as a competitor in each of them. Of those 54 markets, USF estimated that Sysco had the number one position in [Redacted] markets and that, within those [Redacted] markets, USF was number two in [Redacted]. USF also estimated that it was number one in [Redacted] markets, with Sysco ranked number two in those same [Redacted] markets. And, in [Redacted] markets, USF viewed itself as tied for number one with Sysco. Thus, of the [Redacted] local markets, USF viewed Sysco or USF as the leading broadliner in [Redacted] and as the number two broadliner (or tied for first) in [Redacted]. This internal assessment clearly supports Dr. Israel's local market share calculations.

Defendants offer a different ordinary course document to rebut Dr. Israel's market share calculations. In 2013, relying on a sizeable third-party sales database of 335,000 independent restaurants, USF calculated its share of sales to independent restaurants in 53 local markets. That study showed USF with market shares much lower than that shown by Dr. Israel's calculations, ranging from a high of [Redacted] percent in Columbia, South Carolina, to a low of [Redacted] percent in the “Northwest.” DX–00397–002.

But Defendants' reliance on the independent restaurant study as an indicator of local market shares is problematic for several reasons. First, there is no evidence that the underlying database differentiated between purchases from broadline distributors and purchases from other channels of distribution. The evidence has shown that, among foodservice customers, independent restaurants are among the most likely to buy from other channels, such as specialty and cash-and-carry. In other words, unless broadline sales are segregated from the rest—which the restaurant study appears not to have done—the resulting market share estimate will underestimate USF's actual share of only broadline purchases. A market share calculation that uses at its numerator purchases from *all channels* cannot be relied upon to determine USF's *broadline* market shares.

Second, no evidence was presented showing that the buying habits of independent restaurants is representative of other local broadline customers. Thus, by focusing only on independent restaurant purchasing, the data set does not provide an accurate picture of local market shares.

Third, the independent restaurant study's results conflict with other documents. For instance, USF's 2011 strategy document describes the company as having a "[s]olid #[Redacted]" position in "Reno/Sacramento," PX03073–019, but the restaurant study finds a less than 10 percent share in Reno, DX–00397–002. Similarly, the strategy document describes USF as having the "#[Redacted] position" in St. Louis, PX03073–018, but the restaurant study reported only a 13.3 percent share in the "Missouri Group," DX–00397–002.

Finally, Dr. Israel's conclusions are corroborated by PFG's analysis of the local markets. In January 2014, PFG made a presentation to the FTC in which it addressed the state of competition in various local markets. PFG, at the time, was represented by antitrust counsel, Kirkland & Ellis. Because there was no comprehensive industry data for local market shares, PFG "estimated local broadline market shares based upon [distribution center] square footage, which PFG uses to gauge ***61** competitor strength in the ordinary course of business"—one of the very methods that Dr. Israel used for calculating market shares. PX09045–019. PFG observed that, "[w]hile not perfect, we believe this approach produces *directionally correct results* and can be useful in flagging areas that merit closer consideration." *Id.* (emphasis added). PFG's analysis showed that in six major markets—New York, Philadelphia, Detroit, Denver, Las Vegas, and Los Angeles—a combined Sysco–USF, based on distribution center square footage, would control between 45 percent (New York City) to 80 percent (Las Vegas) of those local broadline markets. PX09045–020. PFG also calculated that a merger in those markets would result in HHI increases ranging from 1,000 points (New York City) to 3,100 points (Las Vegas). *Id.* Consistent with Dr. Israel's market shares and HHI calculations, PFG concluded that the "[p]reliminary findings indicate significant concentration in many local markets." *Id.*

3. The Court's Finding as to Local Broadline Customer Market Shares

The court thus finds, based on Dr. Israel's testimony and other evidence, that the FTC has shown that a merged Sysco–USF will significantly increase concentrations in local markets for broadline distribution. The FTC therefore has made its *prima facie* case and established a rebuttable presumption that the merger will lessen competition in the local markets.

C. Additional Evidence of Competitive Harm

The FTC did not rely solely on increased HHIs to establish that Defendants' proposed merger would cause competitive harm. *See* *Baker Hughes,* 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories."). It offered additional evidence to strengthen its *prima facie* case, to which the court now turns.

1. Unilateral Effects—National Customer Market

The FTC advanced a "unilateral effects" theory to argue that the merger would harm competition in both the national and local broadline distribution markets. In this section, the court considers the evidence of unilateral effects in the national customer market and subsequently turns to the evidence regarding local customer markets.

Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition. *See* *Heinz,* 246 F.3d at 717–19 (holding that elimination of competition between second- and third-largest jarred baby food manufacturers would weaken competition); *Swedish Match,* 131 F.Supp.2d at 169 (finding a likelihood of unilateral price increase where merger would eliminate one of Swedish Match's "primary direct competitors"); *Staples,* 970 F.Supp. at 1083 (finding anticompetitive effects where the "merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the ... market."); *see also* Merger Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."). In such circumstances, a merger "is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H & R Block,* 833 F.Supp.2d at 81.

Unilateral anticompetitive effects can arise in a host of different settings. *See* ***62** *generally* Merger Guidelines § 6. Here, the FTC's case for unilateral effects rests on the fact that the broadline distribution industry is marked by negotiations between buyers and sellers. In such a market, "buyers commonly negotiate with more than one seller, and may play sellers off against one another." *Id.* § 6.2. If two competitors merge, buyers will be prevented from playing the sellers off one another in negotiations. *See id.* This elimination of competition "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." *Id.*

On the other hand, even if the merging parties had large market shares, if they were not particularly close competitors, then the market shares might overstate the extent to which the merger would harm competition. Although the merging parties need not be the top two firms to cause unilateral effects, *see, e.g.,* *Heinz,* 246 F.3d at 717–19; *H & R Block,* 833 F.Supp.2d at 83–84, the FTC argues that the potential for unilateral effects here is magnified because Defendants are particularly close competitors and many national customers consider them the top two choices for broadline distribution. *See* Merger Guidelines § 6.2 ("Anticompetitive unilateral effects ... 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.").

The FTC offered various sources of evidence to show that the proposed merger will result in unilateral anticompetitive effects. The evidence includes empirical data collected and analyzed by Dr. Israel, Defendants' ordinary course documents, and testimonial evidence from other market actors.

a. *Dr. Israel's RFP/bidding study*

To show that Defendants were frequent head-to-head competitors—indeed, each other's closest rivals—Dr. Israel analyzed each company's bidding opportunities for national customers based on the RFP/bidding database that he compiled from the companies' records. The RFP/bidding records that Dr. Israel collected spanned a seven-year period, from 2007 to 2014. PX09375–088. He formed the database not only from the parties' reconstructed RFP data, but also from a host of ordinary course records reflecting bidding opportunities, PX09375–089–091. From this evidence, Dr. Israel concluded: "[I]n competitions for National Broadline Customer business, both USF and Sysco compete with and lose to one another much more than they compete with or lose to any other distributor and, indeed, more than all other distributors combined." PX09375–088. More specifically, based on Sysco's RFP/bidding records, Dr. Israel observed that USF appeared as a competitor for national broadline business twice as often as the next competitor and that, when Sysco lost, it lost to USF two and a half times more often than it lost to the next competitor. Similarly, based on USF's RFP/bidding records, Dr. Israel observed that Sysco appeared as a competitor

for national broadline business four times as often as the next competitor and that, when USF lost, it lost to Sysco three and a half times more often than it lost to the next competitor. PX09350–105–109.

Defendants disputed the reliability of Dr. Israel's RFP/bidding data study in two primary ways. First, as already discussed, they forcefully challenged the underlying data set, arguing that neither company keeps ordinary course RFP and bidding records and that Dr. Israel's reliance ***63** on these artificially created data sets to calculate an empirical "win-loss" analysis is inherently flawed. As previously explained, the court has found that drawing precise conclusions based on the RFP/bidding data is problematic because of the data's limitations.

Second, to demonstrate that the merger would not create unilateral anticompetitive effects, Defendants offered a "switching study" conducted by Dr. Bresnahan. A switching study, as the name implies, analyzes customers' decision to "switch" their business to other competitors. For his study, Dr. Bresnahan acquired from a company called Aggdata the location information of tens of thousands of restaurant and hotel chain customers that are on either Sysco's or USF's "national customer" roster. He then analyzed Defendants' transaction records by quarter from the first quarter of 2011 to the third quarter of 2013 to determine if either company provided broadline distribution to a specific restaurant or hotel location. If either Defendant provided broadline distribution, he tracked the company's sales to the location and noted if it lost sales to the location during the period. If the company lost sales in a particular quarter, he checked the other defendant company's transaction records to see if it picked up the customer. If it did not, Dr. Bresnahan assumed that some other competitor did.

So, for example, if USF's records showed that a particular Sonic franchise did not purchase from USF in a particular quarter, he would turn to Sysco's records to see if Sysco had picked up the customer; if it did, he counted it as a switch to Sysco; if not, he assumed that the customer purchased from another distributor and counted it as a switch to a competitor other than Sysco. Based on this analysis, Dr. Bresnahan concluded that Sysco and USF are not uniquely close competitors. He found that USF lost business to Sysco 15 percent of the time based on both revenue and number of locations, and that Sysco lost business to USF 57 percent of the time based on revenue and 39 percent of the time based on number of locations. These percentages of switches, Dr. Bresnahan testified, were much lower than what one would have expected to see if Dr. Israel's national market shares were accurate.

For a variety of reasons, the court cannot agree with Dr. Bresnahan's ultimate conclusion—that USF and Sysco are not uniquely close competitors—based on his switching study. First, though the number of observations in Dr. Bresnahan's study were significant, they were limited almost exclusively to restaurant and hotel locations (including, it appears, restaurants served by Sysco's systems division, SYGMA). [28] The observations did not include other types of large national customers, such as GPOs, foodservice management companies, and large government agencies, which, as the evidence showed, spend large percentages of their foodservice distribution budget on Defendants. As Dr. Bresnahan admitted, he does not claim that his switching analysis reflects the buying habits of these national customers. Hr'g Tr. 2180–82.

Second, the time period of Dr. Bresnahan's study—two-and-a-half years—is shorter than the seven-year time period covered by Dr. Israel's RFP/bidding analysis. Significant switches that might have occurred between Defendants outside the two-and-a-half year period, therefore, were not counted.

***64** Third, the switching analysis does not capture the full extent of competition between Defendants (or between other competitors, for that matter), because it only tracks switches, not instances where a customer might have played one broadliner off the other to get better pricing. That kind of situation reflects actual competition at least as much as a switch, but such competition is not reflected in the data.

Fourth, unlike an RFP or bid situation, a switch does not necessarily equate to actual competition. A switch might have occurred for any number of reasons having nothing to do with pricing or service (*e.g.,* the customer's sister-in-law went to work for a competitor), but the study treats every switch as a loss for competitive reasons.

Fifth, Dr. Israel's rebuttal report pointed out a number of limitations in Dr. Bresnahan's switching analysis, including the exclusion of certain switches between Defendants and the treatment of actual switches, such as timed phase outs from one Defendant to the other, as non-switches. PX09375–081–084. Although Dr. Bresnahan testified that he corrected for these criticisms and that the adjustments did not materially alter his results or conclusion, the need for those adjustments reflects the limitations of drawing firm conclusions from such undifferentiated data.

Finally, Dr. Bresnahan's conclusion that USF and Sysco are not close competitors brings him into conflict with Defendants' other expert, Dr. Hausman. Dr. Bresnahan testified that, although he agrees that Sysco and USF are competitors, he did not think that one was a "particularly strong price constraint" on the other. Hr'g Tr. 2183. Dr. Hausman, on the other hand, unequivocally agreed that "USF is a strong price constraint on Sysco." *Id.* at 2005. He testified Sysco and USF "compete and they compete hard. I'd be the first to agree." *Id.* at 1986; *see id.* at 2037 ("I am not arguing with you that—or disagreeing with you that Sysco and U.S. Foods are important competitive constraints on each other."). Defendants do not explain how Dr. Bresnahan's switching study can be reconciled with Dr. Hausman's unqualified opinion that Defendants mutually constrain each other's prices, which can only mean that they are close competitors; if they were not, the pricing of one would not matter to the other.

In the end, the court finds that Dr. Israel's RFP/bidding analysis is more persuasive than Dr. Bresnahan's switching study. Both empirical studies are imperfect for the reasons already discussed. But Dr. Israel's analysis better captures instances of actual competition across a more representative cross-section of national customers over a longer period of time. Additionally, Dr. Israel's conclusions are corroborated by other evidence in the record, which, as discussed below, indicate that Sysco and USF are close competitors, particularly for large national customers.

b. *The parties' ordinary course documents*

The FTC presented ordinary course documents, from both Defendants and third parties, which support Dr. Israel's conclusion that Sysco and USF are particularly close competitors. For example, a 2012 USF presentation, titled "Strategy Refresh," explains that one reason for strategic rethinking is that "[c]ustomers perceive little difference between us and *our main competitor,*" identified as Sysco. PX03031–003 (emphasis added). The same presentation devotes a section to "Performance v. Sysco" and describes the companies as "[i]ndustry leaders." PX03031–010–011. Another USF document ***65** describes Sysco as USF's "major rival." PX03032–043.

Similarly, a Sysco presentation to its Board of Directors describes USF as its "next largest competitor" and puts forth "recent intelligence" about USF and two other competitors. PX01007–018; PX01007–023. Another Sysco strategy document focusing on the healthcare sector states that "US Foodservice is our strongest competitor for Healthcare GPO dollars." PX01388–004. In addition, there are many specific instances in the record demonstrating fierce competition between Sysco and USF for national customer accounts.[29] These documents indicate that Sysco and USF compete aggressively against one another on price; non-price incentives, such as signing bonuses; service; and other value-added offerings.

Industry analysts also have recognized the close competition between Defendants. For instance, the Cleveland Research Group's January 2014 market report on Sysco noted the Cleveland Research Group's assessment that "both Sysco and U.S. Foods have priced each other down competing for larger national/regional contract accounts over the last several years" and that "the acquisition removes a key price competitor (particularly with larger contract accounts)." PX09332–004.

c. *Testimonial evidence*

A number of industry actors testified that they view Sysco and USF to be close competitors for national customers. Particularly compelling testimony came from Mark Allen, the head of the foodservice distributors' trade group, IFDA. In his deposition, Mr. Allen agreed that Sysco and USF were "closest competitors" for national accounts, such as GPOs, hospitality, and foodservice

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management companies. PX00570–012; PX00570–014. He further described Sysco and USF as "powerful competitors" for independent customers, PX00570–113, and testified that, in his experience, GPOs, foodservice management companies, and hospitality chains use Sysco and USF to keep each other honest on price and service, PX00570–019. The testimony of the PFG's President and CEO, George Holm, was to the same effect. He testified that in his experience "foodservice management companies, GPOs[,] and certain restaurant groups" have "obtained lower prices by bidding Sysco and U.S. Foods against each other." Hr'g Tr. 651.

d. *Conclusion on unilateral effects in the national customer market*

The court's finding that Sysco and USF are close competitors in the national customer market is no surprise, given the uncontested facts of this case. Sysco and USF are the country's two largest broadliners by any measure. They have far more distribution centers, SKUs, private label products, sales representatives, and delivery trucks than any other broadline distributor. That they rely on these competitive advantages to compete, and compete aggressively against one another in the market for national customers, is amply born out on this record.

Based on all of the evidence presented, the court finds that, because the proposed merger would eliminate head-to-head competition between the number one and number two competitors in the market for national customers, the merger is likely to lead to unilateral anticompetitive effects in that market. Evidence of probable unilateral effects strengthens the FTC's *prima facie* case that the merger will lessen competition in the national customer market. *See* *Heinz,* 246 F.3d at 717 (footnote omitted) (finding that "the FTC's market ***66** concentration statistics are bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties"); *Whole Foods,* 548 F.3d at 1043 (Tatel, J.) (citation omitted) (internal quotation marks omitted) (stating that "there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market").

2. Merger Simulation Model—National Customer Market

To further show that the merger would harm national customers, Dr. Israel ran a merger simulation model to predict the merger's effect. Dr. Israel used an "auction model" to estimate the harm to national customers based on his real-world observation that national customers used RFP processes that "typically involve[d] competitive bids and bilateral negotiations between distributors and foodservice operators" to award business. PX09350–110. Under an auction model, the terms offered by the winning bidder are determined (or at least heavily influenced) by the second-best bidder, because the winning bidder will offer price and service terms that are just good enough to win the business. In theory, if the top two bidders merge, price and service terms will be determined (or at least heavily influenced) by the previously third-best bidder, who in a post-merger world would move into the number two spot. An auction model predicts harm to customers if, as here, the top two bidders merge and the next best bidder is a distant third. The magnitude of the harm is defined as the difference between the values offered by the companies that had been the pre-merger second- and third-place bidders. PX09350–113–114; *see* *CCC Holdings,* 605 F.Supp.2d at 69 (describing a similar auction model for predicting a price increase).

Practically speaking, the premise of Dr. Israel's auction model was that, in the pre-merger world, Sysco and USF are national customers' top two choices and, therefore, each company sets the other company's price. But, if they were to merge, the winning bidder's price would only be subject to competitive pressure by a pre-merger third-place bidder, such as PFG or some other distant competitor. If the next best bidder is not a major competitor, and therefore does not play a significant role in affecting prices, national customers will be harmed. An email dated December 12, 2013, summarizing a "USF Senior Teams" webcast addressing the proposed merger, perfectly captures this core premise of Dr. Israel's model. The email identified as one of the "key messages": "The 'distance' between the combined company and the next set of regional players *is huge.* Those regional players will have an even harder time trying to play catch up going forward because they simply won't have the resources

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that the combined company has to transform the industry." PX00103–002 (emphasis added). The "huge" distance between the merged entity and the rest of the field corresponds to the merger harm that Dr. Israel's model predicts.

To quantify the likely harm to national customers, Dr. Israel performed calculations that used as inputs, among others, his estimates of the parties' national customer market shares and their price-cost margins. PX09350–118. He concluded that, absent significant efficiencies and other mitigating factors, the merger would harm national customers on the order of more than $1.4 billion annually. PX09350–120; PX09350–220. Factoring in the divestiture to PFG and its increased market share, Dr. Israel calculated likely merger harm of more than $900 million annually. PX09350–189; PX09350–237.

***67** Defendants assert that Dr. Israel's model is flawed for the same reason that they criticize his national market share calculations—both rely on the unreliable RFP/bidding data. Specifically, Defendants argue that, because the merger simulation model relies on the national market share calculations as a critical input, and because those market shares depend on the unreliable RFP/bidding data, Dr. Israel's estimate of likely merger harm is likewise unreliable. As discussed, the court agrees that the RFP/bidding data set is imperfect and its resulting market share calculations are imprecise to some degree. Dr. Israel's most conservative market share analysis, however, did not rely on the RFP/bidding data but rather on the CID data, and provided a reasonable approximation of the parties' share of the national customer market. Dr. Israel ran his merger simulation using that lower-bound market share estimate and still reached the conclusion that, absent significant efficiencies, the merger would likely cause significant harm. PX09350–121 n.363 ("Finally, I tested the robustness of my results to Sysco and USF having lower combined shares. I found that even when I use the lowest (and almost certainly too low) Sysco and USF shares presented in **Table 1,** the required efficiencies predicted by the model still far outweigh the efficiencies claimed by the parties."). The court, therefore, concludes that Dr. Israel's merger simulation model strengthens the FTC's *prima facie* case that the merger will substantially lessen competition in the market for national customers.

3. Unilateral Effects—Local Markets

As it did for the national customer market, the FTC presented empirical, documentary, and testimonial evidence to demonstrate the potential for unilateral effects to harm local markets. That evidence, however, presented a more muddled picture of the potential for unilateral effects than did the evidence for the national customer market.

a. *Dr. Israel's empirical analysis*

As he did with the national customer market, Dr. Israel looked at Defendants' business records to determine how closely they compete in local markets. The data came from two sources—USF's Linc database and Sysco's request for incentives (RFI) records. The Linc database, as discussed earlier, is a customer relations management tool used by USF sales personnel to manage and store information on existing and prospective customer accounts. RFIs are internal Sysco records that sales personnel were required to submit to regional presidents to obtain approval to offer incentives to customers to either switch to Sysco or stay with the company.

Starting with the Linc database, Dr. Israel observed and analyzed nearly 100,000 business opportunities between January 2011 and June 2014 and divided them into two groups—USF wins and USF losses. When USF won the business, sales personnel identified Sysco as the main competitor 43 percent of the time (and 48 percent of the time measured by revenue); when USF lost the business, USF sales personnel identified Sysco as the main competitor 46 percent of the time (and 68 percent of the time measured by revenue). PX09350–143, Table 11. Whether USF won or lost, sales personnel identified Sysco as the main competitor eight times more frequently than the next most mentioned competitors (PFG and Gordon Food Service). Dr. Israel also segregated the Linc database's mentions of competitors in 20 local markets. That study showed that sales personnel in every market identified Sysco as USF's main competitor by a wide ***68** margin, especially when measured by revenues. PX09350–145, Table 14.

The RFI data painted a similar picture from the Sysco perspective. Dr. Israel reviewed 224 Sysco RFIs, covering a three-year period from 2011 to 2014, when Sysco discontinued the practice. In more than 66 percent of the RFIs, Sysco sales personnel identified USF as the reason for the incentive request. No other competitor appeared more than 10 percent of the time. PX09350–146–147.

Defendants attacked Dr. Israel's reliance on the Linc database, as they did when he used it in his aggregate diversion analysis. They asserted that Dr. Israel improperly relied on the Linc database as a win-loss record, when it was never intended as such. USF's Executive Vice President of Strategy, David Schreibman, testified that sales people did not use the database consistently and would sometimes enter competitor information simply to fill in the database; ultimately, USF did not rely on it to identify market competition. Hr'g Tr. 1505–06. Defendants also presented a local switching study performed by Dr. Bresnahan, which used the same switching methodology as described above but applied to local customers. According to Dr. Bresnahan, when local customers switch away from Sysco, they switch to USF only 11 percent of the time; and when they switch away from USF, they switch to Sysco only 15 percent of the time. Hr'g Tr. 2163. In other words, according to Dr. Bresnahan's switching analysis, when local customers switched away from Sysco it was typically to distributors other than USF. [30]

The court finds that the empirical evidence, on balance, shows that Sysco and USF are close competitors for local customers. As the court has already observed, relying on the Linc database to draw firm conclusions is problematic for the reasons raised by Defendants. That said, even recognizing the data's limitations, it so overwhelmingly demonstrated primary competition between Sysco and USF based on a sizeable number of observations (nearly 100,000 entries) that it cannot be wholly disregarded as evidence of close competition. Furthermore, the court found the RFI analysis especially compelling; indeed, Defendants did little to contest it. Although the number of observations was low, the RFI data overwhelmingly showed Sysco seeking incentives to attract or keep local customers in response to USF's efforts far more often than Sysco attempted to respond to any other competitor's efforts.

Dr. Bresnahan's switching study provided some counterweight to Dr. Israel's work. Like his national switching analysis, however, it did not account for competition when customers used Sysco and USF as leverage against each other, as many local customers said regularly occurred. The local switching study also relied heavily on chain restaurants and hotels and thus did not factor in the buying habits of other types of local customers, particularly independent restaurants. Therefore, notwithstanding the limits of the data sets relied on by Dr. Israel, the court finds that the empirical evidence supports the conclusion that Sysco and USF are close competitors in local markets.

***69** b. *The parties' ordinary course documents*

Two notable ordinary course documents also support the conclusion that Sysco and USF are close competitors for local customers. The first is USF's November 2012 “Investor Presentation,” which represented that “US Foods is estimated # 1 or # 2 position in [Redacted] of served markets.” PX03000–014; *see also* PX03118–006. As previously noted, USF's David Schreibman confirmed both the present-day accuracy of that statement and the fact that, in many of those markets, Sysco occupied the number one or two position. DX–00272 at 62, 65. The second is the July 2011 USF acquisitions strategy document, which estimated USF's position in 54 separate markets, apparently based on market penetration rather than market share. USF estimated that either Sysco or USF was the leading broadliner in [Redacted] of those markets and was the number two broadliner (or tied for first) in [Redacted]. *See also* PX03002–009 (Clayton, Dubilier & Rice document, titled “Operating Review,” acknowledging that one of Sysco's strengths is “[g]eographic coverage in all the key markets in the U.S.—# 1 or # 2 in virtually all the markets in which they operate”); PX03004–001 (Clayton, Dublier & Rice memo stating that USF is a “leader in both national and local markets” and that “Sysco [is the] closest competitor with similar business mix”). Sysco's and USF's leading positions in multiple local markets shows that they are close competitors in those markets.

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c. *Testimonial evidence*

The testimonial evidence was more equivocal about the closeness of competition between Defendants. It demonstrated that Sysco and USF are strong competitors for local customers in several markets, but it also showed that other broadliners are competing effectively in many of those areas. The FTC's case featured four local markets: (i) Columbia/Charleston, South Carolina; (ii) Omaha, Nebraska; (iii) Raleigh/Durham, North Carolina; and (iv) Southwest Virginia. For each of those markets, the FTC presented testimonial evidence supporting Defendants' leading market positions. For instance, PFG's George Holm agreed that Sysco and USF were the largest and two most "competitively significant" broadline distributors in Columbia/Charleston, Raleigh/Durham, and Southwest Virginia. Hr'g Tr. 653–57; DX–00276 at 70–72. Mark Allen, IFDA President, agreed with those assessments, calling Defendants the "dominant" or "strongest" competitors in those three markets (and Las Vegas). DX–00294 at 170; *see also* Hr'g Tr. 1800 (testimony from Sysco Mid–Atlantic President Mike Brawner stating that USF is a "strong competitor" in Columbia, Raleigh/Durham). USF's ordinary course materials corroborate those observations, at least in terms of market penetration. PX03118–007–008 (showing USF as a "Strong # [Redacted]," based on market penetration, in Raleigh, Columbia, and Roanoke, with Sysco as number two in those areas, and showing Sysco as the number one broadliner in Omaha with USF a "Distant # [Redacted]").

Yet, when customer-level testimony is considered, the evidence of Defendants' leading market positions and their post-merger ability to increase prices becomes less clear. Both sides deposed and obtained numerous declarations from various customers in these local markets. The customer testimony obtained by the FTC invariably decried the merger's impact on local markets, whereas Defendants' customer witnesses emphasized alternatives in the marketplace and the ability to switch broadliners if the merged company ***70** attempted to impose a price increase. [31] Because of these conflicting local market assessments, the court cannot draw firm conclusions about the competitiveness of the local broadline markets from the testimonial evidence. [32]

d. Conclusion on unilateral effects in the local markets

In the final analysis, after considering all of the record evidence on local markets, the court finds that the FTC has shown that unilateral effects are likely to occur in many local markets because the merger will eliminate one of the top competitors in those markets. Though the court finds the evidence of unilateral effects in the local markets to be less convincing than in the national customer market, the evidence nevertheless strengthens the FTC's *prima facie* case of merger harm.

4. Local Event Studies

To further show that the merger would adversely impact local customers, the FTC presented the results of an econometric event study conducted by Dr. Israel. Dr. Israel analyzed Sysco's opening of two distribution centers—one in Long Island, New York, in July 2012, and one in Riverside, California, in June 2013—to determine the impact those openings had on prices paid by USF customers served from a nearby competing facility. Known as an "entry study," Dr. Israel selected the Long Island and Riverside events because they were the only two recent instances in which Sysco had opened a new distribution center in the same market as a USF distribution center. From these event studies, the FTC hoped to show that prices fell ***71** when Sysco and USF directly competed and that the merger's elimination of USF as a competitor would have an upward effect on pricing.

Dr. Israel found that Sysco's entry in Long Island resulted in a 1.4 percent decline in USF's prices for customers in the 75 percent overlap area. PX09350–148. He also ran variations of his regression analysis on other groupings—customers within a 50 percent overlap area, customers purchasing more than 100 SKUs, and customers buying private label products—and found that the price decrease on these groupings was even greater. PX09350–148. By contrast, Dr. Israel found a less significant price impact in the Riverside entry study—a negligible price decline of only .06 percent.

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Dr. Israel explained that neither of these events were clean entry studies because, in both cases, Sysco already had an existing distribution facility in the area, and thus already was competing against USF. In his opinion, the resulting price effects, therefore, were actually understated. Dr. Israel also found the results of the Long Island event more compelling than the Riverside event for two reasons. First, the Long Island facility was a greater distance away from Sysco's existing facility than the new Riverside facility was from its existing facility. Second, the Long Island facility served more new business than the Riverside facility. For those reasons, he concluded, the Long Island study better approximated a true entry event. Hr'g Tr. 1097–98. Dr. Israel ultimately concluded, based largely on the Long Island study, that the merger's elimination of USF as a competitor would have an upward pricing effect in local markets.

The court does not find Dr. Israel's entry studies to be convincing evidence that the merger will harm local customers. Dr. Israel's efforts to distinguish the Long Island and Riverside events simply do not hold up. Defendants' expert, Dr. Bresnahan, showed that the difference in distance between the Riverside facility and its nearby existing facility, on the one hand, and the Long Island facility and its nearby existing facility, on the other, was a mere 14 miles. He also showed that both new Sysco facilities served a similar fraction of existing Sysco customers. Thus, the two entry events were not as dissimilar as Dr. Israel testified, yet they produced very different results—one showing a significant price decrease, the other showing a negligible one. There may be location-specific reasons for the different results, but the reasons offered by Dr. Israel do not withstand scrutiny and no other evidence explained the difference. The court thus cannot conclude from these seemingly conflicting entry studies that the merger will harm local customers.

The court further notes that the pricing evidence here is far weaker than that found in other merger cases. In *Staples,* for instance, there was "compelling evidence" showing that prices were 13 percent higher in markets where Staples did not have competition from another office superstore. 970 F.Supp. at 1075–76 (pricing study). Similarly, in *Whole Foods,* an entry study showed that Whole Foods dropped its prices by five percent when another organic supermarket opened in the area. 548 F.3d at 1046–47 (Tatel, J.). In fairness, the FTC was unable to conduct pricing studies like those done in *Staples* and *Whole Foods* here because Defendants have competing facilities in nearly every local market. But the absence of convincing pricing effects evidence is the weakest aspect of the FTC's case.

5. Summary

In summary, the FTC has bolstered its *prima facie* case with additional proof that ***72** the merger would harm competition in both the national and local broadline markets. Although the FTC's case would have been strengthened with more convincing pricing effects evidence, the court nevertheless finds that the FTC has presented a compelling *prima facie* case of anticompetitive effects. *See* *Baker Hughes,* 908 F.2d at 991 ("The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."). The court now turns to Defendants' rebuttal arguments.

III. *DEFENDANTS' REBUTTAL ARGUMENTS*

The FTC has established a presumption that the proposed merger will substantially lessen competition. Defendants, however, may rebut that presumption by showing that the traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects. *Heinz,* 246 F.3d at 715. The more "compelling the [FTC's] prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully." *Baker Hughes,* 908 F.2d at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.*

Defendants advance four arguments to support their claim that the food industry will remain competitive after the merger: (i) a post-divestiture PFG will be a strong competitor for customers seeking nationwide distribution; (ii) competition from other broadliners and other distribution channels will continue and grow; (iii) the entry of new competition and the repositioning of existing competitors will keep the industry competitive; and (iv) customers will benefit from efficiencies arising from the merger. The court addresses each of those arguments in turn and finds that, even taken collectively, Defendants cannot overcome the FTC's strong presumption of anticompetitive harm.

A. PFG Divestiture

Aside from the Supreme Court's guidance that "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition,' " *Ford Motor Co. v. United States,* 405 U.S. 562, 573, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972) (footnote omitted) (quoting *United States v. E.I. du Pont De Nemours & Co.,* 366 U.S. 316, 326, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961)), there is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger. *Compare* *CCC Holdings,* 605 F.Supp.2d at 56–59 (applying the framework for market entry analysis in assessing the effectiveness of a licensing agreement that would enhance the competitiveness of an existing competitor) *with* *FTC v. Libbey, Inc.,* 211 F.Supp.2d 34, 47–48 (D.D.C.2002) (finding defendants' proposed "fix" inadequate—without going into market entry analysis—because competitor would face higher costs).

Here, both sides cite to the 2004 U.S. Department of Justice's "Policy Guide to Merger Remedies," which provides the following guidance: "Restoring competition requires replacing the *competitive intensity* lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels." Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 5 (Oct. 2004) [hereinafter 2004 Policy Guide] (emphasis ***73** added); *see also* Areeda & Hovenkamp 3d ed., *supra,* ¶ 990d (citing 2004 Policy Guide). A more recent U.S. Department of Justice Policy Guide provides: "The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market." Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (June 2011) [hereinafter 2011 Policy Guide] (footnote omitted). Both the 2004 Policy Guide and the 2011 Policy Guide add that an effective divestiture should address:

> [W]hatever obstacles (for example, lack of a distribution system or necessary know-how) lead to the conclusion that a competitor, absent the divestiture, would not be able to discipline a merger-generated increase in market power. That is, the divestiture assets must be substantial enough to enable the purchaser to *maintain the premerger level of competition,* and should be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.

2004 Policy Guide at 9 (emphasis added) (footnotes omitted); *see also* 2011 Policy Guide at 8. With these principles in mind, the court analyzes the effect of the proposed divestiture.

1. Competitive Pressure Exerted by Post–Divestiture PFG

Defendants argue that the divestiture of 11 "strategically located" USF distribution centers to PFG, coupled with PFG's "aggressive" expansion across the country, will "replace [any] competitive intensity lost as a result of the merger." Defs.' Proposed Findings of Fact and Conclusions of Law, ECF No. 171 at 156 [hereinafter DFF] (alteration in original) (quoting 2004 Merger Guidelines at 5). In addition to the 11 divested distribution centers, PFG's owner, The Blackstone Group, a leading

private equity firm, has committed $490 million to develop seven more distribution centers (called "foldouts") and to expand capacity in 16 existing facilities. Hr'g Tr. 724, 767–69; DFF at 155. Defendants also point to the industry acumen and experience of PFG's executives, particularly that of its President and CEO, George Holm, who has over 37 years of experience in the foodservice distribution industry. The court does not doubt Blackstone's financial commitment to PFG or Mr. Holm's leadership capabilities. However, based on the evidence presented, the court is not persuaded that post-merger PFG will be able to step into USF's shoes to maintain—certainly not in the near term—the pre-merger level of competition that characterizes the present marketplace.

PFG's five-year business plan shows that post-merger PFG will not be nearly as competitive as USF is today. In the lucrative market for national customers, the plan projects that PFG will have approximately $[Redacted] billion in national broadline sales by 2019—*less than half* of USF's 2013 national broadline sales of $[Redacted] billion. PX09350–074; PX09060–002; PX09060–004; PX09060–006; PX09253–023. Stated in terms of market share, PFG estimates that it will grow to 20 percent of the national broadline market over five years, with the merged Sysco–USF company having the "remaining share of the national broadline business." PFF at 220; Hr'g Tr. 719, 721–22. That percentage is smaller than USF's share of the national broadline customer market today. PX09350–187 (Dr. Israel's report stating "the best case scenario under the divestiture is the emergence of a significantly smaller competitor than USF even several years into the future"). Defendants are correct that the ***74** divestiture does not have to replicate pre-merger HHI levels. However, the fact that PFG only expects to achieve less than *half* of USF's current national customer sales in five years—assuming that its planned expansion efforts are successful—does not demonstrate that PFG will be sufficiently able to "discipline a merger-generated increase in market power." *See* 2011 Policy Guide at 8 (footnote omitted).

The court's concern about PFG's ability to compete effectively in the post-merger world is not limited to sales and market share projections. PFG's short-term effectiveness will depend in large part on its ability to incorporate the 11 formerly-USF-held distribution centers. Even assuming that PFG can do so seamlessly, the new PFG will have only 35 distribution centers—far fewer than the at least 100 distribution centers owned by the combined Sysco/USF. Having only one-third of the merged company's distribution centers will put PFG at a significant disadvantage in competing for national customers. Indeed, as Dr. Israel demonstrated, Defendants' largest national customers use more than 35 distribution centers. Those customers represent [Redacted] percent of Sysco's national broadline revenues, and [Redacted] percent of USF's national broadline revenues. PX09375–075–077, Figure 3. The court is not convinced that these large national customers will consider a post-merger PFG to be as capable of meeting their needs as USF is today.

Defendants counter that "PFG will be able to compete aggressively with its additional distribution centers because the fewer the distribution centers used for a particular customer, the greater the inbound efficiencies." DFF at 161–62. Because of higher volume per warehouse and lower freight costs, Defendants claim, many customers *prefer* to be served out of fewer distribution centers—so having a larger number of distribution centers is not necessarily a competitive advantage. *Id.* at 28, 161–62; Hr'g Tr. 1570–71, 1573–74; DX–00264 at 122–23. For example, to serve Zaxby's, a regional quick serve chain, PFG trucks drive past some of their own distribution centers because the longer drive "proves cheaper for the customer." DFF at 161; Hr'g Tr. 852. PFG can also take advantage of "shuttling," a technique of caravanning multiple trailers on a single truck, to increase efficiencies. DFF at 162; Hr'g Tr. 855–57. Mr. Holm even stated at his deposition that he believed that PFG would be able to serve [Redacted] out of 35 distribution centers more effectively than USF currently does out of [Redacted] DX–00276 at 96.

The court is skeptical of Defendants' claim that, even with far fewer distribution centers, PFG will be on equal competitive footing with the merged firm, especially for national customers. Defendants' own growth belies this fact. Both Sysco and USF have, over time, increased their number of distribution centers, demonstrating that Defendants view more distribution centers to be a competitive advantage. Indeed, when Defendants presently compete for national business, they highlight their nationwide geographic coverage to potential customers. *See, e.g.,* PX03000–014 (USF presentation touting its "[a]bility to leverage our national scale to cost effectively service customers nationally"); PX00247–001–002 (USF email communication to [Redacted] describing the "US Foods Value Proposition" as including a "Privately held National Distribution footprint company"); PX01062–005 (Sysco presentation to [Redacted] highlighting that Sysco's "national footprint, strong service

approach and our breadth of product offerings is what differentiates us from our competition"); PX00279–001 (USF email to [Redacted] (a restaurant chain), mentioning "national footprint and scale" as a ***75** selling point); PX00281–006 (slide presentation to [Redacted] touting USF's "extensive" distribution network). USF's Executive Vice President of Strategy David Schreibman also testified that USF has the ability to leverage its national scale to cost-effectively service customers, and that USF views its national scale as a significant competitive advantage. Hr'g Tr. 1521–22; *see also* PX03010–001 (internal USF document stating that the "[o]nly 'true' options for both Premier and Novation is either Sysco or USF[;] [t]he regional players will bid, but not be seriously considered"). Furthermore, there was no evidence presented that Defendants have moved to consolidate their distribution facilities to take advantage of the supposed benefits of having fewer distribution centers. [33]

Notably, not even PFG has always considered the divestiture of only 11 distribution centers to be sufficient for it to compete on a national level. A PFG internal strategy document, dated April 3, 2014, sets forth two "final" proposals for additional distribution centers "necessary to establish a national broadline network." One proposal included options of 16 to 20 distribution centers, and the other included a list of 14 to 15. Hr'g Tr. 669–71 (discussing PX09193). Six months later, in October 2014, after PFG had started negotiations with Sysco about the divestiture, internal PFG communications re-affirmed the need for more than 11 distribution centers. Following Sysco's proposal to sell only seven distribution centers, a PFG board member wrote to George Holm:

> I would still find a way to tell the FTC that we think it takes 13 but that Sysco won't let us look at more than 7 *which will get us nowhere near a national solution.* We need the package size to be bigger to have any chance of winning *and to ever compete nationally....* [We] should proactively educate the FTC why 13 opcos [another word for distribution center] is the *bare mimimum.*

PX09192–001 (emphasis added); *see also* PX00526–036; PX00526–141–142; PX09190. PFG did just that when it met with the FTC, making the case that it needed 13 distribution centers to "compete effectively for national business." PX00526–039 at 153; PX09070 (PFG's presentation to the FTC with a map of 13 USF distribution centers needed by PFG, which included the four metropolitan areas mentioned below). Ultimately, PFG was not able to negotiate the sale of more than 11 distribution centers, with Sysco having made the decision that it "would rather litigate w[ith] the FTC than sell more than 11." PFG felt that it was "prudent to engage on 11 for now to keep the momentum/dialogue going." PX09157–002; PX00526–041 at 163.

Having fewer distribution centers means that PFG will face coverage gaps in the geographic areas where it sought, but did not receive, a distribution center. Those areas include: Cincinnati, Ohio; Omaha, Nebraska; Oklahoma City, Oklahoma; and Los Angeles, California, where PFG received a different, smaller distribution center than it requested. PX00526–039 at 155–56; *see also* PX09070.

Defendants argue that PFG's requests to Sysco for a larger number of distribution centers than they actually received was part of a bargaining strategy. Closing Arg. Hr'g Tr. 115–16. However, PFG's recognition that it needed more than 11 distribution centers to compete ***76** nationally is reflected in internal documents that were created months before PFG began negotiating with Sysco. The court credits those internal projections over PFG's current position that an additional 11 distribution centers is enough to compete for national customers. *See* Amicus Br. of PFG, ECF No. 133 at 22–24 (arguing that PFG will be able to compete effectively with 35 distribution centers).

Defendants argue that, with the planned "foldouts," *i.e.,* new distribution facilities located in contiguous geographic markets, PFG will have more than the 13 distribution centers it was seeking, including one in Cincinnati. DX–01706 at 14. However, PFG has never done a foldout, and according to internal estimates, these facilities may not be operational until, at the earliest, several years following the merger. [34] Defendants assert that "PFG will be well-positioned to *bid* on Day One," because even after the bids are submitted, discussions between a customer and a distributor can take up to a year before a contract is finalized, and PFG

can continue its foldout efforts in the meantime. DFF at 160 (emphasis added). According to Defendants, if the customer needs service sooner, PFG can provide service via shuttling until the foldout is complete. *Id.* at 161. However, there is substantial evidence showing that customers value having distribution centers close to their locations and that distribution costs increase with driving distance. Thus the court is not persuaded that—even with promises of foldouts and the use of shuttling—a sufficient number of national customers will view PFG as a viable alternative to the merged entity "on day one" to maintain the intensity that characterizes the present competition between Sysco and USF.

2. Additional Disadvantages Faced by Post–Merger PFG

In addition to its lack of nationwide geographic coverage, the court has other concerns about PFG's ability to compete against the merged entity. Because it will purchase in smaller product volumes than the merged Sysco entity, PFG could face higher product acquisition costs, or cost of goods sold ("COGS"), than its competitor. PX05051–003 (Blackstone Memorandum indicating that "due to its scale, USF has better procurement than PFG and the 11 [distribution centers] will likely spend more to acquire private label products and get less supplier rebate dollars"); PX09350–205 (Dr. Israel's opinion that, even with the divestiture, PFG is unlikely to make up the gap in COGS between itself and the parties today). PFG also will offer substantially fewer SKUs than the merged entity. PFG today sells less than half the total number of SKUs as USF and one third the number of private label SKUs. PX06055–004 (USF offers 350,000 SKUs, of which 30,000 are private label); PX09507–007; PX09507–013 (PFG offers 150,000 SKUs, of which [Redacted] are private label). PFG's fewer SKU offerings will be a competitive disadvantage.

PFG also will face disadvantages in terms of human resources. Defendants point out that, as part of the divestiture package, PFG would acquire over "4,400 USF personnel, including senior executives and personnel with healthcare expertise at the 11 distribution centers, and corporate regional leadership, national sales personnel, merchandising personnel, and others with national sales expertise; [and] a 12 month non-solicit of PFG employees at the 11 distribution centers." DFF at 155 (citing Hr'g Tr. 815–25; DX–06100 at 1). ***77** However, even assuming that every USF employee at the 11 distribution centers becomes a PFG employee, PFG will still have fewer than half the sales representatives of either Sysco or USF today and less than one-quarter of the sales representatives of the combined firm. PX09350–181–184, Figure 18. And, PFG will only receive, at most, one-fifth of the national sales employees at USF dedicated to serving national customers. Hr'g Tr. 1528–31 (stating that only about 20 percent of USF's national account team will be made available for PFG to hire).

Moreover, PFG will be at a competitive disadvantage in its ability to offer value-added services. The lucrative healthcare segment is illustrative. George Holm conceded that PFG has had limited success with national healthcare customers. Hr'g Tr. 716–17. Some of that lack of success is due to PFG's limited footprint, but it is also attributable to PFG's lack of expertise in the healthcare segment and its inability to deliver value-added services to those customers. *See, e.g.,* PX00594–025 at 100 (PFG has a very small portion of [Redacted] members' business because PFG lacks acute care expertise); PX00474–001 ("PFG offers a more limited selection of healthcare-specific products than U.S. Foods."). Even if over time PFG can acquire health care expertise, in the short run it will be at a competitive disadvantage as compared to the merged entity. [35] For instance, Joan Ralph, Group Vice President of Premier testified that, even with the healthcare employees PFG acquires through the divestiture. PFG will have significantly less healthcare expertise than USF today. Hr'g Tr. 413: PX09350–211–212. And, as IFDA President Mark Allen testified. Sysco and USF have the best understanding of the healthcare class of trade. DX–00294 at 121. The merger would only enhance that strategic advantage.

3. Post–Merger PFG as an Independent Competitor

A final factor that cuts against the divestiture as a proposed fix is that PFG will be dependent on the merged entity' for years following the transaction, "In order to be accepted, curative divestitures must be made to ... a willing, *independent* competitor capable of effective production...." *CCC Holdings,* 605 F.Supp.2d at 59 (quoting *White Consol. Indus. v. Whirlpool Corp.,*

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781 F.2d 1224, 1228 (6th Cir.1986)) (internal quotation marks omitted). As the court observed in *CCC Holdings,* it can be a "problem" to allow "continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior." *Id.* (internal quotation marks omitted). Under the Transition Services Agreement. PFG will have complete access to USF private label products for three years at its 11 new distribution centers, and therefore will be relying on the merged entity to license those products to PFG. *See* DX–06100 at 1; PX09060–005. PFG will also have the right to license USF's database for at least ***78** five years, with a continuing option for five more. PFG, therefore, will not be a truly independent competitor.

For the foregoing reasons, the court is not persuaded that the proposed divestiture will remedy the anticompetitive effects of the merger.

B. Existing Competition

1. Regionalization

Defendants assert that existing competition can and will constrain potential price increases or other unilateral effects in the national customer market. Their primary argument is that the ability of national customers to switch or threaten to switch to a network of regional distributors will inhibit anticompetitive behavior by the merged company. *See* Defs.' Opp'n Br. at 40–41. Defendants point to many large national customers who multi-source their foodservice distribution needs, including using various regional broadliners to service individual locations. Defendants cite as examples Amerinet, Sodexo, the Defense Logistics Agency, [Redacted], Subway, and [Redacted], all of whom operate regionally under multiple contracts. *See id.* at 15.

But, for several reasons, the ability to regionalize is not likely to inoculate national customers from potential anticompetitive effects. The decision of many large customers to predominantly use one broadline distributor is not simply a preference, as Defendants would characterize it, but a rational business decision. As already discussed, for the most part, the largest national customers—particularly GPOs, foodservice management companies, and hospitality companies—predominantly rely on Sysco or USF for their broadline distribution needs. The largest customers, generally speaking, make from 61 percent to 100 percent of their broadline purchases from Sysco or USF. *See* FTC Closing Slide 35; PFF at 113–16. Even customers who contract regionally, such as [Redacted] and [Redacted], buy in very high quantities from Defendants. Regionalization is available today, as it will be after the merger. But market actors are not moving to that model. To the contrary, as PFG's George Holm testified, the "clear trend" among large customers is to move to a single nationwide provider. Hr'g Tr. 597–98. The court can only infer from this trend that regionalization is not a reasonable option for many national customers.

Regionalization likely has not taken hold for a variety of reasons. The record shows that when a customer increases its number of distributors, it incurs greater management and supply chain costs, making it far less desirable to switch to a multi-regional model. The court found the deposition testimony of Dan Cox, the President and CEO of DMA, particularly illuminating, given that the reason for DMA's existence is to consolidate the product and service offerings of multiple regional distributors and compete for national customers. Mr. Cox testified that using a sole source broadliner "forms the most efficient supply chain." DX00265 at 44. He explained that "[m]ore products at each delivery reduces our cost to service and therefore reduces their supply chain costs.... By aggregating [customers'] spend it makes the delivery system more efficient." *Id.* at 44–45.

A regional arrangement also brings with it the disadvantage of multiple points of contact. As Mr. Cox testified, a single point of contact simplifies communications, which DMA touts as an advantage over multi-sourcing broadline distribution. *Id.* at 14, 46, 68. He also added that a single information technology system is important to national customers, and DMA offers such a platform to attract them. As ***79** Mr. Cox explained: "[I]f they come to DMA and deal with five different members, they wouldn't have to learn and understand five different order entry platforms. We have just one platform." *Id.* at 68. A multi-regional approach thus likely would require a customer to develop greater information technology capabilities to manage its foodservice distribution contracts.

Another downside of a multi-regional model is the difficulty in obtaining consistent products—particularly private label products—across a national customer's different locations. Mr. Cox offered the example of [Redacted], with which DMA does over $[Redacted] million in business. [Redacted] demands that DMA comply with its product specifications “at a level of 90 percent,” *id.* at 74, indicating that even when a large customer uses multiple regional distributors, they impose rigorous demands with regard to product consistency. Product consistency, of course, can be achieved by purchasing from multiple distributors who carry the same brand-named products. But that approach would limit a customer's ability to purchase private label products, which typically offer a better value proposition than branded products.

PFG's George Holm concurred with Dan Cox's assessment of national customers' business needs and why they avoid regionalization. When asked why large national customers contract mainly with either Sysco or USF and why there is a clear trend toward those customers using a single broadliner, Holm offered numerous reasons: the “ability to get SKUs in quickly”; “one place to contact”; “[o]ne IT system”; “[o]ne sales contract”; “[o]ne person to deal with”; “the same product [across] their system”; writing “one check as opposed to several”; “simplified contract administration”; and easier “management of approved item lists and specifications.” Hr'g Tr. 600–04. The court thus concludes that the possibility of regionalizing broadline foodservice is not likely to protect national customers from the merger's anticompetitive effects.

2. DMA

Today, the only other competitor with a nationwide footprint is DMA. Defendants claim that DMA is capable of effectively competing against the merged entity because it provides a single point of contact, a single contract with consistent terms across customer locations, and a single ordering platform. DFF at 165–66 (citing DX–00265 at 63–64, 66, 68). The court disagrees.

Defendants acknowledge that DMA is not a one-stop-shop for national customers as Sysco and USF are today. Indeed, Defendants recognize that “larger customers ‘look to [DMA's] members regionally ... rather than DMA as a national solution.’ ” *Id.* at 164–65 (quoting DX00265 at 86).

[Redacted] As Dan Cox, the President and CEO of DMA, explained:

> [Redacted]

DX–00265 at 64–65. As a result, [Redacted] *Id.* at 65.

National customers who value private label products, such as GPOs or foodservice companies, [Redacted] *Id.* 79–80. [Redacted] *See id.* at 224–26

And, even if a national customer wanted to switch to DMA, [Redacted] As Mr. Cox explained, [Redacted] *Id.* at 99. [Redacted] *Id.* at 100, 157. For example, [Redacted] recently considered switching its business to DMA, but decided to stay with Sysco [Redacted] *Id.* at 227–29. [Redacted] the court does not view DMA as a viable competitor that can constrain a post-merger Sysco.

***80** *3. Conclusion as to Existing Competition*

Based on the evidence presented, the court is convinced that national customers will be better off in a marketplace that has two strong competitors capable of nationwide broadline distribution than in a marketplace in which there is a single undisputed heavyweight of broadline distribution whose only competitive constraints is a transitioning PFG, DMA, and a collection of regional players.

C. Entry of New Firms and Expansion of Existing Competitors

Defendants argue that the entry of new competitors and the expansion of existing competitors will keep the industry competitive. If a court finds that "there exists ease of entry into the relevant product market," that finding "can be sufficient to offset the government's prima facie case of anti-competitiveness." *Cardinal Health,* 12 F.Supp.2d at 55. "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." Merger Guidelines § 9. Ease of entry must be "*timely, likely,* and *sufficient* in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *Id.* (emphasis added). As with their other rebuttal arguments, Defendants bear the burden of demonstrating the ability of other distributors to "fill the competitive void" that will result from the proposed merger. *See* *Swedish Match,* 131 F.Supp.2d at 169. Defendants assert that a lack of technological, legal, and regulatory barriers makes entry into the foodservice distribution industry relatively easy. Yet although all it may take is a "guy and a truck" to become a foodservice distributor, becoming a *broadline* foodservice distributor with the ability to compete for national customers is another thing altogether.

The broadline foodservice distribution industry is extraordinarily capital and labor intensive. It costs roughly $35 million to build a single distribution center. Hr'g Tr. 586. In addition, the distribution center must be stocked with goods. A fleet of expensive, refrigerated trucks is required to deliver the products. People—lots of them—are needed to sell the broadline service, maintain and stock the warehouse, and deliver the products. *See* *Swedish Match,* 131 F.Supp.2d at 171 (finding high barriers to entry where the evidence showed "substantial sunk costs in plant construction, product development, and marketing" required to compete). And, even if a newcomer were to make the substantial investment to start a broadline distribution company, there is no guarantee that customers will follow. Incumbency is a powerful force in the foodservice distribution industry. *See* *H & R Block,* 833 F.Supp.2d at 75 (finding that "importance of reputation and brand in driving consumer behavior" limited an existing competitor's ability to expand). Even if it were possible for a new entrant to overcome the incumbent's advantage, it would take years. These high barriers to entry will further entrench the merged company's market power. PX03003–005 (USF lender presentation describing broadline foodservice distribution as having "High barriers to entry for scale players").

Defendants also contend that existing firms have demonstrated the capacity to expand to compete against the merged firm. They highlight the fact that other broadline distributors—including Shamrock, Ben E. Keith, and Reinhart—started out as small businesses serving only limited items to local customers, but were able to grow to regional prominence. They ***81** describe examples of competitors that have recently opened new facilities or plan to do so.

But none of these examples overcome the fundamental problem with expansion as a constraint on the merged company—like new entry, successful expansion is extraordinarily capital intensive and demands a long time horizon. Based on their assessment that expansion would not be an economically viable strategy, regional distributors have said that they have no plans to expand or reposition in order to serve national customers. [Redacted], which has [Redacted] distribution centers mostly located in the [Redacted] has told the FTC that such a massive expansion would not be "viable" in the short term, given the "time and cost required." PX[Redacted]–006. Other regional distributors, including [Redacted] have similarly been dissuaded by the time, costs, or risks of expansion. PX[Redacted]–036 at 139–42; PX[Redacted]–004; PX[Redacted]–003; PX[Redacted]–005–006; PX[Redacted]–048–049.

Companies rarely enter new markets without an existing customer base because the costs and risks are prohibitive. There is a real "chicken-and-egg" problem with such expansion, known in the industry as "greenfield" expansion. Companies will not make the significant capital expenditure of building a new distribution center unless they already have customers to serve, but customers will not commit to a distributor unless it has demonstrated the ability to serve its needs. As a result, expansion in the industry is typically done through "foldouts"—building distribution centers in contiguous geographic areas—so that customers can be served from an existing facility until the new facility is built. But even foldouts take time to succeed. They can take from one to three years to complete, and it can take four to five years for a foldout facility to achieve sales per square foot similar

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to established broadline facilities. PX00529–042 at 166–68; Hr'g Tr. 837–39; *see also* PX00558–051 at 201–04. Although a foldout strategy may preserve competition in a particular local market, it cannot effectively be used to replace the competition benefitting national customers lost by the merger. The only way in which a regional player could expand sufficiently and quickly enough to compete with the merged company would be through a sizeable acquisition of multiple distribution centers.

In summary, the court finds that, absent a substantial acquisition opportunity, expansion by regional players will not be timely, likely, and of sufficient magnitude to counteract anticompetitive harm. *See* *Cardinal Health,* 12 F.Supp.2d at 58 ("Although the smaller wholesalers may adequately compete and expand to service both the primary and secondary needs of local customers, this Court finds that they would not sufficiently expand to compete with the nationals.").

D. Efficiencies

1. Requirement for Merger–Specific and Verifiable Efficiencies

Although the Supreme Court has never recognized the "efficiencies" defense in a Section 7 case, the Court of Appeals as well as the Horizontal Merger Guidelines recognize that, in some instances, efficiencies resulting from the merger may be considered in rebutting the government's *prima facie* case. *Heinz,* 246 F.3d at 720 (citations omitted). Where, as in this case, the court finds high market concentration levels, defendants must present "proof of extraordinary efficiencies" to rebut the government's *prima facie* case. *Id.* (citations omitted) (requiring "extraordinary" efficiencies to rebut an increase in HHI of 510 points); *see also* ***82** Areeda & Hovenkamp 3d ed., *supra,* ¶ 971f (requiring "extraordinary" efficiencies where the "HHI is well above 1800 and the HHI increase is well above 100"). The court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government's *prima facie* case on the strength of the efficiencies. *See* *CCC Holdings,* 605 F.Supp.2d at 72 (stating that "courts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies"). Yet even if evidence of efficiencies alone is insufficient to rebut the government's *prima facie* case, such evidence may nevertheless be "relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition." *Arch Coal,* 329 F.Supp.2d at 151 (citations omitted).

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. Specifically, the court must determine whether the efficiencies are "merger specific"—meaning they represent "a type of cost saving that could not be achieved without the merger"—and "verifiable"—meaning "the estimate of the predicted saving must be reasonably verifiable by an independent party." *H & R Block,* 833 F.Supp.2d at 89 (internal quotation marks omitted) (citing Merger Guidelines § 10); *Cardinal Health,* 12 F.Supp.2d at 62 ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger."). Defendants bear the burden of demonstrating that their claimed efficiencies are merger specific, *H & R Block,* 833 F.Supp.2d at 90, which requires demonstrating that the efficiencies "cannot be achieved by either company alone," *Heinz,* 246 F.3d at 722. And, Defendants must also demonstrate that their claimed efficiencies would benefit customers. *CCC Holdings,* 605 F.Supp.2d at 74.

Defendants claim that the merger will generate over one billion dollars in annual cost savings and operational synergies and, "[e]ven when discounted substantially for unforeseen integration complications, possible customer loss, and the divestiture, the merged company's efficiencies are expected to generate over $600 million in savings." DFF at 178. Defendants argue that the $600 million efficiencies estimate is "the product of meticulous analysis and planning," which occurred over the course of eight months and involved over 100 employees at McKinsey, an independent consulting firm, and over 170 Sysco and USF employees

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who are extremely familiar with the business. *Id.* at 179. As Defendants explained, "Sysco, USF, and McKinsey reviewed a back-breaking amount of information from the merging firms, analyzed historical integration data, modeled possible cost-savings opportunities, and built a new organizational structure around the companies' combined customer base, and designed detailed day 1, day 100, and year 1 plans for integration." *Id.* Of the $600 million cost savings identified by McKinsey, Defendants' expert Dr. Hausman identified more than $490 million as merger specific. To rebut Dr. Hausman's opinion on efficiencies, the FTC presented Mr. Rajiv Gokhale of Compass Lexecon as an expert in financial economics. He opined that at least 65 percent of Defendants' efficiencies were not merger specific. PX09351–007.

The court does not question the rigor and scale of the analysis conducted by ***83** McKinsey. Nor does the court have any reason to question the accuracy of McKinsey's total annual cost savings estimate. But that is not the issue before the court. The issue is whether Defendants have shown that the projected "merger-specific" cost savings are substantial enough to overcome the presumption of harm arising from the increase in market concentration and other evidence of anticompetitive harm. As to that question, the court is unpersuaded that Defendants' combination would result in $490 million in merger-specific cost savings. Defendants have not shown that that amount, or at least a substantial portion of it, could not be achieved independently of the merger. Nor does it appear that Dr. Hausman conducted any independent analysis of the McKinsey estimate to determine which savings, if any, can be achieved without the merger.

Sysco did not hire McKinsey to identify merger-specific savings for antitrust purposes. Rather, it initially hired McKinsey in the fall of 2013 to determine whether a merged company could achieve enough cost savings to make the combination worthwhile. Hr'g Tr. 1862–63. After McKinsey concluded that the merger would generate sufficient cost savings and Sysco and USF announced the merger, McKinsey began a more in-depth analysis beginning in January 2014 to identify "particular synergies that would arise from the deal." *Id.* at 1864–65. Carter Wood, the McKinsey Director who led the effort, testified that his firm was hired "to estimate what is possible by combining these two companies such that, number one, they would have confidence or not to go ahead with the deal; and two, to create value for the newly integrated company." *Id.* at 1914. McKinsey was not given instructions on identifying merger-specific savings, and Mr. Wood testified that he was not familiar with the term "merger specific." *Id.* at 1904.

Dr. Hausman used McKinsey's projections as his baseline for identifying merger-specific savings. *Id.* at 2053. However, it is not clear what independent analysis Dr. Hausman did to reduce McKinsey's projected savings of $600 million annually to $[Redacted] million in merger-specific savings. In his report, Dr. Hausman explained:

> In my previous academic research I have emphasized the effect of cost saving efficiencies on marginal cost, which can be approximated by average variable cost. Thus I will take a conservative approach to the estimated efficiencies and focus on cost savings from changes in variable costs that arise from the merger and would not occur otherwise.

DX–01355 at 67 (footnote omitted). It is not apparent, however, how Dr. Hausman calculated merger-specific savings using this approach, as neither his testimony nor his report spell out precisely how he went about identifying the amount of variable cost savings to include in his merger-specific estimate.

Table 4a of Dr. Hausman's rebuttal report illustrates the difficulties with verifying his analysis. Dr. Hausman itemized the "run-rate of merger-specific variable cost synergies" into four

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Table 4a: Estimated Cost Efficiencies[i]
Adjusted for Divestiture, Customer Loss, and Contingencies

Category	Run-Rate Synergies	Run-Rate of Variable Cost Synergies	Run-Rate of Merger Specific Variable Cost Synergies
Merchandising Total	[Redacted]	[Redacted]	[Redacted]
Best cost and terms			[Redacted]
Enhance terms			[Redacted]
Consolidate suppliers			[Redacted]
Full category management			[Redacted]
Corporate billing			[Redacted]
Operations Total	[Redacted]	[Redacted]	[Redacted]
Network Optimization			[Redacted]
Driver Efficiency[iii]			[Redacted]
Reduce average cost per mile for inbound freight[v]			[Redacted]
Leverage network			[Redacted]
Dis-synergy (LEI loss) from consolidation			[Redacted]
Indirect Sourcing[vi]			[Redacted]
Sales Total	[Redacted]	[Redacted]	[Redacted]
Sales associate headcount			[Redacted]
DSM and RSM headcount			[Redacted]
Reduce variable opex			[Redacted]
Corporate Total	[Redacted]	[Redacted]	[Redacted]
Combined Total: [Redacted]	[Redacted]	[Redacted]	[Redacted]

categories: (i) Merchandising, (ii) Operations, (iii) Sales, and (iv) Corporate. In each of those four categories, Dr. Hausman listed the component parts (in the first column) and the corresponding amounts (in the fourth column) that comprise the category cost savings estimate. Yet for each of these elements, Dr. Hausman relied exclusively on documents created by either McKinsey or Defendants. *See* DX–01353 at Ex. C, 2 n.i. He performed no independent analysis to verify these numbers. *Id.* ("All source material is either Sysco, U.S. Foods, or McKinsey material and I take those materials at face value.").

***85** But even taking Dr. Hausman's variable cost savings numbers as presented, the court is not convinced that the full $490 million in projected savings is merger specific. For example, nearly half of the $[Redacted] million in merger-specific savings identified by Dr. Hausman come from the "Merchandising" category, also known as "category management." The $281 million that Dr. Hausman attributed to category management cost savings comes directly from McKinsey's calculations. Category management refers to a process of optimizing a distributor's product assortment by gaining insights into which SKUs its customers value and then optimizing the SKU inventory to match customers' demands and procure those products in the most cost-efficient manner. Hr'g. Tr. 1881. Both companies prior to the merger already were undertaking category management efforts. PX00592–035 at 137–40; PX00592–049 at 193–94.

Although McKinsey Director Mr. Wood testified that McKinsey made an effort to identify only incremental merchandising savings, that is, savings arising only because of the merger, he could not say whether the $281 million included some cost savings that Defendants might have been able to achieve separately. For instance, before the merger, Sysco was undergoing a category management program, called Project Naples, which was due to end in June 2015. However, Project Naples covered only two-thirds of Sysco's product categories; Sysco planned to complete the remaining categories at a later date. Mr. Wood

testified that the $281 million figure was in addition to the Project Naples costs savings, but he could not say whether or not that number was in addition to the cost savings that Sysco could achieve through its continued cost savings efforts beyond June 2015.

USF, meanwhile, suspended its category management project after the merger's announcement. At the time the merger was announced, USF had only conducted category management on [Redacted] to [Redacted] categories out of 300. PX00592–035 at 139; PX00592–048–049 at 192–93. Mr. Wood could not say whether the $281 million was in addition to cost savings that USF might have achieved had it continued its category management program. Thus, Dr. Hausman's estimate of $281 million in “merger-specific” savings in Merchandising—a number that, again, relied exclusively on McKinsey's calculations—likely overstates the achievable merger-specific category management savings.

The FTC has pointed to, and Defendants have not rebutted, other ways in which Dr. Hausman's reliance on McKinsey's estimates likely overstated the savings arising from the merger. During the hearing, Mr. Wood acknowledged that part of the sales synergy estimate—which represents savings from combining the salesforces of the two companies—would be achieved by having customers place orders via an e-commerce platform. However, migration to electronic ordering can be achieved by either company independently of the merger. Hr'g Tr.1904–05. Another savings strategy identified by McKinsey, “maximizing backhaul,” refers to having delivery trucks stop by suppliers to reload goods on their way back to the warehouse, in order to save an extra trip to those suppliers. Hr'g Tr. 1894–95. However, backhaul savings can also be achieved independently of the merger. *See* Hr'g Tr.1905–06.

2. Insufficiency of Estimated Merger–Specific Savings

Even if the court were to credit Dr. Hausman's total estimate of merger-specific efficiencies, the figure would only amount to less than one percent of the ***86** merged entity's annual revenue. PX09375–118 (Dr. Israel's rebuttal report stating that Dr. Hausman's original estimate of merger-specific, variable cost efficiencies of $[Redacted] million per year represents only one percent of Sysco and USF's combined annual broadline revenue). [36] Even assuming that 100 percent of the cost savings would be passed on to customers, the savings are unlikely to outweigh the competitive harm to customers. Since the savings are equal to a small percentage of the combined company's total revenue, even a modest increase in price could offset any cost savings generated by the efficiencies. At oral argument, Defendants' response to this concern was that the market would not allow even a slight price increase, as customers would exercise their other options, such as regionalizing. *See* Closing Arg. Hr'g Tr. 117–18. Having found that this merger will result in high national customer and local market concentration levels, the court does not share Defendants' confidence that the market would not tolerate such a price increase. As the court observed in *Cardinal Health,* “[t]he critical question raised by the efficiencies defense is whether the projected savings from the merger[ ] are enough to overcome the evidence [showing] that possibly greater benefits can be achieved by the public through existing, continued competition.” 12 F.Supp.2d at 63. Here, Defendants have fallen short of making that showing.

E. Conclusion

Upon consideration of all of the evidence presented, the court concludes that Defendants' rebuttal evidence is not sufficient to overcome the presumption of anticompetitive harm that the FTC was able to establish through evidence of high post-merger market concentrations and other evidence of competitive harm. The court thus concludes that the FTC has met its burden of demonstrating a likelihood of success. That is, the FTC has raised “questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.” *Heinz,* 246 F.3d at 714–15 (citation omitted) (internal quotation marks omitted).

III. *THE EQUITIES*

Although the court has found that the FTC has shown a likelihood of success on the merits and thus created a presumption in favor of injunctive relief, *see* *Swedish Match,* 131 F.Supp.2d at 172, Section 13(b)'s "public interest" standard still requires the court to weigh the public and private equities of enjoining the merge, *Heinz,* 246 F.3d at 726. Here, the primary public interests to be considered include (i) the public interest in effectively enforcing antitrust laws and (ii) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial.

The public's interest in enforcing antitrust law plainly favors enjoining Defendants' proposed merger. *See* *id.* ("The principle public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws."); *Swedish Match,* 131 F.Supp.2d at 173 ("There is a strong public interest in effective enforcement of the antitrust laws that weighs heavily in favor of an injunction in this case.").

***87** The second public interest factor—preserving the FTC's ability to order effective relief after the administrative hearing—also supports an injunction. As stated by the Court of Appeals, "if the merger were ultimately found to violate the Clayton Act, it would be impossible to recreate pre-merger competition" because the merging parties would have already combined their operations and they would be difficult to separate, even by a subsequent divestiture order. *Id.* ("Section 13(b) ... embodies Congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case."). That problem is amplified here because the proposed merger involves two transactions, not just one: (i) Sysco's merger with USF and (ii) PFG's purchase of USF's distribution centers and other assets. The parties have represented that, absent an injunction, Sysco and USF will merge their operations and divest 11 distribution centers and associated assets—including personnel, IT Systems, and USF private label products—to PFG, which will incorporate those assets into its own operations. As the FTC has pointed out, it would face an especially daunting and potentially impossible task of "unscrambling" the eggs (*i.e.,* returning the merging companies to their pre-merger state) if the ensuing administrative proceedings were to determine that the merger violates Section 7 of the Clayton Act. Additionally, it is difficult to conceive how a subsequent divestiture order—which would attempt to restore the parties to their pre-merger state—could be fulfilled without causing significant disruption to the foodservice distribution industry, its customers, and the ultimate consumers—Americans who eat outside the home.

Defendants contend that the public equities weigh against granting the preliminary injunction because the merger will generate substantial efficiencies that will be passed on to customers. They claim that, if the FTC obtains the injunction, Defendants and their customers will be harmed because "Sysco and U.S. Foods will abandon the merger and consumers will be deprived of its benefits." DFF at 186–87 (citing Hr'g Tr. 1516–17). But the court cannot conclude, on this record, that the merger's cost savings will outweigh the potential harm to customers from losing the country's second largest broadline distributor as a competitor for their business. Dr. Israel's merger simulation model predicted that, even taking into account the estimated cost savings, the merger would harm customers. PX09350–114–121, Table 3. Although the court has reservations about some of Dr. Israel's merger simulation model inputs, the court finds that the record as a whole—at the very least—raises substantial questions about whether the merger will harm consumers. Therefore, the public equities here favor granting the preliminary injunction.

The court recognizes the extraordinary amount of time, energy, and money that Sysco, USF, and PFG have devoted to the proposed merger. Their efforts, and the risk that the parties will abandon the merger rather than proceed to an administrative trial on the merits is, however, "at best, a private equity" which cannot overcome the significant public equities weighing in favor of a preliminary injunction. *See* *Heinz,* 246 F.3d at 727 (internal quotation marks omitted).

CONCLUSION

In the end, after considering the record in its entirety, the court returns to Judge Tatel's observation in *Whole Foods:* "[T]here can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to

harm competition in that market." *Whole Foods,* 548 F.3d at 1043 (Tatel, J.) (citation omitted) (internal quotation ***88** marks omitted). The court finds that the FTC has carried its burden of showing a "reasonable probability" that a merger of the country's two largest broadline foodservice distributors, Sysco and USF, would harm competition. Defendants' merger is likely to cause unduly high market concentrations in two relevant markets—broadline foodservice distribution to national customers and broadline foodservice distribution to local customers—and eliminate a key competitor in those markets, USF. The evidence offered by Defendants to rebut the FTC's showing of likely harm was unavailing. The equities also favor granting the requested preliminary injunction. The FTC, therefore, has established that it is likely to succeed in proving, after a full administrative hearing, that the effect of Sysco's proposed acquisition of USF "may be substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act.

The court thus grants the FTC's Motion for Preliminary Injunction. A separate order accompanies this Memorandum Opinion.

All Citations

113 F.Supp.3d 1, 2015-1 Trade Cases P 79,221

Footnotes

1 Michelle Jamrisko, *Americans' Spending on Dining Out Just Overtook Grocery Sales for the First Time Ever,* Bloomberg Business (Apr. 14, 2015), http://www.bloomberg.com/news/articles/2015–04–14/americans–spending–on–dining–out–just–overtook–grocery–sales–for–the–first–time–ever.

2 The *Brown Shoe* practical indicia may indeed be "old school," as Sysco's counsel asserted at oral argument, Closing Arg. Hr'g Tr. 44, and its analytical framework relegated "to the jurisprudential sidelines," *see* *Whole Foods,* 548 F.3d at 1059 (Kavanaugh, J., dissenting). But Brown Shoe remains the law, and this court cannot ignore its dictates.

3 There was little evidence presented about the delivery capabilities of specialty distributors, aside from the fact that they have a limited geographic range of delivery. *See* PX00427–002 (Sodexo declarant indicating that specialty distributors covered a limited geographic range); PX00594–012 at 45 (MedAssets stating the same); PX00407–002 (Amerinet stating the same).

4 In neither their opposition to the FTC's motion for preliminary injunction nor their proposed findings of fact and conclusions of law do Defendants attempt to distinguish *Whole Foods or* *Staples.* At oral argument, Defendants distinguished *Staples* based on the fact that in *Staples* the FTC had pricing data to show that prices were lower in markets where both merging firms were present. Closing Arg. Hr' g Tr. at 38–40. Defendants also sought to distinguish *Whole Foods* on the facts, arguing that in *Whole Foods* the defendants could not show that in the event of a price increase consumers of PNOS could go to a standard grocery store. *Id.* at 40–41. But the court finds these efforts to distinguish *Staples* and *Whole Foods* unconvincing. It is true that there was stronger pricing data in *Staples,* but pricing data alone did not lead to the court's conclusion. The factual similarities between this case and *Staples,* particularly the *Brown Shoe* practical indicia, are otherwise strong. As for *Whole Foods,* it is even more factually analogous to this case than is *Staples.* If anything, the proof that other channels of distribution are not reasonable

substitutes for broadline is more compelling in this case than the evidence in *Whole Foods* that ordinary grocery stores are not a reasonable substitute for PNOS.

5 *See, e.g.,* DX–00319 at 32–36 (Sysco's CEO, William DeLaney, explained that systems is a “tailored, customized approach to certain types of customers” and the "model is not to serve GPO customers"); Hr' g Tr. 1369–70 (DeLaney stated that, compared to cash-and-carry, broadline is a "value package" that includes delivery services and menu consulting); Hr'g Tr. 1452 (David Schreibman of USF stated that "specialty distributors compete by having a broader array of products within their expertise" that “broadliner[s] may not have in [their] portfolio”); Investigat'l Hr'g Tr., PX00580–008–010 at 32-39 (DeLaney explained that broadline and specialty are "two different businesses," whereas broadline distribution includes "a full range of products"); Investigat'l Hr' g Tr., PX00584–060 at 239–40 (Louis Nasir, the Pacific Market President for Sysco, maintained that cash-and-carry stores "don't have the same selection" of products and "also don't have consistent inventory" compared with broadliners); Investigat'l Hr'g Tr., PX00590–011 at 42 (Schreibman stated that he was not aware of a cash-and-carry store that delivers).

6 *See* PX00429–002–007; Hr'g Tr. 571–73.

7 DX–00285 at 115–16, 164–66.

8 DX–00295 at 16–17, 22.

9 PX00414–001.

10 DX–00260 at 139.

11 DX–00264 at 64, 141; PX00424–001 (Maines is predominantly systems, but [Redacted] percent of 2013 revenues were from broadline sales).

12 DX–00314 at 146–47.

13 Gross margin is calculated as follows: (Revenue-Cost of Goods Sold)/Revenue.

14 Dr. Israel testified that the parties' reported gross margins are between 15 and 20 percent, but to be conservative he used a 10 percent margin. Hr'g Tr. 1004–05.

15 The Katz–Shapiro formula that Dr. Israel used is L =X/(X+ M), where L is the aggregate diversion ratio, or “critical loss,” X is the price increase, and M is the margin. PX09350–055 at n.134. For his aggregate diversion analysis, Dr. Israel used a 10 percent price increase and a 10 percent margin, for a resulting critical loss of 50 percent, i.e., .50 = .10/(.10 + .10). Hr'g Tr. 1004–07.

16 According to Dr. Hausman, the correct formula is L = X/M, where L is the aggregate diversion ratio, or “critical loss,” Xis the price increase, and Mis the margin. Dr. Hausman testified that this is the more appropriate formula in an asymmetric market, like food distribution, which involves suppliers and customers with different costs, different types of customers, and a different mix of products. Hr'g Tr. 1960–64; DFF at 285-86 (citing to DX–05028 at 11). The formula used by Dr. Israel, on the other hand, is more appropriate in a symmetric market, that is, a market marked by homogeneity among suppliers and customers. Hr'g Tr. 1960, 1965–66; DX–05028 at 10–11.

17 In finding Dr. Israel's conclusion more persuasive than that advanced by Defendants' expert, the court might be doing more than it is required to do. As Judge Tatel stated in *Whole Foods:* “Although courts certainly must evaluate the evidence in section 13(b) proceedings and may safely reject expert testimony they find unsupported, they trench on the FTC's role when they choose between plausible, well-supported expert studies.” *Whole Foods,* 548 F.3d at 1048 (Tatel, J.).

18 *See also* PX00429–004–007 (George Holm, President and CEO of PFG, explaining that systems, specialty, and cash-and-carry distributors are not substitutes for customers needing broadline distribution); DX–00285 at 125-26 (John Roussel, COO of Shamrock Foods, stating that it's “not possible” or “practical” for a broadline customer to use a systems distributor); DX–00260 at 139 (Bob Stewart, interim CEO of Unipro, explaining that a broadline customer cannot easily switch to a systems distributor and a broadline customer's needs are different than a systems customer's needs).

19 The FTC cites to the “distinct customers” factor in *Brown Shoe* as support for defining a market around a targeted customer. However, Brown Shoe only listed "distinct customers" as one of many factors for courts to consider in defining a market. *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502. It did not endorse defining a market around a group of targeted customers.

20 The Merger Guidelines do not, for instance, set forth how a court is to distinguish a "targeted" group of customers from customers in general. This gives rise to the question of what limiting principles or factors a court should apply in defining a price discrimination market. Absent limitations, price discrimination against a single customer might be used to justify blocking a merger. This is not a mere theoretical possibility. According to the Merger Guidelines, "[i]f prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers." Merger Guidelines § 4.1.4 (emphasis added).

21 *See* Hr'g Tr. 143–145 (Christine Szrom, fact witness for U.S. Department of Veteran Affairs, explaining that she is not familiar with systems distribution and could “absolutely not” use a cash-and-carry distributors); Hr' g Tr. 214–17 (James Thompson, Head of Procurement for Interstate Hotels and Resorts, stating that "it would be very difficult if not impossible" to operate Interstate's foodservice distribution without a broadliner and that specialty is not a substitute for broadline distribution); PX[Redacted]–002 (Joan Ralph, Group Vice President at Premier, Inc., saying that "[e]ven if we choose one day to contract with systems distributors, specialty distributors, or cash and carry stores, each would be as an additional, distinct service for our members who may need a quick, last-minute item or two; none could replace or serve as a substitute for broadline distribution services"); PX[Redacted]–002 ([Redacted], nothing that [Redacted] cannot contract with a systems distributor or use other forms of distribution.

22 As to Premier, the person responsible for foodservice program, Joan Ralph, testified that [Redacted]. Hr'g Tr. 474; PX00475–001–002.

23 *See, e.g.,* PX00415–004 (Reinhart); PX00416–003 (Merchants); PX00434–003–004 (Labatt); PX00438–002–003 (Cash-Wa); PX00443–005 (Ben E. Keith); PX00449–003 (Jacmar); PX00451–005 (Services Group of America); PX00458–004 (Nicholas & Co.); PX00460–002–003 (Shamrock); PX00529–047–048 at 188–89 (Gordon).

24 “Dr. Israel acknowledged that he left out $30 billion in systems distribution in the ‘sensitivity analysis purporting to account for systems sales.’ Defs.” Proposed Findings of Fact and Conclusions of Law, ECF No. 171 at 263 (citing Hr'g Tr. 1259–60).

25 The court infers that the sales figure was reduced, in part, to estimate only Cash–Wa's *broadline* sales, as opposed to all sales. But that reason, if correct, was not made clear on the record. Additionally, in his report, Dr. Bresnahan reported over $[Redacted] million in sales by another broadliner, Reinhart. However, he made no mention of Reinhart's. However, he made no mention of Reinhart's sales in his testimony. That may be because Reinhart reported that [Redacted]. PX09034–019.

26 In a third variant, Dr. Israel went beyond the overlap areas and performed market calculations that took into account all local broadline customers, regardless of whether they fell into the overlap area. Dr. Israel also used a fourth variant—though not entirely clear from his report—in which he appears to have re-run his 75 percent draw methodology using all of Defendants' broadline customers in the overlap area, not just local broadline customers. PX09350–137–138

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27 These figures are pre-divestiture share calculations. But the local market share percentages and HHI increases are so high that, even taking into account the divestiture, when aggregated across numerous markets, these figures are unlikely to decrease enough to change the overall picture. *See* PX09375–103–104.

28 The study did include one health care organization, Kaiser Permanente, and one GPO, Amerinet.

29 *See, e.g.,* PX01066–001–002; PX03064–001; PX01061–001–006.

30 Dr. Bresnahan also did another switching study to support his findings. He conducted a study of fresh chicken purchases by customers in San Diego, from which he concluded that customers "turn off and on buying fresh chicken from Sysco" and that most of the time when they "turn off" Sysco they buy from someone other than USF. Hr'g Tr. 2162. 93

31 *Compare* PX07020–002 (Champ McGee, owner of Little Pigs Barbeque and FTC-sponsored declarant expressing "serious concerns" about merger's effect on business in the Columbia market), *and* Hr'g Tr. 344 (FTC witness, Gary Hoffman, Vice President and Corporate Executive Chef of Upstream Brewing Company from the Omaha market, expressing concern that the proposed merger would prevent him from playing Defendants off one another), *and* PX00487–005 (FTC-sponsored declarant Jason Smith of 18 Restaurant Group, from the Raleigh/Durham market, expressing concerning about the merger "because it eliminates one of our only two options for broadline distribution services" and rejects other competitors), *and* Hr'g Tr. 544–45 (FTC witness, Daniel Schablein, Controller at Wintergreen Resort from the southwestern Virginia market, stating that Sysco and USF were the only legitimate broadliners for his business), with DX–00227 at 2 (Justin Brooks, owner of Frayed Knot Restaurant and Defendants sponsored declarant, stating "I do not believe that Sysco could raise prices or reduce services on my business" in the Columbia market because of competition from PFG, Merchants, Reinhart, and Gordon Food Service), *and* DX–00191 at 2 (Defendants-sponsored declarant Anthony Fucinaro of Anthony's Steakhouse, from the Omaha market, stating, "If Sysco were to raise prices or lower service levels, I would move my contract to Reinhart, Martin Brothers, and/or Cash-Wa"), *and* DX–00232 at 2 (Defendants-sponsored declarant Patrick Cowden of Tobacco Road Sports Cafe, from the Raleigh/Durham market stating, "If Sysco tried to raise prices or decrease service quality following the merger, I could and would replace them with any of the other bidders in a heartbeat"), and DX-00209 at 1 (Defendants-sponsored declaration from George Huger of Southern Inn Restaurant, from the southwestern Virginia market, stating that he would have alternatives, including PFG and Staunton Foods, if he became dissatisfied with Sysco's prices or service after the merger).

32 The FTC did not present testimony or customer declarations about many of the markets that it claims will be highly concentrated after the merger. That is not, however, fatal to its case. *See* *Brown Shoe,* 370 U.S. at 339, 341, 82 S.Ct. 1502 (rejecting the argument that the government had not proven its case because it did not present evidence "in each line of commerce and each section of the country" and stating that "[t]here is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts, if the basic issues of the case may be determined through study of a fair sample").

33 Defense counsel at oral argument represented that USF recently had closed two distribution centers, Closing Arg. Hr'g Tr. 113, but counsel for the FTC noted that USF also recently had opened a new distribution center, *id.* at 125–26.

34 PFG's Senior VP of Operations estimated that PFG's "priority" foldouts in Cincinnati, Ohio, Detroit, Michigan and Buffalo, New York, will not be operational until fiscal year 2018, and Montgomery, Alabama will not be operational until 2017. Hr'g Tr. 735–38.

35 PX[Redacted]–002 ([Redacted] stating that USF to offer "certain value-added services that are especially important to healthcare facilities"); PX[Redacted]–002 (Joan Ralph of Premier stating, "[i]t is critical to Premier that its members have access to foodservice representation with healthcare expertise who can provide nutritional guidance, menu-planning services, and [Redacted]."); PX[Redacted]–004 ([Redacted] discussing his concern that PFG "may lack the ability to provide the information technology services" like dynamic item ordering [Redacted] currently receives from

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USF); PX[Redacted]–009 ([Redacted] stating "I do not know whether PFG has the healthcare experience, which [Redacted] highly values.").

36 In 2013, Sysco and USF's combined broadline revenue was [over $50 B] PX09350–216, Table 27. One percent of that sum is greater than Dr. Hausman's merger-specific cost savings estimate of $[Redacted] million.

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HILB ROGAL & HOBBS COMPANY, Plaintiff,
v.
RICK STRATEGY PARTNERS, INC., Beecher Carlson Holdings, Inc., Beecher Carlson Risk Management, Inc.; and Beecher Carlson Insurance Services, Inc., Defendants.

Civil Action No. 3:C5cv355.
|
Feb. 10, 2006.

Attorneys and Law Firms

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MEMORANDUM OPINION

ROBERT E. PAYNE, District Judge.

***1** This matter is before the Court on the Defendants' Motion *In Limine* (Docket No. 78) to determine what law should be applied to the claims asserted by Hilb Rogal & Hobbs Co. ("HRH") against Risk Strategy Partners, Inc. ("RSP"), Beecher Carlson Holdings, Inc. ("Beecher Holdings"), Beecher Carlson Risk Management, Inc. ("BCRM"), and Beecher Carlson Insurance Services, Inc. ("BCIS") (hereafter, defendants are collectively referred to as "Beecher Carlson").[1] Also, before the Court is the plaintiff's Motion to Reconsider (Docket No. 121).

The motion *in limine* was argued orally on December 1, 2005. At that hearing, the Court found that Virginia's choice of law rules dictated that Georgia law should apply to Counts III and IV of HRH's complaint.[2] This opinion further sets forth the factual and legal basis for that holding with respect to Count III, and addresses HRH's motion to reconsider the Court's holding on choice of law.

When the motion *in limine* was argued, first at the final pretrial conference and then at the hearing on December 1, counsel agreed that, if Count III was controlled by Georgia law, it would fail as a matter of law. However, both parties relied on parts of the factual record in support of their choice of law arguments. Accordingly, and with the agreement of counsel, the motion *in limine* will be resolved as if it were a motion for summary judgment. For the reasons set forth below, the motion *in limine* is granted, summary judgment will be entered in favor of the defendants on Count III, and the motion to reconsider will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

On April 6, 2005, HRH filed this action against the defendants in the Circuit Court of Henrico County, Virginia. Pursuant to 28 U.S.C. § 1441, the defendants filed a timely notice of removal to this Court on the basis of diversity jurisdiction. Count III of the bill of complaint asserted a claim under Va.Code 18.2-499, *et seq.,* alleging that the defendants conspired with former HRH employees, Thomas Golub ("Golub") and Douglas MacGinnitie ("MacGinnitie"), the former CEO of Beecher+Carlson, Gregory Meyers ("Meyers"), and then current HRH employees, Joseph Siech ("Siech"), Christopher Gagnon ("Gagnon"), Michael Stern ("Stern"), Seandra Miller ("Miller"), and others for the purpose of willfully and maliciously injuring HRH in its business. [3]

The defendants first raised the choice of law question in a motion for summary judgment in which only cursory reference was made to the choice of law issues and the facts that related to it. Thereafter, the defendants moved *in limine* to determine what law should be applied to HRH's claims, and asserted that the proper choice of law analysis required the application of Georgia law. Following the final pretrial conference, further briefing was ordered on that issue. On December 1, 2005, the Court heard argument from the parties with respect to choice of law, and subsequently ruled from the bench that Georgia law applied. Both at the final pretrial conference and at the hearing, the parties agreed that Georgia does not have an analog to Virginia's business conspiracy statute, and consequently that Count III could not proceed to trial if the law of Georgia controlled Count III. Thus, the functional effect of granting the motion *in limine* was also to grant summary judgment. On December 20, 2005, HRH moved the Court to reconsider its choice of law decision, contending that no choice of law analysis was appropriate in this action.

A. Origins Of The Alleged Conspiracy

***2** According to the complaint, HRH is an insurance brokerage company, and provides related risk management and consulting services to its corporate and individual clients. HRH is a Virginia corporation, and has its headquarters in Henrico County, Virginia, but it has clients located throughout the United States. Before it acquired HRH in July 2002, Hobbs Group, LLC ("Hobbs") was a Delaware corporation then engaged in providing insurance brokerage services similar to those provided by HRH.

On July 1, 2002, HRH (then known as Hilb Rogal & Hamilton Co.) purchased Hobbs in accordance with the Purchase Agreement executed on May 10, 2002. At closing, HRH paid the members of Hobbs and the shareholders of a non-operating equity affiliate approximately $172 million in cash and stock. HRH later paid the members and shareholders of Hobbs an additional $101.9 million under an earn-out provision in the Purchase Agreement. The terms of the Purchase Agreement provided that HRH's acquisition of Hobbs included the acquisition of Hobbs' customers, employee and producer agreements and relationships, corporate assets, liabilities, and goodwill.

According to HRH, Golub formed Hobbs in August of 1997, and served as its president and chief executive officer until August of 2003, when he resigned. During the earn-out period, before the completion of the merger with HRH in June 2003, Golub retained his positions as President and CEO of Hobbs, but also took on additional roles as Executive Vice-President and a member of the Board of Directors of HRH.

In February 2003, HRH's chief executive officer, Andrew Rogal, stepped down. Golub and HRH's Chief Operating Officer, Martin L. Vaughan III ("Vaughan"), were identified as potential successors. At some point in the first quarter of 2003, HRH's Board of Directors elected Vaughan as HRH's new CEO. According to HRH, Golub had come to expect that he would succeed Rogal as CEO of HRH, and was upset at being passed over for the position.

At this point, says HRH, the conspiracy to harm HRH in its business was formed. HRH points to a series of e-mails between Golub and two Hobbs employees, Joseph Siech and Daniel Donovan, that it contends are evidence of a nascent conspiracy to injure HRH after Golub was not tapped as the new CEO of HRH. According to HRH, the proper inference to be drawn from these communications was a conspiracy, the aim of which was for Golub and some of the Hobbs employees to leave HRH, form a new company, and take back the clients and service teams that were the subject of the Purchase Agreement between HRH and

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Hobbs. HRH believes that it could prove that Golub was in Virginia at the time the e-mails to Siech and Donovan were sent, and thus that it could prove that the conspiracy to injure HRH in its business was launched in Virginia.

B. Acts In Furtherance Of The Alleged Conspiracy

In March 2003, Vaughan sought to assuage any hard feelings about the outcome of the election for CEO, and to move forward with the process of integrating Hobbs into HRH. According to HRH, however, Golub expressed to Vaughan that he would treat any attempt to integrate Hobbs into HRH as constructive termination and that he would resign for cause. Golub also refused to allow HRH to prepare for integration, by blocking HRH personnel from access to Hobbs employees and information. Additionally, before integration, Golub took exception to HRH producers competing with Hobbs producers for Hobbs' clients, and threatened to undertake a letter writing campaign that would target some of HRH's largest revenue generating clients.

***3** According to HRH, the meetings between Vaughan and Golub occurred in Georgia, Virginia, and Florida. Otherwise, with respect to the communications between Golub and HRH on these matters, the only connection to Virginia was the fact that HRH employees received them in Virginia. It is undisputed that Golub was in Georgia during this period.

In light of the rapidly deteriorating relationship, HRH decided to protect its investment in Hobbs by negotiating a severance agreement with Golub, though HRH contends it could have dismissed him for cause. The severance agreement was executed on August 5, 2003, and Golub left the employ of HRH and Hobbs in September 2003. Between August 2003 and June 2004, in Virginia, Golub received severance payments from HRH totaling $2,125,000.

1. Purchase Of Beecher+Carlson

Shortly after the execution of the severance agreement, in October 2003, Golub and Douglas MacGinnitie, who had been Senior Vice-President and General Counsel at Hobbs, formed Risk Strategy Partners, in which each owned a fifty percent interest. [4] RSP, a Georgia based company, served as a vehicle to purchase Beecher+Carlson, [5] an independent insurance brokerage firm engaged in providing services similar to those offered by HRH. [6] Golub and MacGinnitie traveled to Princeton, New Jersey in early October, and submitted a term sheet to American Reinsurance Company for the purchase of Beecher+Carlson. After an expedited negotiation process, RSP executed an agreement to purchase Beecher+Carlson on October 10, 2003.

HRH contends that Golub learned of the Beecher+Carlson opportunity in a presentation by Timothy Korman ("Korman") in the final HRH Board of Directors meeting that Golub attended in July 2003 at the Greenbrier in West Virginia. According to HRH, it was considering Beecher+Carlson as a potential target for acquisition at that time. On October 16, 2003, Korman received an e-mail in Virginia from James E. Inglis at PhiloSmith, informing him that a management buyout offer had been made for Beecher+Carlson. Following this e-mail, HRH terminated its efforts to acquire Beecher+Carlson.

2. Solicitation Of Gagnon And Stern

HRH also alleges that, as part of the conspiracy alleged in Count III, Beecher Carlson and its coconspirators tortiously interfered with the retention agreements between Hobbs and Christopher Gagnon and Michael Stern. Gagnon was Hobbs' Chief Technology Officer and Stern was Assistant Vice-President of Finance, though both now hold executive positions with Beecher Carlson. Both Gagnon and Stern executed confidentiality and non-solicitation agreements with Hobbs when they were hired, as well as acknowledgment and amendment agreements, which extended their employment with Hobbs after its acquisition by HRH. Additionally, both Gagnon and Stern executed retention agreements with Hobbs, which secured their full-time employment and best business efforts through March 31, 2004, at which point each would receive a considerable bonus.

***4** Stern's retention agreement was executed on August 26, 2003 and Gagnon's was executed on August 28, 2003, both in express anticipation of the integration of Hobbs into HRH following the earn-out period. According to HRH, MacGinnitie has

admitted that he was aware of the employment and contractual obligations of Gagnon and Stern to HRH, but nevertheless, before March 31, 2004, solicited them to aid RSP in the acquisition of Beecher+Carlson and the operation of Beecher Carlson.

Specifically, MacGinnitie solicited Stern to assist RSP in performing due diligence with respect to the Beecher+Carlson purchase, which occurred in October 2003. According to HRH, Stern, while employed by HRH, conducted due diligence for the formation of RSP, developed RSP's budget, and evaluated producers that RSP was considering luring away from other insurance brokerage firms. With respect to Gagnon, in October or November 2003, MacGinnitie solicited Gagnon's assistance on the technology needs of RSP and Beecher Carlson. According to HRH, Gagnon, while still employed by HRS, provided the requested advice, and helped RSP and Beecher Carlson to set up the necessary equipment to begin operations, including e-mail accounts and a website. HRH contends that RSP and Beecher Carlson, by and through MacGinnitie, knew that the performance of this sort of work by Gagnon and Stern would interfere with their job duties at Hobbs and HRH, and was a breach of their duty of loyalty.[7] The solicitation of Stern and Gagnon by MacGinnitie, and the disloyal conduct of Stern and Gagnon in response to MacGinnitie's entreaties occurred in Georgia where all three worked and lived.

In January 2004, all Hobbs employees formally became employees of HRH. From this point through March 31, 2004, the salaries of Gagnon and Stern were paid by HRH in Virginia, through checks from its third-party vendor located in Virginia. Additionally, Gagnon and Stern received bonuses according to the terms of their retention agreements. Those checks were issued in Virginia.

3. Solicitation Of Riceland Foods

HRH has further alleged that RSP and Beecher Carlson solicited one of HRH's clients, Riceland Foods. Siech solicited Riceland Foods on behalf of Beecher Carlson, and ultimately HRH lost the Riceland Foods account to Beecher Carlson. Riceland Foods was an Arkansas based company, which was serviced out of HRH's Atlanta, Georgia office where Siech worked when he committed the alleged perfidious solicitation of Riceland Foods. HRH contends that it felt the effect of the lost account on its bottom line at its headquarters in Virginia.

4. Solicitation Of White, Simpson, And Troisi

HRH also contends that it incurred injury from Beecher Carlson's solicitation and attempt to lure away several of its employees, specifically Michael White, Clif Simpson, and Joel Troisi. According to HRH, Beecher Carlson attempted to hire White, Simpson, and Troisi, who were based in Georgia, in June and July of 2004. In order to retain White, Simpson, and Troisi as its employees, HRH was forced to increase their compensation. These increased salaries were paid to those employees by checks that were issued in Virginia.

DISCUSSION

I. Summary Judgment Standard

***5** Rule 56 sets forth the familiar standard for summary judgment, providing that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also* *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1987). In reviewing a motion for summary judgment, a court must view the facts and any inferences drawn from these facts in the light most favorable to the nonmoving party. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Seabulk Offshore, Ltd. v. American Home Assur. Co.,* 377 F.3d 408, 418 (4th Cir.2004).

II. Choice Of Law Analysis

“It is axiomatic that, when sitting in diversity jurisdiction, federal courts must apply state substantive law as announced by the state's highest court.” *Insteel Industries, Inc. v. Costanza Contracting Co., Inc.,* 276 F.Supp.2d 479, 483 (E.D.Va.2003) (citing *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Thus, “a federal court sitting in Virginia and exercising diversity jurisdiction applies Virginia's choice of law rules.” *Id.* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496-497, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). *See also* *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.,* 407 F.3d 631, 635 (4th Cir.2005). “[G]iven that the parties and facts in this action are associated with multiple jurisdictions, it is first necessary to apply the Virginia choice of law rules to determine the substantive law against which the Court will measure the allegations that give rise to” Count III. *Insteel Industries,* 276 F.Supp.2d at 483.

A. Lex Loci Delicti

The first step in the choice of law analysis is to determine the nature of the claim, so that the proper choice of law rule may be applied. Here, the parties agree that a statutory business conspiracy claim under Va.Code § 18.2-499, *et seq.,* is an intentional tort claim. *Accord* *MicroStrategy Inc. v. Business Objects, S.A.,* 429 F.3d 1344, 1362-1363 (Fed.Cir.2005).

The parties also agree that, under the Virginia choice of law rule for tort claims, the Court should “adhere to the *lex loci delicti,* or place of the wrong, standard that [is] ‘the settled rule in Virginia.’ “ *Jones v. R.S. Jones and Associates, Inc.,* 246 Va. 3, 431 S.E.2d 33, 34 (1993). “The place of the wrong for purposes of the *lex loci delicti* rule [ ] is defined as the place where ‘the last event necessary to make an act liable for an alleged tort takes place.’ “ *Quillen v. Int'l Playtex, Inc.,* 789 F.2d 1041, 1044 (4th Cir.1986) (quoting *Miller v. Holiday Inns, Inc.,* 436 F.Supp. 460, 462 (E.D.Va.1977)). *See also* Restatement (First) of Conflict of Laws § 377 (1934); *McMillan v. McMillan,* 219 Va. 1127, 253 S.E.2d 662 (1979) (declining to adopt the “most significant relationship” approach suggested in the Restatement (Second) of Conflict of Laws).

***6** “The word ‘tort’ has a settled meaning in Virginia. A tort is any civil wrong or injury; a wrongful act. Thus Virginia's choice of law rule selects the law of the state in which the wrongful act took place, wherever the effects of that act are felt.” *Milton v. IIT Research Institute,* 138 F.3d 519, 522 (4th Cir.1998)(omitting internal citations and quotation marks). “[W]hen Virginia residents are victims of out-of-state torts, the Virginia courts routinely apply the law of other states, even though the physical pain or economic impact caused by the tort injury may be experienced by the Virginia plaintiffs within the boundaries of the Commonwealth .” *Id.* “Virginia clearly selects the law of the place where the wrongful act occurred, even when that place differs from the place where the effects of injury are felt.” *Id.* If the Court were to find that the place of the wrong was simply the place where the effects of the injury are felt, it “would effectively replace Virginia's traditional rule for tort cases with default application of the law of plaintiff's domicile.” *Id.*

B. Statutory Business Conspiracy

Under Va.Code § 18.2-499, to prove a claim for statutory business conspiracy, a plaintiff “must show that: (1) two or more persons combine [d], associate [d], agree [d], or mutually undert[ook] together, to (2) willfully and maliciously injure [the plaintiff in its] reputation, trade, business, or profession,” *Michigan Mut. Ins. Co. v. Smoot,* 128 F.Supp.2d 917, 925 (E.D.Va.2000), and (3) that the conspiratorial actions of the defendants caused the plaintiff to suffer damages. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.,* 108 F.3d 522, 526 (4th Cir.1997). *See also* *Virginia Vermucilite, Ltd. v. W.R. Grace & Co.-Conn.,* 144 F.Supp.2d 558, G01 (W.D.Va.2001)(“The elements of a statutory conspiracy claim under the Virginia Conspiracy Act are: (1) concerted action (2) legal malice; and (3) causally-related injury.”); *Commercial Bus. Systems, Inc. v. Bell South Services, Inc.,* 249 Va. 39, 453 S.E.2d 261, 267 (1995).

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When determining what state's law is dictated by *lex loci delicti* with respect to conspiracy, the place of the wrong is the place of the first causally-related injury because the first legal injury produced by an alleged business conspiracy is the last act necessary for liability. The Fourth Circuit made clear in *Milton* that the place of the legal injury is not necessarily where the effects of the legal injury are felt. Thus, the headquarters of a corporate victim, where the effects of an alleged conspiracy are ultimately felt on the bottom line, is not necessarily where the legal injury occurred.

C. First Causally-Related Injury Occurred In Georgia

Viewing the facts and all reasonable inferences therefrom most favorably to HRH, the conspiracy to injure HRH in its business likely began in Virginia sometime in early 2003. Very shortly after Golub learned that he would not become CEO of HRH, he sent an e-mail to Donovan and Siech directing them to start working on "option b." Given what transpired in the following months, it is reasonable to infer that Golub was directing Donovan and Siech to begin impeding the integration of Hobbs into HRH.

***7** At this point, however, the conspiracy had yet to produce a causally-related injury. If the conspiracy had ended with HRH never having sustained any legal injury, HRH would have no claim. In its briefs and argument, HRH argued that the first causally-related injury to HRH, and hence the last act necessary to make the defendants liable under Count III, was the acquisition of Beecher+Carlson by RSP. HRH tries to connect this event with Virginia by offering evidence that Korman learned of the acquisition in Virginia. The record evidence, however, shows quite clearly that the purchase of Beecher+Carlson was completed in New Jersey. The fact that HRH learned of the acquisition in Virginia is irrelevant to the choice of law analysis. The loss of the corporate opportunity occurred when RSP completed the sale in New Jersey. Thus, if the purchase of Beecher+Carlson was the first causally-related injury, then New Jersey law, not Virginia law, should apply. Neither party has asserted that position. [8]

Moreover, the record establishes that the first causally-related injury asserted by HRH was the solicitation of Gagnon and Stern. Stern was solicited by MacGinnitie to assist RSP in performing due diligence with respect to the acquisition of Beecher+Carlson. While few dates have been provided, the clear and common sense inference is that the due diligence was conducted before the acquisition of Beecher+Carlson. Although it is undisputed that this solicitation occurred in Georgia, HRH argues that it was injured when it paid Gagnon and Stern by checks issued in Virginia. [9] It is irrelevant where the paychecks for Gagnon and Stern were issued from, however, because those payments did not constitute the legal injury. The causally-related injuries owing to the conspiracy were the alleged interference with the job duties of Gagnon and Stern and the inducement of Gagnon and Stern to breach their duty of loyalty. Those injuries were sustained by HRH in Georgia.

The other acts alleged by HRH to be causally-related injuries occurred later, and thus are irrelevant to the choice of law analysis. The solicitation of HRH's client, Riceland Foods, and HRH's employees, White, Simpson, and Troisi, occurred after RSP had changed its name to Beecher Carlson.

Neither party has presented the Court with evidence as to where the loss of Riceland Foods occurred, in other words where the contract between HRH and Riceland Foods was terminated. However, Riceland Foods is located in Arkansas and there is no evidence that the so-called theft of Riceland Foods occurred in Virginia. And, acts alleged to comprise the theft appear, on this record, to have been in Georgia.

It is reasonable to infer that HRH's decision to pay White, Simpson, and Troisi additional compensation was made in Virginia. And, it is clear that the checks to pay the increased salaries were issued from HRH's headquarters in Virginia. However, the causally-related injury, the acts of solicitation that led to the need to pay additional compensation to White, Simpson, and Troisi in return for continuing their employment, occurred in Georgia, where these employees were located and where those who solicited them were employed.

***8** The consequences of the theft of Riceland Foods, says HRH, was a loss of income and profit suffered at its Virginia headquarters. The injury inflicted by the solicitation of White, Simpson and Troisi likewise was incurred, according to HRH,

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at its Virginia headquarters when it paid additional compensation to retain those employees. However, the Fourth Circuit was clear in *Milton* that these secondary consequences of a tort are merely effects of the legal injury, and not the legal injury itself.

In sum, under Virginia's choice of law rules, the applicable law for tort claims is the place of the wrong, or the *lex loci delicti* which is the place of the last act necessary for liability to attach. In the context of Va.Code § 18.2-499, *et seq.,* the place of the last act necessary for liability is the place of the first causally-related injury. In this action, the first causally-related injury was the interference with the job duties of Stern and Gagnon, and the inducement of Stern and Gagnon to breach their duty of loyalty. There is no dispute that this occurred in Georgia, and thus Georgia law must be applied. Moreover, with the exception of the purchase of Beecher+Carlson in New Jersey, the other injuries asserted by HRH to be the first causally-related injury occurred in Georgia, not in Virginia.

The parties agree that HRH's statutory business conspiracy claim cannot survive under Georgia law, and thus summary judgment must be granted against HRH with respect to Count III.

III. Motion to Reconsider

Following, the Court's bench ruling that Georgia law applies to Counts III and IV of the complaint, HRH filed a motion to reconsider. In its motion to reconsider, HRH urges that no choice of law analysis is necessary with respect to Count III because there is no conflict between Georgia and Virginia law with respect to business conspiracies. HRH contends that the Virginia Business Conspiracy Statute may be applied to the extraterritorial conduct of Beecher Carlson by virtue of the sufficient minimum contacts.

A. Reconsideration Based On New Legal Arguments

Beecher Carlson argues that it would be improper to reconsider the Court's ruling on choice of law because HRH's motion raises an entirely new legal theory. It is generally correct that "motions to reconsider are not appropriate vehicles to advance arguments already rejected by the Court or new legal theories not argued before the ruling." *Zurich Capital Markets, Inc. v. Coglianese,* 383 F.Supp.2d 1041, 1045 (N.D.I 11.2005). "A motion to reconsider is appropriate when the court has obviously misapprehended a party's position or the facts or applicable law," but "a party who fails to present his strongest case in the first instance generally has no right to raise new theories or arguments in a motion to reconsider." *United States v. Duke Energy Corp.,* 218 F.R.D. 468, 474 (M.D.N.C.2003). Courts will not typically reconsider an interlocutory order where the motion to reconsider simply seeks "to present a better and more compelling argument that the party could have presented in the original briefs." *Madison River Mgmt. Co. v. Business Mgmt. Software Corp. .,* 402 F.Supp.2d 617, 619 (M.D.N.C.2005)(refusing to consider new legal argument in motion to reconsider that there was no conflict of laws, after having denied motion for summary judgment based on choice of law analysis).

***9** Applying these principles here, it would be appropriate to reject HRH's motion to reconsider on the ground that it raises an entirely new argument. However, considering the substantive impact of the grant of the motion *in limine,* it is appropriate to resolve the motion to reconsider on its merits.

B. Legislative Jurisdiction

In its motion to reconsider, HRH argues that, because Count III asserts a claim under Va.Code § 18.2-499 *et seq.,* no choice of law analysis is appropriate, and that the only question is whether Virginia has legislative jurisdiction. HRH entirely misunderstands the concept of legislative jurisdiction, which does not displace choice of law analyses. The concept of legislative jurisdiction governs constitutional challenges to state choice of law rules, and is otherwise irrelevant to the choice of law analysis. More importantly perhaps, HRH suffers under the misimpression that a plaintiff can determine what state's law will apply by inserting a reference to a particular state's law in its pleading.

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The concept of legislative jurisdiction "involves 'the authority of a state to make its law applicable to persons or activities.' " *Adventure Communications, Inc. v. Kentucky Registry of Election Finance,* 191 F.3d 429, 435 (4th Cir.1999) (quoting *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 813, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)). Whether a state's law may be applied extraterritorially, "to any given set of facts," is dependent upon whether the State has legislative jurisdiction. *Id.* (quoting *McCluney v. Jos. Schlitz Brewing Co.,* 649 F.2d 578, 581 n. 3 (8th Cir.1981), aff'd, 454 U.S. 1071, 102 (1981)). Like adjudicative jurisdiction, the bounds of a state's legislative jurisdiction is a matter of constitutional concern. Legislative jurisdiction is circumscribed by both the due process and full faith and credit clauses in the Constitution. *Id.*

Thus, legislative jurisdiction presents a constitutional choice of law question as to whether a particular state's law may be constitutionally applied to the facts of a given case. "Implicit in this inquiry is the recognition, long accepted by [the Supreme] Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 307, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981)(holding that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that [application] of its law is neither arbitrary nor fundamentally unfair."). Where multiple states have legislative jurisdiction, "the forum State may have to select one law from among the laws of several jurisdictions having some contact with the controversy." *Id.* at 308. Were it not for the fact that multiple states may have legislative jurisdiction, states would have no need for choice of law rules because only one state's law could be constitutionally applied.

***10** Beyond the question whether a state's law may be constitutionally applied, the Constitution has no bearing on choice of law analyses. After determining that a state's law may be constitutionally applied, the obvious remaining question is what law is chosen by the State's choice of law rules-as formulated by the highest court in the State. In this respect, choice of law rules are analogous to state long-arm statutes, which determine the reach of a state's adjudicative jurisdiction within the constitutional boundaries of personal jurisdiction.

HRH's argument with respect to legislative jurisdiction is irrelevant to the choice of law determination previously made by the Court. HRH has not argued that it is constitutionally impermissible to apply Georgia law. Assuming that HRH is correct in its assertion that Virginia has legislative jurisdiction over the relevant conduct of Beecher Carlson, that means nothing more than that application of Virginia law would be constitutionally permissible. The Court must still determine what law must be applied in accordance with Virginia's choice of law rules, and Virginia's choice of law rules mandate application of Georgia law.

The implication in HRH's argument that a plaintiff can determine what state's law will apply by asserting a cause of action under a particular state's law in its complaint is patently absurd. There would be little need for choice of law rules if a plaintiff could simply forum shop among the states with legislative jurisdiction and choose the most favorable law. Choice of law rules are determined by the highest court of the forum state, not self-serving plaintiffs.

C. Blue Sky Law Cases

HRK also uses its motion to reconsider to argue that a choice of law analysis is only necessary where state laws are directly in conflict. According to HRH, courts need not perform a choice of law analysis where one state's law provides a cause of action and the otherwise applicable state law does not prohibit that cause of action. HRH relies on a series of choice of law cases dealing with state Blue Sky laws to argue that a party can assert a claim under multiple states' law, even if inconsistent with one another.

"Choice-of-law analysis becomes necessary [ ] only if the relevant laws of the different states lead to different outcomes." *Lowry's Reports, Inc. v. Legg Mason, Inc.,* 271 F.Supp.2d 737, 750 (D.Md.2003) (citing *Int'l Adm'rs, Inc. v. Life Ins. Co. of N. Am.,* 753 F.2d 1373, 1376 n. 4 (7th Cir.1985). *See also Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.,* 319 F.2d 469, 472 (4th Cir.1963)(noting that there would be no conflict of laws problem if North Carolina, like Pennsylvania, did

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not recognize the cause of action alleged). Additionally, where there is no difference in the substantive law of the different states, states will generally apply forum law. *See, e.g., Ditton v. Legal Times,* 947 F.Supp. 227, 230 n. 2 (E.D.Va.1996) ("[B]ecause the Court finds that the law of Virginia and the law of the District of Columbia do not differ on the relevant issues, the Court applies Virginia law.").

***11** Several district courts have concluded, however, that in the context of Blue Sky laws, a party may assert a claim under multiple state laws and that no choice of law analysis is necessary. In the leading case, *Lintz v. Carey Manor Ltd.,* 613 F.Supp. 543, 548 (W.D.Va.1985), the court posed the question "whether two or more state statutes can simultaneously provide civil liability for securities fraud or non-registration." Several law review articles considered by the court suggested that states probably enact securities laws both to regulate securities activities within their territorial boundaries and to regulate extraterritorial securities activities by their citizens. Given such "comprehensive scheme [s] for the regulation of securities," the court could find no "no reason why a conflicts of law problem develops if one Blue Sky law provides fewer remedies, lacks an attorneys' fee provision, has a shorter statute of limitations or has a more limited scope than the law of another state." *Id.* at 551. The court concluded that "[t]here is nothing inconsistent in trying a securities case on multiple theories, and determining liability under each statute that is applicable, so long as the plaintiff is prevented from multiple recoveries." *Id.*

There is a split of authority among district courts as to whether the approach adopted by the *Lintz* court with respect to choice of law questions in securities cases is proper. *See, e.g., Simms Inv. Co. v. E.F. Hutton & Co., Inc.,* 699 F.Supp. 543, *reversing, Simms Inv. Co. v. E.F. Hutton & Co., Inc.,* 688 F.Supp. 193 (M.D.N.C.1988) (reversing previous rejection of stance taken by *Lintz* court); *Barnebey v. E.F. Hutton & Co.,* 715 F.Supp. 512 (M.D.Fla.1989) (following *Lintz); McInnis v. Merrill. Lynch, Pierce, Fenner & Smith, Inc.,* 706 F.Supp. 1355 (M.D.Tenn.1989) (rejecting *Lintz* and noting criticism of *Lintz* for misreading of commentator relied upon). No circuit court has addressed the merits of the *Lintz* court's holding, however, nor has the reasoning behind the *Lintz* court's holding ever been applied outside the context of securities laws.

HRH offers no explanation of how the reasoning on which *Lintz* is based can be extended from securities litigation to business torts. There is no suggestion that Va.Code § 18.2-499 *et seq.,* is a comprehensive scheme with respect to the regulation of business torts, and such a bare assertion would hardly carry the day. Whatever the merits of the holding in *Lintz,* it is clearly restricted to the context of securities laws. To hold otherwise would be to revolutionize choice of law jurisprudence. The Court declines the invitation to do so.

CONCLUSION

For the foregoing reasons, the Court finds that Georgia law applies to Count III of the complaint. Georgia does not recognize a claim analogous to Va.Code § 18.2-499 *et seq.,* and so summary judgment must granted against HRH on Count III. HRH's motion to reconsider is denied.

***12** The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

All Citations

Not Reported in F.Supp.2d, 2006 WL 5908727

Footnotes

1 According to the Answer filed on behalf of RSP and Beecher Holdings, the corporation formerly known as Risk Strategy Partners is now known as Beecher Holdings. BCRM is a subsidiary of Beecher Holdings, and BCIS is a wholly owned subsidiary of BCRM.

2 HRH's action was initiated by filing a bill of complaint in state court. For simplicity, the bill of complaint will be referred to as a complaint.

3 Count I of the complaint asserted a violation of the Uniform Trade Secrets Act, as adopted by Virginia, and Count II set forth a common law civil conspiracy claim. Both of these counts were withdrawn by counsel for HRH at the final pretrial conference and subsequently were dismissed without prejudice.

In Count IV, HRH asserted a tortious interference with contract claim. After the bench ruling on the choice of law issue on December 1, 2005, Count IV was the only remaining claim to be tried. Count IV was subsequently withdrawn by counsel for HRH, and dismissed without prejudice. This memorandum opinion will not address the merits of the choice of law ruling with respect to Count IV because it is no longer a part of the case.

4 While the conspiracy allegedly began sometime in the first quarter of 2003, HRH does not allege that any of the defendants in this action conspired to injure HRH prior to October 2003-most notably because before October 2003, RSP did not yet exist.

5 Beecher+Carlson is now known as Beecher Carlson Risk Management.

6 HRH has argued that Golub breached the confidentiality and non-solicitation clauses in his severance agreement, and likewise that MacGinnitie breached the confidentiality and non-solicitation clauses in his employment agreement, in the course of competing with HRH through RSP and Beecher Carlson. However, the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit found that the restrictive covenants in MacGinnitie's contract were unenforceable. An arbitration panel reached the same conclusion with respect to the restrictive covenants in Golub's contract, a matter which is now under review by this Court in a separate action.

7 Both Stern and Gagnon now hold executive positions at Beecher Carlson. Stern is Vice-President of Finance, and Gagnon is Senior Vice-President of Technology.

8 The defendants argue that the acquisition of Beecher+Carlson occurred in Georgia because the defendants later moved the company there. That too is not relevant to the choice of law analysis.

9 Though, HRH concedes that it did not begin to pay Gagnon and Stern from Virginia until the official integration of Hobbs into HRH in January 2004.

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636 F.Supp. 1513
United States District Court,
S.D. Indiana,
Indianapolis Division.

LAIDLAW ACQUISITION CORP., Plaintiff,
v.
MAYFLOWER GROUP, INC., et al., Defendants.
MAYFLOWER GROUP, INC., Counterclaim Plaintiff,
v.
LAIDLAW ACQUISITION CORP., Laidlaw Transportation Limited, Michael G. DeGroote, Counterclaim Defendants.

No. IP 86–602–C.
|
June 11, 1986.

Synopsis
Largest provider of busing for school children in the United States brought action against second largest provider of such services and related parties challenging constitutionality of Indiana Takeover Offers Act and certain provisions of Indiana Business Corporation Law and asserting shareholder derivative and federal securities claims. Second largest provider filed counterclaim alleging violations of federal antitrust and securities law. Both parties moved for preliminary injunction. The District Court, Dillin, J., held that second largest provider was entitled to preliminary injunction given its substantial likelihood of success on merits of antitrust claim, inadequacy of remedy at law, irreparable harm it would suffer if preliminary injunction were not granted, and public interest favoring competition.

Preliminary injunction issued.

Procedural Posture(s): Motion for Preliminary Injunction.

Attorneys and Law Firms

***1515** Thomas A. Withrow, Indianapolis, Ind., Donald E. Egan, Chicago, Ill., Paul M. Donovan, Washington, D.C., for Laidlaw Acquisition Corp.

Richard E. Deer, Indianapolis, Ind., Marc P. Cherno, Victor S. Friedman, New York City, for Mayflower Group, Inc.

Arthur T. Perry, Deputy Atty. Gen., Indianapolis, Ind., for State of Ind.

MEMORANDUM OF DECISION

DILLIN, District Judge.

The Court having heard evidence on the cross-motions of the parties for a preliminary injunction, now grants the motion of the counterclaim plaintiff.

Laidlaw Transportation Limited is the largest private contractor in the United States engaged in busing school children. Mayflower Group, Inc. is second largest. ***1516** On May 7, 1986, Laidlaw Acquisition Corp. (Laidlaw) commenced this action by filing its complaint seeking declaratory and injunctive relief against Mayflower Group, Inc. (Mayflower), the individual members of Mayflower's board of directors, and certain state officials, challenging the constitutionality of the Indiana Takeover

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Offers Act and certain provisions of the Indiana Business Corporation Law, as amended March 5, 1986. Contemporaneously with its initiation of this litigation Laidlaw announced its intention to commence a cash tender offer for all of the outstanding shares of Mayflower common stock. Laidlaw has since filed an amended complaint adding a claim under Section 14(e) of the Securities Exchange Act and a shareholder derivative claim. However, it seeks no preliminary injunction based on these additional claims, which are not here considered.

On May 20, 1986, Mayflower filed its answer and counterclaim against Laidlaw, Laidlaw Transportation Limited (Laidlaw Transportation), Laidlaw's parent, and Michael G. DeGroote (DeGroote), the chief executive officer of both Laidlaw and Laidlaw Transportation, alleging that: (1) Laidlaw's acquisition of Mayflower through its tender offer will violate Section 7 of the Clayton Act, 15 U.S.C. § 18; (2) Laidlaw manipulated the price of Mayflower stock in violation of Section 14(e) of the Securities Exchange Act of 1934; and (3) Laidlaw's offer to purchase is materially false and misleading in violation of Sections 14(d) and (e) of the Securities Exchange Act of 1934.

A two and one-half day evidentiary hearing on the preliminary injunction motions was held before the Court in three phases. First presented was Laidlaw's constitutional challenge to the above referenced Indiana statutes, followed by Mayflower's Williams Act challenges to Laidlaw's tender offer, and finally Mayflower's Clayton Act challenge to the proposed acquisition. At the conclusion of the hearing, on June 6, 1986, Laidlaw withdrew its constitutional challenge to the Indiana Takeover Offers Act, as moot in the light of certain actions taken by the defendant Indiana Secretary of State.

This Court has a general and basic judicial duty to avoid decision of constitutional questions. *See generally J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law* 83–85 (1978). This is particularly true when, as here, a state statute is under constitutional attack in a federal court. *Id.* Our determination, discussed below, of the Clayton Act portion of Mayflower's preliminary injunction motion effectively obviates the need for us to consider the constitutionality of the challenged provisions of the Indiana Business Corporation Law. Moreover, that determination effectively moots Mayflower's claims under the Williams Act. Therefore, we need not, and will not, address the various factual and legal issues raised by any of such claims.

Initially, we must consider Laidlaw's argument that the case of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), requires us to dismiss the Clayton Act claim because of an alleged lack of standing by Mayflower to bring it. We cannot accept Laidlaw's position, nor, for that matter, the reasoning of the law review article upon which it is based—despite the esteem in which we hold the scholarly authors of that thesis. *See* Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers,* 80 *Mich.L.Rev.* 1155 (1982).

Mayflower seeks an injunction to prevent violation of § 7 of the Clayton Act. *Brunswick* held (not surprisingly) that a plaintiff seeking damages under § 4 of the Clayton Act must prove a personal antitrust injury, but it specifically permitted the respondents/plaintiffs in that case to seek equitable relief pursuant to § 7 on remand. 429 U.S. at 491, 97 S.Ct. at 698. To argue that this Court should hold Mayflower to be without standing on the basis of so frail a reed as *Brunswick* would be to invite an exercise in judicial activism which we quickly decline.

Since *Brunswick,* at least two judges of this circuit have held that § 16 of the Clayton Act confers a private right of action to obtain injunctive relief against an unlawful ***1517** acquisition to the target of a hostile takeover bid. *Whittaker Corp. v. Edgar,* 535 F.Supp. 933, 950 (N.D.Ill.) (opinion by now Circuit Judge Flaum), *aff'd mem.,* Nos. 82–1305 and 1307 (7th Cir.1982); *Chemetron Corp. v. Crane Co.,* 1977–2 Trade Cas. (CCH) ¶ 61,717 (N.D.Ill.1977) (opinion by District Judge Marshall); *see also* *Grumman Corp. v. LTV Corp.,* 665 F.2d 10, 11 (2d Cir.1981) ("[E]ven though the true concerns of the 'private attorney general' may be more 'private' than 'attorney general' [,i]f the effect of a proposed takeover may be substantially to lessen competition, the target company is entitled to fend off its suitor.") In fact, the Seventh Circuit has indicated that it is the *duty* of a board of directors to file an antitrust suit when it believes that a proposed combination would be illegal. *Panter v. Marshall Field & Co.,* 646 F.2d 271, 297 (7th Cir.), *cert. denied,* 454 U.S. 1092, 102 S.Ct. 658, 70 L.Ed.2d 631 (1981).

Having determined that Mayflower has standing to pursue its antitrust claim, we turn to its request for a preliminary injunction. After an extensive review of Seventh Circuit decisions concerning the proper standard for granting a preliminary injunction, a panel of that Court recently has identified four factors which are to be considered on a preliminary injunction motion: (1) whether the plaintiff has an adequate remedy at law and whether he will suffer irreparable harm if the preliminary injunction is not granted; (2) whether the threatened irreparable injury to the plaintiff outweighs the threatened irreparable injury the preliminary injunction may inflict upon the defendant; (3) whether the plaintiff has some likelihood of succeeding on the merits and, if so, how likely that success is (the more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor); and (4) what impact, if any, the preliminary injunction (or lack thereof) will have on the "public interest." *Roland Mach. Co. v. Dresser Indus.,* 749 F.2d 380, 386–88 (7th Cir.1984); *see also* *American Hosp. Supply Corp. v. Hospital Prods. Ltd.,* 780 F.2d 589 (7th Cir.1986). We have been assured that "these decisions ... represent a continued affirmation of the traditional equitable factors governing injunctions and the classic roles of both district and appellate courts." *Lawson Prods., Inc. v. Avnet, Inc.,* 782 F.2d 1429, 1441 (7th Cir.1986).

As a threshold matter, the movant must establish that it has no adequate remedy at law and that it will suffer irreparable harm if the preliminary injunction is not granted. *Lawson,* 782 F.2d at 1433; *Roland,* 749 F.2d at 386. The virtual impossibility of "unscrambling the scrambled eggs," once these parties are joined in corporate (shotgun) matrimony, if Mayflower should prevail on the merits or if a subsequent government action results in an order of divestiture, constitutes the irreparable harm and inadequacy of remedy required. *See Chemetron, supra; see also* Easterbrook and Fischel, *supra* ("It is possible to argue, with fair support, that unless a merger is enjoined ... before consummation, we may as well forget about attempting to disestablish the resulting firm.")

Even if it were possible to put asunder the parties once joined, Mayflower would still incur irreparable damage. *See Marathon Oil Co. v. Mobil Corp.,* 530 F.Supp. 315, 320–21 (N.D.Ohio), *aff'd,* 669 F.2d 378 (6th Cir.1981), *cert. denied,* 455 U.S. 982, 102 S.Ct. 1490, 71 L.Ed.2d 691 (1982). For example, it is an inevitable consequence of a takeover that the acquiring company will gain access to the target's confidential information. *Grumman,* 665 F.2d at 16. This could be devastating in the instant case which finds the principals engaged in head to head bidding wars for private school busing contracts, utilizing such sophisticated bidding techniques as special computer programs. We find, as have other courts of this circuit in similar circumstances, that Mayflower has demonstrated the requisite irreparable injury required by this threshold factor. *See, e.g., Chemetron, supra; Harnischfeger Corp. v. Paccar, Inc.,* 474 F.Supp. 1151, 1153 (E.D.Wis.), *aff'd w/o opinion,* 624 F.2d 1103 (7th Cir.1979).

***1518** Another threshold that the movant must cross is to demonstrate that it has some likelihood of succeeding on the merits. *Lawson,* 782 F.2d at 1433; *Roland,* 749 F.2d at 387. As demonstrated by our discussion below, we find that Mayflower not only has some likelihood of succeeding on its Clayton Act claim, but rather a substantial likelihood of doing so.

Section 7 of the Clayton Act is an extraordinarily clear statute. It provides, in pertinent part, that:

> No person shall acquire, directly or indirectly, the whole or any part of the stock ... of one or more persons engaged in commerce, or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition ... may be substantially to lessen competition, or to tend to create a monopoly.

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15 U.S.C. § 18. The purpose of the statute is simply "to nip monopoly in the bud." *United States v. E.I. Du Pont de Nemours & Co.,* 353 U.S. 586, 592–93, 77 S.Ct. 872, 876–77, 1 L.Ed.2d 1057 (1957). Congress sought to carry out its purpose by structuring § 7 to arrest mergers tending to lessen competition "in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S.Rep. No. 1775, 81st Cong., 2d Sess. 4–5 (1950) (quoted in *Brown Shoe Co. v. United States,* 370 U.S. 294, 318 n. 32, 82 S.Ct. 1502, 1520 n. 32, 8 L.Ed.2d 510 (1962)).

The statute and subsequent cases disclose that to discover whether a violation of § 7 is threatened, three separate, but somewhat interrelated, findings must be made. We must determine (1) the relevant line of commerce, or product market, (2) the relevant geographic market, and (3) the acquisition's effect on competition in the relevant line of commerce in the relevant geographic market. *See, e.g., Weeks Dredging & Contracting, Inc. v. American Dredging Co.,* 451 F.Supp. 468, 486 (E.D.Pa.1978). In determining what constitutes the relevant product market for antitrust purposes, the goal is to delineate markets which conform to areas of effective competition and to the realities of competitive practice. *Sargent-Welch Scientific Co. v. Ventron Corp.,* 567 F.2d 701, 710 (7th Cir.1977), *cert. denied,* 439 U.S. 822, 99 S.Ct. 87, 58 L.Ed.2d 113 (1979).

Laidlaw urges us to define the relevant product market as all school bus transportation, regardless of whether it is provided by private contractors or by the school districts themselves. Of course, within the outer boundaries of a given product market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. at 1523. We find, in light of the appropriate factors including those delineated in *Brown Shoe, supra,* that, whether private contracting for school bus transportation is considered a *sui generis* market, or a submarket of a broader school bus transportation industry, it is the relevant product market in this case.

Laidlaw argues that its competition comes, not only from other private contractors in the market, but also from the school districts to whom the private contractors seek to sell their services. This argument is based on the fact that school districts can always refuse to "go private" for their bus transportation, and that, perhaps more importantly, a school district can always go back to providing its own transportation if the private contract gets too high as a result of the provider having an effective monopoly in the private market. Because the ultimate issue is whether competition may be substantially lessened in the area of effective competition, the appropriateness of including "in-house" activity must turn on an assessment of the economic realities of the competitive situation. *Grumman Corp. v. LTV Corp.,* 665 F.2d 10, 13 (2d Cir.1981).

The evidence demonstrates that, despite its recent pronunciations to the contrary, Laidlaw itself actually considers its competition to be other private contractors in the market place. *See, e.g.,* Defendant's Exhibit 64. The only expert witness called testified that the relevant product market is the private contractor market. The ***1519** record also shows that, because of practical and political considerations, school districts rarely, if ever, return to public school bus transportation once they have "gone private." Even if they could and have done so, we cannot accept Laidlaw's argument that, just because a school district's demand for private school bus transportation may have an undefined ceiling, school districts should be considered competitors instead of consumers. Obviously, in any market—be it for school bus services or sealing wax—there is some price at which a consumer will decline to buy, and will, perhaps, attempt to supply his needs by self help. However, this does not mean that the customer's decision not to buy can then be considered "competition." Such a position would significantly erode, if not *de facto* repeal, the Clayton Act.

Having found that private contracting for school bus transportation is the relevant product market, we next address the question of what is the relevant geographic market. Mayflower argues that the relevant markets are Alaska, Washington and Oregon (the Pacific Northwest), and California. Laidlaw's position is that the entire United States should be considered the relevant market.

The proper issue is not merely where the respective parties do business or even where they compete, but where, within the area of competitive overlap, the effect of a merger on competition will be direct and immediate. *United States v. Philadelphia*

Nat'l Bank, 374 U.S. 321, 357, 83 S.Ct. 1715, 1738, 10 L.Ed.2d 915 (1963). The relevant geographic market may be as large as the United States or as small as a single metropolitan area. *Brown Shoe,* 370 U.S. at 337, 82 S.Ct. at 1530; *see also Marathon Oil Co. v. Mobil Corp.,* 530 F.Supp. 315, 322–23 (N.D.Ohio) (and cases cited therein), *aff'd,* 669 F.2d 378 (6th Cir.1981), *cert. denied,* 455 U.S. 982, 102 S.Ct. 1490, 71 L.Ed.2d 691 (1982).

Actually, "Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country." *United States v. Pabst Brewing Co.,* 384 U.S. 546, 549, 86 S.Ct. 1665, 1667, 16 L.Ed.2d 765 (1966). Establishing where the anticompetitive effect exists geographically is "entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States." *Id.* 384 U.S. at 550, 86 S.Ct. at 1668. Finally, § 7 prohibits an acquisition which merely eliminates a potentially significant entrant into a highly concentrated relevant market when the acquiring party is one of the few dominant or substantial competitors in that market. *Chemetron Corp. v. Crane Co.,* 1977–2 Trade Cas. (CCH) ¶ 61,717 (N.D.Ill.1977) (citing *United States v. Marine Bancorporation,* 418 U.S. 602, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974)).

We find from the evidence that the relevant geographic markets are the Pacific Northwest, Alaska, and California. Alaska and the Pacific Northwest are geographically, or more precisely, demographically isolated. While this is self-evident as to Alaska, it is also true of the Pacific Northwest. In the latter area private contracting for school buses is concentrated in the western portion of Washington and Oregon, following the population centers of these states. It is obvious that these areas are those in which Mayflower and Laidlaw presently have their competitive overlap, and where the effect on competition of their merger would be direct and immediate.

As to California, it is clear that Mayflower is a likely significant entrant into that market, which is dominated by Laidlaw. Mayflower personnel have identified a "California Marketing Project," Defendant's Exhibit 28, attended school board and school superintendent conventions, obtained bid specifications, prepared brochures specifically geared to California, Defendant's Exhibit 29, and made general preparatory inquiries into that market. *See* Defendant's Exhibits 31–35. Mayflower's stated desire is to compete forthwith in the California market.

***1520** Having established the relevant markets, we next address whether the effect of Laidlaw's acquisition of Mayflower may be to substantially lessen competition in those markets. The Supreme Court has instructed that

> intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963).

The combined market share of Laidlaw and Mayflower in the private contract school bus transportation business in Alaska is 76.2%. In the Pacific Northwest such combined share is a whopping 85.9%! Laidlaw's present share of the relevant California market is approximately 40%. In *Philadelphia Nat'l, supra,* the Supreme Court stated that "[w]ithout attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." 374 U.S. at 364–65, 83 S.Ct. at 1742.

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We find that a merger between Mayflower and Laidlaw would produce a firm controlling an undue share of the relevant markets, and would result in a significant increase in the concentration of firms in those markets. Therefore, we must enjoin Laidlaw's acquisition, unless we are presented with evidence clearly showing that the acquisition is not likely to lessen competition substantially. 374 U.S. at 363, 83 S.Ct. at 1741.

Laidlaw asserts that its acquisition of Mayflower—with the resulting increase in its market share and market domination—will not have the proscribed anticompetitive effect. It argues that entry into the market is so easy that it will be effectively constrained from unreasonably raising its prices because of the entry, or potential entry, of new competitors into the market. Because we find that there are, in fact, significant barriers to entry into the relevant markets, we are not persuaded by this argument.

One obvious and important barrier is the cost of insurance. Smaller, newer firms cannot absorb skyrocketing insurance premiums, if they can get insurance at all, and remain competitive in their bids. An example of this is the sad story of Transportation & Marketing Systems, Inc. (TMSI), as shown by the evidence. This company was started in 1982, and won a substantial contract in Anchorage, Alaska. In 1985, TMSI found itself unable to pay its vastly increased insurance premium and was forced to sell out to a larger company (Mayflower). Besides insurance costs, would-be entrants into the relevant markets are deterred by the length of the contracts (3–5 years normally), high capitalization costs, performance bond requirements, experience requirements, and other bid specification requirements.

Laidlaw has understandably tried to minimize the deterrent effect of these considerations. However, the record demonstrates that one of Laidlaw's successful marketing tactics is to encourage school boards to place experience requirements in bid specifications in order to freeze out new companies trying to enter the business. The same factors which deter new firms from entering the market can, and have, caused existing smaller firms to leave the market, as in the case of TMSI. Moreover, even if some small firms survive in an otherwise monopolized market, they may be quite content to follow the high prices set by the dominant firm, thus leaving the market effectively anticompetitive. *Philadelphia Nat'l,* 374 U.S. at 367 n.43, 83 S.Ct. at 1743 n.43.

***1521** We note that even if the relevant geographic market were defined as the entire United States, it is likely that Laidlaw's acquisition of Mayflower would be violative of the Clayton Act. Laidlaw is the largest private marketer and provider of contract operation bus service in the United States. Mayflower is the second largest. Together they account for approximately 10% of the American market. In *United States v. Pabst Brewing Co.,* 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966), the Supreme Court held a merger between the tenth and eighteenth largest United States brewers, holding 4.49% of the national market share after the merger, to violate § 7 of the Clayton Act.

Laidlaw complied with 15 U.S.C. § 18a by filing its notification of intent to make a tender offer with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. It argues that the failure of either of these agencies to take adverse action on the antitrust question should be persuasive on this Court. We are not persuaded.

The agencies' opinion of a merger is not binding on this Court, and their enforcement decisions do not necessarily reflect the current state of antitrust law. *See, United States v. American Cyanamid Co.,* 719 F.2d 558 (2d Cir.1983), *cert. denied,* 465 U.S. 1101, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984); *Chrysler Corp. v. General Motors Corp.,* 589 F.Supp. 1182 (D.D.C.1984); *Monfort of Colorado, Inc. v. Cargill, Inc.,* 591 F.Supp. 683 (D.Colo.1983), *aff'd,* 761 F.2d 570 (10th Cir.1985) *cert. granted,* 474 U.S. 1049, 106 S.Ct. 784, 88 L.Ed.2d 763 (1986) (the guidelines "are primarily a statement of ... enforcement intentions" and "a tool to assist Justice Department attorneys in determining which mergers to challenge"; they "do not represent

legal precedent to determine illegality." *Id.* In affirming, the Tenth Circuit stated that the Department of Justice "guidelines are more useful for setting prosecutorial policy than delineating judicial standards." 761 F.2d at 579.)

However, perhaps the best response to the argument that the Attorney General, rather than the Supreme Court, is the final authority on the meaning of the antitrust laws, is set out in the appendix to the concurring opinion of Mr. Justice Douglas in *Pabst,* 384 U.S. at 553, 86 S.Ct. at 1669. We suggest that it should be required reading for every judge who wants to put his own gloss on the simple language of § 7.

We find that Mayflower has a strong likelihood of succeeding on its § 7 Clayton Act claim against Laidlaw.

Because we have so found, the balance of harm need weigh less in favor of Mayflower than if Mayflower's likelihood of success on the merits was less strong. *Roland,* 749 F.2d at 387. Nevertheless, we find that the balance of harm weighs significantly in Mayflower's favor. We have already discussed the harm which will result to Mayflower if injunctive relief is denied. Neither Laidlaw, nor the shareholders of Mayflower, are entitled to any gain obtained from a sale that presents a substantial likelihood of violating the Clayton Act. *Grumman,* 665 F.2d at 16.

The fourth and last criterion to be considered in granting or denying a preliminary injunction is the impact, if any, which the decision will have on the public interest. *Roland, supra.*

We find that the public interest weighs heavily in favor of granting injunctive relief to Mayflower. There is an overriding public interest in the preservation of competition. *See, e.g., Harnischfeger, supra; Chemetron, supra; see also United States v. Siemens Corp.,* 621 F.2d 499, 506 (2d Cir.1980) (once it has been demonstrated that a reasonable probability exists that § 7 will be violated, irreparable harm to the public should be presumed).

Injunctive relief to prevent a violation of the Clayton Act is appropriate when an acquisition will have the specified anticompetitive effect "in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition." ***1522** *Chemetron, supra* (quoting S.Rep. No. 1775, 81st Cong., 2d Sess. 5 (1950)). Moreover, a merger may be enjoined as violative of the Clayton Act even though the corporations involved do not compete in every geographic market in which either operates. *Cf. Brown Shoe,* 370 U.S. at 337, 82 S.Ct. at 1530. Any limitation on the injunctive relief to be granted would be particularly inappropriate in this case given that, as discussed above, Laidlaw's acquisition of Mayflower could very well constitute a violation of the Clayton Act, not just in Alaska, the Pacific Northwest, and California but on a nationwide scale as well.

Finally, we come to the matter of the appropriate bond to be posted by Mayflower, pursuant to Rule 65(c), Federal Rules of Civil Procedure. Laidlaw, although arguing that it should not be required to post bond if successful on its own motion for a preliminary injunction, suggests that Mayflower, if successful, should be required to post bond in the sum of at least $725,000,000—a sum more than three times the amount of Laidlaw's tender offer. We do not find this suggestion helpful. In the absence of any evidence, or further suggestion, bond is hereby fixed in the sum of $250,000.00.

A preliminary injunction will issue in accordance herewith.

All Citations

636 F.Supp. 1513, 1986-2 Trade Cases P 67,194, 33 Ed. Law Rep. 674

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143 S.Ct. 1142
Supreme Court of the United States.

NATIONAL PORK PRODUCERS COUNCIL, et al., Petitioners
v.
Karen ROSS, in Her Official Capacity as Secretary of the California Department of Food & Agriculture, et al.

No. 21-468
|
Argued October 11, 2022
|
Decided May 11, 2023

Synopsis
Background: Organizations representing pork producers brought action against California officials seeking declaratory judgment that ballot initiative barring sales of whole pork meat from animals confined in manner inconsistent with California standards violated dormant Commerce Clause, and permanent injunction barring its implementation and enforcement. The United States District Court for the Southern District of California, Thomas J. Whelan, Senior District Judge, 456 F.Supp.3d 1201, dismissed complaint for failure to state a claim. Organizations appealed. The United States Court of Appeals for the Ninth Circuit, Ikuta, Circuit Judge, 6 F.4th 1021, affirmed. Organizations sought certiorari, which was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that:

there is no per se rule under dormant Commerce Clause forbidding enforcement of state laws that have practical effect of controlling commerce outside the State, when those laws do not purposely discriminate against out-of-state economic interests;

initiative was not subject to any balancing test to assess whether burden imposed on interstate commerce was clearly excessive in relation to putative local benefits; and

initiative did not impose substantial burden on interstate commerce.

Affirmed.

Justice Thomas joined.

Justice Sotomayor joined with respect to Parts I, II, III, IV-A, IV-C, and V.

Justice Kagan joined with respect to Parts I, II, III, IV-A, IV-C, and V.

Justice Barrett joined with respect to Parts I, II, III, IV-A, IV-B, IV-D, and V.

Justice Sotomayor filed opinion concurring in part, in which Justice Kagan joined.

Justice Barrett filed opinion concurring in part.

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Chief Justice Roberts filed opinion concurring in part and dissenting in part, in which Justices Alito, Kavanaugh, and Jackson joined.

Justice Kavanaugh filed opinion concurring in part and dissenting in part.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion to Dismiss for Failure to State a Claim.

****1144** *Syllabus* *

This case involves a challenge to a California law known as Proposition 12, which as relevant here forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are "confined in a cruel manner." Cal. Health & Safety Code Ann. § 25990(b)(2). Confinement is "cruel" if it prevents a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely." § 25991(e)(1). Prior to the vote on Proposition 12, proponents suggested the law would benefit animal welfare and consumer health, and opponents claimed that existing farming practices did better than Proposition 12 protecting animal welfare (for example, by preventing pig-on-pig aggression) and ensuring consumer health (by avoiding contamination). Shortly after Proposition 12's adoption, two organizations—the National Pork Producers Council and the American Farm Bureau Federation (petitioners)—filed this lawsuit on behalf of their members who raise and process pigs alleging that Proposition 12 violates the U. S. Constitution by impermissibly burdening interstate commerce. Petitioners estimated that the cost of compliance with Proposition 12 will increase production costs and will fall on both California and out-of-state producers. But because California imports almost all the pork it consumes, most of Proposition 12's compliance costs will be borne by out-of-state firms. The district court held that petitioners' complaint failed to state a claim as a matter of law and dismissed the case. The Ninth Circuit affirmed.

Held: The judgment of the Ninth Circuit is affirmed.

6 4th 1021, affirmed.

Justice GORSUCH delivered the opinion of the Court, except as to Parts IV–B, IV–C, and IV–D, rejecting petitioners' theories that would place Proposition 12 in violation of the dormant Commerce Clause even though petitioners do not allege the law purposefully discriminates against out-of-state economic interests. Pp. 1151 - 1159, 1164 - 1165.

(a) The Constitution vests Congress with the power to "regulate Commerce ... among the several States." Art. I, § 8, cl. 3. Although Congress may seek to exercise this power to regulate the interstate trade of pork, and many pork producers have urged Congress to do so, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States. Petitioners' litigation theory thus rests on the *dormant* Commerce Clause theory, pursuant to which the Commerce Clause not only vests Congress with the power to regulate interstate trade, but also "contain[s] a further, negative command," one effectively forbidding the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261. This Court has held that state laws offend this dormant aspect of the Commerce Clause when they seek to "build up ... domestic commerce" through "burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443, 25 L.Ed. 743. At the same time, though, the Court has reiterated that, absent purposeful discrimination, "a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" the interests of its citizens. *Ibid.*

The antidiscrimination principle lies at the "very core" of the Court's dormant Commerce Clause jurisprudence. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581, 117 S.Ct. 1590, 137 L.Ed.2d 852. This Court has said that the Commerce Clause prohibits the enforcement of state laws "driven by ... 'economic protectionism—that is, regulatory

measures designed to benefit in-state economic interests by burdening out-of-state competitors.' " *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274, 108 S.Ct. 1803, 100 L.Ed.2d 302). Petitioners here disavow any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state pork producers. Pp. 1151 - 1154.

(b) Given petitioners' concession that Proposition 12 does not implicate the antidiscrimination principle, petitioners first invoke what they call the "extraterritoriality doctrine." They contend that the Court's dormant Commerce Clause cases suggest an additional and "almost *per se*" rule forbidding enforcement of state laws that have the "practical effect of controlling commerce outside the State," even when those laws do not purposely discriminate against out-of-state interests. Petitioners further insist that Proposition 12 offends this "almost *per se*" rule because the law will impose substantial new costs on out-of-state pork producers who wish to sell their products in California. Petitioners contend the rule they propose follows ineluctably from three cases: *Healy v. Beer Institute*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275; *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552; and *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032. But a close look at those cases reveals that each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests. In *Baldwin*, a New York law that barred out-of-state dairy farmers from selling their milk in the State for less than the minimum price New York law guaranteed in-state producers "plainly discriminate[d]" against out-of-staters by "erecting an economic barrier protecting a major local industry against competition from without the State." *Dean Milk Co. v. Madison*, 340 U.S. 349, 354, 71 S.Ct. 295, 95 L.Ed. 329 (discussing *Baldwin*). In *Brown-Forman*, a New York law that required liquor distillers to affirm that their in-state prices were no higher than their out-of-state prices impermissibly sought to force out-of-state distillers to "surrender" whatever cost advantages they enjoyed against their in-state rivals, which amounted to economic protectionism. 476 U.S. at 580, 106 S.Ct. 2080. The Court reached a similar conclusion in *Healy*, which involved a Connecticut law that required out-of-state beer merchants to affirm that their in-state prices were no higher than those they charged in neighboring States. 491 U.S. at 328–330, 109 S.Ct. 2491. As the Court later explained, "[t]he essential vice in laws" like Connecticut's is that they "hoard" commerce "for the benefit of " in-state merchants and discourage consumers from crossing state lines to make their purchases from nearby out-of-state vendors. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391–392, 114 S.Ct. 1677, 128 L.Ed.2d 399.

Petitioners insist that *Baldwin*, *Brown-Forman*, and *Healy* taken together suggest an "almost *per se*" rule against state laws with "extraterritorial effects." While petitioners point to language in these cases pertaining to the "practical effect" of the challenged laws on out-of-state commerce and prices, "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S.Ct. 2326, 60 L.Ed.2d 931. The language highlighted by petitioners in *Baldwin*, *Brown-Forman*, and *Healy* appeared in a particular context and did particular work. A close look at those cases reveals nothing like the "almost *per se*" rule against laws that have the "practical effect" of "controlling" extraterritorial commerce that petitioners posit, and indeed petitioners' reading would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. *Baldwin*, *Brown-Forman*, and *Healy* did not mean to do so much. In rejecting petitioners' "almost *per se*" theory the Court does not mean to trivialize the role territory and sovereign boundaries play in the federal system; the Constitution takes great care to provide rules for fixing and changing state borders. Art. IV, § 3, cl. 1. Courts must sometimes referee disputes about where one State's authority ends and another's begins—both inside and outside the commercial context. Indeed, the antidiscrimination principle found in the Court's dormant Commerce Clause cases may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers. But none of this means, as petitioners suppose, that *any* question about the ability of a

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State to project its power extraterritorially must yield to an "almost *per se*" rule under the dormant Commerce Clause. This Court has never before claimed so much "ground for judicial supremacy under the banner of the dormant Commerce Clause." *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 346–347, 127 S.Ct. 1786, 167 L.Ed.2d 655. Pp. 1153 - 1157.

(c) Petitioners next point to *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174, which they assert requires a court to at least assess " 'the burden imposed on interstate commerce' " by a state law and prevent its enforcement if the law's burdens are " 'clearly excessive in relation to the putative local benefits.' " Brief for Petitioners 44. Petitioners provide a litany of reasons why they believe the benefits Proposition 12 secures for Californians do not outweigh the costs it imposes on out-of-state economic interests.

Petitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of the Court's dormant Commerce Clause jurisprudence. As this Court has previously explained, "no clear line" separates the *Pike* line of cases from core antidiscrimination precedents. *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, n. 12, 117 S.Ct. 811, 136 L.Ed.2d 761. If some cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose. *Pike* itself concerned an Arizona order requiring cantaloupes grown in state to be processed and packed in state. 397 U.S. at 138–140, 90 S.Ct. 844. The Court held that Arizona's order violated the dormant Commerce Clause, stressing that even if that order could be fairly characterized as facially neutral, it "requir[ed] business operations to be performed in [state] that could more efficiently be performed elsewhere." *Id.*, at 145, 90 S.Ct. 844. The "practical effect[s]" of the order in operation thus revealed a discriminatory purpose—an effort to insulate in-state processing and packaging businesses from out-of-state competition. *Id.*, at 140, 90 S.Ct. 844. While this Court has left the "courtroom door open" to challenges premised on "even nondiscriminatory burdens," *Davis*, 553 U.S. at 353, 128 S.Ct. 1801, and while "a small number of our cases have invalidated state laws ... that appear to have been genuinely nondiscriminatory," *Tracy*, 519 U.S. at 298, n. 12, 117 S.Ct. 811, petitioners' claim about Proposition 12 falls well outside *Pike*'s heartland. Pp. 1157 - 1159.

(d) The Framers equipped Congress with considerable power to regulate interstate commerce and preempt contrary state laws. See U. S. Const., Art. I, § 8, cl. 3; Art. IV, § 2. While this Court has inferred an additional judicially enforceable rule against certain state laws adopted even against the backdrop of congressional silence, the Court's cases also suggest extreme caution is warranted in its exercise. Disavowing reliance on this Court's core dormant Commerce Clause teachings focused on discriminatory state legislation, petitioners invite the Court to endorse new theories of implied judicial power. They would have the Court recognize an "almost *per se*" rule against the enforcement of state laws that have "extraterritorial effects"—even though it has long recognized that virtually all state laws create ripple effects beyond their borders. Alternatively, they would have the Court prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases they invoke has never before yielded such a result. Like the courts that faced this case below, this Court declines both incautious invitations. Pp. 1164 - 1165.

Justice Gorsuch, joined by Justice THOMAS and Justice BARRETT, concluded in Part IV–B that, accepting petitioners' allegations, the *Pike* balancing task that they propose in this case is one no court is equipped to undertake. Some out-of-state producers who choose to comply with Proposition 12 may incur new costs, while the law serves moral and health interests of some magnitude for in-state residents. In a functioning democracy, those sorts of policy choices—balancing competing, incommensurable goods—belong to the people and their elected representatives. Pp. 1159 - 1161.

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Justice GORSUCH, joined by Justice THOMAS, Justice SOTOMAYOR, and Justice KAGAN, concluded in Part IV–C that the allegations in the complaint were insufficient as a matter of law to demonstrate a substantial burden on interstate commerce, a showing *Pike* requires *before* a court may assess the law's competing benefits or weigh the two sides against each other, and that the facts pleaded merely allege harm to some producers' favored "methods of operation" which the Court found insufficient to state a claim in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91. Pp. 1160 - 1163.

Justice GORSUCH, joined by Justice THOMAS and Justice BARRETT, concluded in Part IV–D that petitioners have not asked the Court to treat putative harms to out-of-state animal welfare or other noneconomic interests as freestanding harms cognizable under the dormant Commerce Clause, and in any event that the Court's decisions authorizing claims alleging "burdens on commerce," *Davis*, 553 U.S. at 353, 128 S.Ct. 1801, do not provide judges "a roving license" to reassess the wisdom of state legislation in light of any conceivable out-of-state interest, economic or otherwise. *United Haulers*, 550 U.S. at 343, 127 S.Ct. 1786. Pp. 1163 - 1164.

Justice SOTOMAYOR, joined by Justice KAGAN, concluded that the judgment should be affirmed, not because courts are incapable of balancing economic burdens against noneconomic benefits as *Pike* requires or because of any other fundamental reworking of that doctrine, but because petitioners fail to plausibly allege a substantial burden on interstate commerce as required by *Pike*. Pp. 1149 - 1151.

Justice Barrett concluded that the judgment should be affirmed because *Pike* balancing requires both the benefits and burdens of a State law to be judicially cognizable and comparable, see *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 354–355, 128 S.Ct. 1801, 170 L.Ed.2d 685, but the benefits and burdens of Proposition 12 are incommensurable; that said, the complaint plausibly alleges a substantial burden on interstate commerce because Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California. Pp. 1149 - 1150.

GORSUCH, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III, IV–A, and V, in which THOMAS, SOTOMAYOR, KAGAN, and BARRETT, JJ., joined, an opinion with respect to Parts IV–B and IV–D, in which THOMAS and BARRETT, JJ., joined, and an opinion with respect to Part IV–C, in which THOMAS, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part, in which KAGAN, J., joined. BARRETT, J., filed an opinion concurring in part. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which ALITO, KAVANAUGH, and JACKSON, JJ., joined. KAVANAUGH, J., filed an opinion concurring in part and dissenting in part.

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Opinion

Justice GORSUCH announced the judgment of the Court and delivered the opinion of the Court, except as to Parts IV–B, IV–C, and IV–D.

***363** ****1149** What goods belong in our stores? Usually, consumer demand and local laws supply some of the answer. Recently, California adopted just such a law banning the in-state sale of certain pork products derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around. In response, two groups of out-of-state pork producers ***364** filed this lawsuit, arguing that the law unconstitutionally interferes with their preferred way of doing business in violation of this Court's dormant Commerce Clause precedents. ****1150** Both the district court and court of appeals dismissed the producers' complaint for failing to state a claim.

We affirm. Companies that choose to sell products in various States must normally comply with the laws of those various States. Assuredly, under this Court's dormant Commerce Clause decisions, no State may use its laws to discriminate purposefully against out-of-state economic interests. But the pork producers do not suggest that California's law offends this principle. Instead, they invite us to fashion two new and more aggressive constitutional restrictions on the ability of States to regulate goods sold within their borders. We decline that invitation. While the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list.

I

Modern American grocery stores offer a dizzying array of choice. Often, consumers may choose among eggs that are large, medium, or small; eggs that are white, brown, or some other color; eggs from cage-free chickens or ones raised consistent with organic farming standards. When it comes to meat and fish, the options are no less plentiful. Products may be marketed as free range, wild caught, or graded by quality (prime, choice, select, and beyond). The pork products at issue here, too, sometimes come with “antibiotic-free” and “crate-free” labels. USDA, Report to Congress: Livestock ***365** Mandatory Reporting 18 (2018), https://www.ams.usda.gov/sites/default/files/media/LMR2018ReporttoCongress.pdf. Much of this product differentiation reflects consumer demand, informed by individual taste, health, or moral considerations.

Informed by similar concerns, States (and their predecessors) have long enacted laws aimed at protecting animal welfare. As far back as 1641, the Massachusetts Bay Colony prohibited “Tirranny or Crueltie towards any bruite Creature.” Body of Liberties § 92, in A Bibliographical Sketch of the Laws of the Massachusetts Colony 52–53 (1890). Today, Massachusetts prohibits the sale of pork products from breeding pigs (or their offspring) if the breeding pig has been confined “in a manner that prevents [it] from lying down, standing up, fully extending [its] limbs or turning around freely.” Mass. Gen. Laws Ann., ch. 129, App. §§ 1–3, 1–5 (Cum. Supp. 2023). Nor is that State alone. Florida's Constitution prohibits “any person [from] confin[ing] a pig during pregnancy ... in such a way that she is prevented from turning around freely.” Art. X, § 21(a). Arizona, Maine, Michigan, Oregon, and Rhode Island, too, have laws regulating animal confinement practices within their borders. See Ariz. Rev. Stat. Ann. § 13–2910.07(A) (2018); Me. Rev. Stat. Ann., Tit. 7, §§ 4020(1)–(2) (2018); Mich. Comp. Laws § 287.746(2) (West Cum. Supp. 2022); Ore. Rev. Stat. §§ 600.150(1)–(2) (2021); R. I. Gen. Laws § 4–1.1–3 (Supp. 2022).

This case involves a challenge to a California law known as Proposition 12. In November 2018 and with the support of about 63% of participating voters, California adopted a ballot initiative that revised the State's existing standards for the in-state sale of eggs and announced new standards for the in-state sale of pork and veal products. App. to Pet. for Cert. 37a–46a. As relevant here, Proposition 12 forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are “confined ***366** in a cruel manner.” Cal. Health & Safety Code Ann. § 25990(b)(2) (West Cum. Supp. 2023). Subject

to certain exceptions, the law deems confinement "cruel" if it prevents a pig from "lying down, standing up, ****1151** fully extending [its] limbs, or turning around freely." § 25991(e)(1). Since Proposition 12's adoption, the State has begun developing "proposed regulations" that would permit compliance "certification[s]" to be issued "by non-governmental third parties, many used for myriad programs (*e.g.*, 'organic') already." Brief for Intervenor Respondents 30, n. 8.

A spirited debate preceded the vote on Proposition 12. Proponents observed that, in some farming operations, pregnant pigs remain "[e]ncased" for 16 weeks in "fit-to-size" metal crates. M. Scully, A Brief for the Pigs: The Case of *National Pork Producers Council* v. *Ross*, National Review, July 11, 2022, https://www.nationalreview.com/2022/07/a-brief-for-the-pigs-the-case-of-national-pork-producers-council-v-ross/. These animals may receive their only opportunity for exercise when they are moved to a separate barn to give birth and later returned for another 16 weeks of pregnancy confinement—with the cycle repeating until the pigs are slaughtered. *Ibid.* Proponents hoped that Proposition 12 would go a long way toward eliminating pork sourced in this manner "from the California marketplace." A. Padilla, Cal. Secretary of State, California General Election —Official Voter Information Guide 70 (Nov. 6, 2018) (Voter Guide), https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf. Proponents also suggested that the law would have health benefits for consumers because "packing animals in tiny, filthy cages increases the risk of food poisoning." *Ibid.*; see App. to Pet. for Cert. 201a–202a.

Opponents pressed their case in strong terms too. They argued that existing farming practices did a better job of protecting animal welfare (for example, by preventing pig-on-pig aggression) and ensuring consumer health (by avoiding contamination) than Proposition 12 would. *Id*., at 185a–187a; see also Voter Guide 70–71. They also warned voters ***367** that Proposition 12 would require some farmers and processors to incur new costs. *Id*., at 69. Ones that might be "passed through" to California consumers. *Ibid.*

Shortly after Proposition 12's adoption, two organizations—the National Pork Producers Council and the American Farm Bureau Federation (collectively, petitioners)—filed this lawsuit on behalf of their members who raise and process pigs. App. to Pet. for Cert. 154a–155a. Petitioners alleged that Proposition 12 violates the U. S. Constitution by impermissibly burdening interstate commerce. *Id.*, at 230a–232a.

In support of that legal claim, petitioners pleaded a number of facts. They acknowledged that, in response to consumer demand and the laws of other States, 28% of their industry has already converted to some form of group housing for pregnant pigs. *Id.*, at 186a. But, petitioners cautioned, even some farmers who already raise group-housed pigs will have to modify their practices if they wish to comply with Proposition 12. *Id.*, at 208a–209a. Much of pork production today is vertically integrated, too, with farmers selling pigs to large processing firms that turn them into different "cuts of meat" and distribute the "different parts ... all over to completely different end users." *Id.*, at 334a–335a. Revising this system to segregate and trace Proposition 12-compliant pork, petitioners alleged, will require certain processing firms to make substantial new capital investments. *Id.*, at 205a–206a. Ultimately, petitioners estimated that "compliance with Proposition 12 will increase production costs" by "9.2% ... at the farm level." *Id.*, at 214a. These compliance costs will fall on California and out-of-state producers alike. *Ibid*. But because California imports almost all the pork it consumes, petitioners emphasized, "the majority" of ****1152** Proposition 12's compliance costs will be initially borne by out-of-state firms. *Ibid*.

After considerable motions practice, the district court held that petitioners' complaint failed to state a claim as a matter of law and dismissed the case. ***368** 456 F.Supp.3d 1201 (SD Cal. 2020). With Judge Ikuta writing for a unanimous panel, the Ninth Circuit affirmed. 6 F.4th 1021 (2021). Following that ruling, petitioners sought certiorari and we agreed to consider the complaint's legal sufficiency for ourselves. 596 U. S. ––––, 142 S.Ct. 1413, 212 L.Ed.2d 402 (2022).

II

The Constitution vests Congress with the power to "regulate Commerce ... among the several States." Art. I, § 8, cl. 3. Everyone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has done with various

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other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws. See Art. VI, cl. 2. But everyone also agrees that we have nothing like that here. Despite the persistent efforts of certain pork producers, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States. See, *e.g.*, H. R. 272, 116th Cong., 1st Sess., § 2 (2019); H. R. 4879, 115th Cong., 2d Sess., § 2(a) (2018); H. R. 3599, 115th Cong., 1st Sess., § 2(a) (2017); H. R. 687, 114th Cong., 1st Sess., § 2(a) (2015).

That has led petitioners to resort to litigation, pinning their hopes on what has come to be called the *dormant* Commerce Clause. Reading between the Constitution's lines, petitioners observe, this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also "contain[s] a further, negative command," one effectively forbidding the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995).

This view of the Commerce Clause developed gradually. In *Gibbons* v. *Ogden*, Chief Justice Marshall recognized that the States' constitutionally reserved powers enable them to regulate commerce in their own jurisdictions in ways sure to have "a remote and considerable influence on commerce" in other States. 9 Wheat. 1, 203, 22 U.S. 1, 6 L.Ed. 23 (1824). By way of example, ***369** he cited "[i]nspection laws, quarantine laws, [and] health laws of every description." *Ibid.* At the same time, however, Chief Justice Marshall saw "great force in th[e] argument" that the Commerce Clause might impliedly bar certain types of state economic regulation. *Id.*, at 209, 115 S.Ct. 1331. Decades later, in *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, this Court again recognized that the power vested in Congress to regulate interstate commerce leaves the States substantial leeway to adopt their own commercial codes. 12 How. 299, 317–321, 53 U.S. 299, 13 L.Ed. 996 (1852). But once more, the Court hinted that the Constitution may come with some restrictions on what "may be regulated by the States" even "in the absence of all congressional legislation." *Id.*, at 320.

Eventually, the Court cashed out these warnings, holding that state laws offend the Commerce Clause when they seek to "build up ... domestic commerce" through "burdens upon the industry and business of other States," regardless of whether Congress has spoken. *Guy v. Baltimore*, 100 U.S. 434, 443, 25 L.Ed. 743 (1880). At the same time, though, the Court reiterated that, absent discrimination, "a State may exclude from its territory, ****1153** or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" the interests of its citizens. *Ibid.*

Today, this antidiscrimination principle lies at the "very core" of our dormant Commerce Clause jurisprudence. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997). In its "modern" cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws "driven by ... 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' " *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988)); see also *Tennessee Wine and Spirits Retailers Assn.* v. *Thomas*, 588 U. S. ––––, ––––, 139 S.Ct. 2449, 2461, 204 L.Ed.2d 801 (2019) (observing ***370** that this Court's cases operate principally to "safeguard against state protectionism"); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373, n. 18, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994) (describing "a violation of the dormant Commerce Clause" as "discrimination against interstate commerce").

Admittedly, some "Members of the Court have authored vigorous and thoughtful critiques of this interpretation" of the Commerce Clause. *Tennessee Wine*, 588 U. S., at ––––, 139 S.Ct., at 2460 (citing cases). They have not necessarily quarreled with the antidiscrimination principle. But they have suggested that it may be more appropriately housed elsewhere in the

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Constitution. Perhaps in the Import–Export Clause, which prohibits States from "lay[ing] any Imposts or Duties on Imports or Exports" without permission from Congress. Art. I, § 10, cl. 2; see *Camps Newfound/Owatonna*, 520 U.S., at 621–637, 117 S.Ct. 1590 (THOMAS, J., dissenting). Perhaps in the Privileges and Immunities Clause, which entitles "[t]he Citizens of each State" to "all Privileges and Immunities of Citizens in the several States." Art. IV, § 2; see *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 265, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (Scalia, J., concurring in part and dissenting in part). Or perhaps the principle inheres in the very structure of the Constitution, which "was framed upon the theory that the peoples of the several [S]tates must sink or swim together." *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433, 125 S.Ct. 2419, 162 L.Ed.2d 407 (2005) (internal quotation marks omitted).

Whatever one thinks about these critiques, we have no need to engage with any of them to resolve this case. Even under our received dormant Commerce Clause case law, petitioners begin in a tough spot. They do not allege that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals. In fact, petitioners *disavow* any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones. As petitioners put it, "the ***371** dormant Commerce Clause ... bar on protectionist state statutes that discriminate against interstate commerce ... is not in issue here." Brief for Petitioners 2, n. 2.

III

Having conceded that California's law does not implicate the antidiscrimination principle at the core of this Court's dormant Commerce Clause cases, petitioners are left to pursue two more ambitious theories. In the first, petitioners invoke ****1154** what they call "extraterritoriality doctrine." *Id*., at 19. They contend that our dormant Commerce Clause cases suggest an additional and "almost *per se*" rule forbidding enforcement of state laws that have the "practical effect of controlling commerce outside the State," even when those laws do not purposely discriminate against out-of-state economic interests. *Ibid.* Petitioners further insist that Proposition 12 offends this "almost *per se*" rule because the law will impose substantial new costs on out-of-state pork producers who wish to sell their products in California.

A

This argument falters out of the gate. Put aside what problems may attend the minor (factual) premise of this argument. Focus just on the major (legal) premise. Petitioners say the "almost *per se*" rule they propose follows ineluctably from three cases —*Healy v. Beer Institute*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986); and *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935). A close look at those cases, however, reveals nothing like the rule petitioners posit. Instead, each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests.

Start with *Baldwin*. There, this Court refused to enforce New York laws that barred out-of-state dairy farmers from selling their milk in the State "unless the price paid to" them ***372** matched the minimum price New York law guaranteed in-state producers. *Id*., at 519, 55 S.Ct. 497. In that way, the challenged laws deliberately robbed out-of-state dairy farmers of the opportunity to charge lower prices in New York thanks to whatever "natural competitive advantage" they might have enjoyed over in-state dairy farmers—for example, lower cost structures, more productive farming practices, or "lusher pasturage." D. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1248 (1986). The problem with New York's laws was thus a simple one: They "plainly discriminate[d]" against out-of-staters by "erecting an economic barrier protecting a major local industry against competition from without the State." *Dean Milk*

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Co. v. Madison, 340 U.S. 349, 354, 71 S.Ct. 295, 95 L.Ed. 329 (1951) (discussing *Baldwin*). Really, the laws operated like "a tariff or customs duty." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994); see *Baldwin*, 294 U.S. at 523, 55 S.Ct. 497 (condemning the challenged laws for seeking to "protec[t]" New York dairy farmers "against competition from without").

Brown-Forman and *Healy* differed from *Baldwin* only in that they involved price-affirmation, rather than price-fixing, statutes. In *Brown-Forman*, New York required liquor distillers to affirm (on a monthly basis) that their in-state prices were no higher than their out-of-state prices. 476 U.S. at 576, 106 S.Ct. 2080. Once more, the goal was plain: New York sought to force out-of-state distillers to "surrender" whatever cost advantages they enjoyed against their in-state rivals. *Id.*, at 580, 106 S.Ct. 2080. Once more, the law amounted to "simple economic protectionism." *Ibid.* (internal quotation marks omitted).

In *Healy*, a Connecticut law required out-of-state beer merchants to affirm that their in-state prices were no higher than those they charged in neighboring States. 491 U.S. at 328–330, 109 S.Ct. 2491. Here, too, protectionism took center stage. As ****1155** the Court later noted, "[t]he essential vice in laws" like Connecticut's is that they "hoard" commerce "for the benefit of" ***373** in-state merchants and discourage consumers from crossing state lines to make their purchases from nearby out-of-state vendors. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391–392, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). Nor did the law in *Healy* even try to cloak its discriminatory purpose: "By its plain terms, the Connecticut affirmation statute applie[d] solely to interstate" firms, and in that way "clearly discriminate[d] against interstate commerce." 491 U.S. at 340–341, 109 S.Ct. 2491. The Court also worried that, if the Connecticut law stood, "each of the border States" could "enac[t] statutes essentially identical to Connecticut's" in retaliation—a result often associated with avowedly protectionist economic policies. *Id.*, at 339–340, 109 S.Ct. 2491.

B

Petitioners insist that our reading of these cases misses the forest for the trees. On their account, *Baldwin*, *Brown-Forman*, and *Healy* didn't just find an impermissible discriminatory purpose in the challenged laws; they also suggested an "almost *per se*" rule against state laws with "extraterritorial effects." Brief for Petitioners 19, 23. In *Healy*, petitioners stress, the Court included language criticizing New York's laws for having the " 'practical effect' " of "control[ling] commerce 'occurring wholly outside the boundaries of [the] State.' " Brief for Petitioners 21, 25 (quoting 491 U.S. at 336, 109 S.Ct. 2491). In *Brown-Forman*, petitioners observe, the Court suggested that whether a state law " 'is addressed only to [in-state] sales is irrelevant if the "practical effect" of the law is to control' " out-of-state prices. Brief for Petitioners 21 (quoting 476 U.S. at 583, 106 S.Ct. 2080). Petitioners point to similar language in *Baldwin* as well. Brief for Petitioners 37 (quoting 294 U.S. at 523–524, 55 S.Ct. 497).

In our view, however, petitioners read too much into too little. "[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). Instead, we emphasize, our opinions dispose of discrete cases ***374** and controversies and they must be read with a careful eye to context. See *Cohens v. Virginia*, 6 Wheat. 264, 399–400, 19 U.S. 264, 5 L.Ed. 257 (1821) (Marshall, C. J.).

And when it comes to *Baldwin*, *Brown-Forman*, and *Healy*, the language petitioners highlight appeared in a particular context and did particular work. Throughout, the Court explained that the challenged statutes had a *specific* impermissible "extraterritorial effect"—they deliberately "prevent[ed out-of-state firms] from undertaking competitive pricing" or "deprive[d] businesses and consumers in other States of 'whatever competitive advantages they may possess.' " *Healy*, 491 U.S. at 338–339, 109 S.Ct. 2491 (quoting *Brown-Forman*, 476 U.S. at 580, 106 S.Ct. 2080).

In recognizing this much, we say nothing new. This Court has already described "[t]he rule that was applied in *Baldwin* and *Healy*" as addressing "price control or price affirmation statutes" that tied "the price of ... in-state products to out-of-state prices." *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 669, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003) (internal quotation marks omitted). Many lower courts have read these decisions in exactly the same way. See, *e.g.*, 6 F.4th at 1028–1029; *Association for Accessible Medicines v. Frosh*, 887 F.3d 664, 669 (C.A.4 2018); ****1156** *Energy and Environment Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (C.A.10 2015); *American Beverage Assn. v. Snyder*, 735 F.3d 362, 373 (C.A.6 2013).

Consider, too, the strange places petitioners' alternative interpretation could lead. In our interconnected national marketplace, many (maybe most) state laws have the "practical effect of controlling" extraterritorial behavior. State income tax laws lead some individuals and companies to relocate to other jurisdictions. See, *e.g.*, *Banner v. United States*, 428 F.3d 303, 310 (C.A. DC 2005) (*per curiam*). Environmental laws often prove decisive when businesses choose where to manufacture their goods. See *American Beverage Assn.*, 735 F.3d at 379 (Sutton, J., concurring). Add to the extraterritorial-effects list all manner of "libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws," and plenty else besides. J. Goldsmith ***375** & A. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L. J. 785, 804 (2001). Nor, as we have seen, is this a recent development. Since the founding, States have enacted an "immense mass" of "[i]nspection laws, quarantine laws, [and] health laws of every description" that have a "considerable" influence on commerce outside their borders. *Gibbons*, 9 Wheat. at 203; see also *Cooley*, 12 How. at 317–321. Petitioners' "almost *per se*" rule against laws that have the "practical effect" of "controlling" extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. It would provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them. Instead, it would invite endless litigation and inconsistent results. Can anyone really suppose *Baldwin*, *Brown-Forman*, and *Healy* meant to do so much?

In rejecting petitioners' "almost *per se*" theory we do not mean to trivialize the role territory and sovereign boundaries play in our federal system. Certainly, the Constitution takes great care to provide rules for fixing and changing state borders. Art. IV, § 3, cl. 1. Doubtless, too, courts must sometimes referee disputes about where one State's authority ends and another's begins—both inside and outside the commercial context. In carrying out that task, this Court has recognized the usual "legislative power of a State to act upon persons and property within the limits of its own territory," *Hoyt v. Sprague*, 103 U.S. 613, 630, 26 L.Ed. 585 (1881), a feature of our constitutional order that allows "different communities" to live "with different local standards," *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). But, by way of example, no one should think that one State may adopt a law exempting securities held by the residents of a second State from taxation in that second State. *Bonaparte v. Tax Court*, 104 U.S. 592, 592–594, 26 L.Ed. 845 (1882). Nor, we have held, should anyone think one State may prosecute the citizen of another State for acts committed "outside [the first State's] jurisdiction" that are not "intended to produce [or ***376** that do not] produc[e] detrimental effects within it." *Strassheim v. Daily*, 221 U.S. 280, 285, 31 S.Ct. 558, 55 L.Ed. 735 (1911).

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To resolve disputes about the reach of one State's power, this Court has long consulted original and historical understandings of the Constitution's structure and the principles of "sovereignty and comity" it embraces. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). This Court has invoked as well a number of the Constitution's express provisions—including "the Due Process Clause and the Full Faith and Credit Clause." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). The ****1157** antidiscrimination principle found in our dormant Commerce Clause cases may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers. But none of this means, as petitioners suppose, that *any* question about the ability of a State to project its power extraterritorially must yield to an "almost *per se*" rule under the dormant Commerce Clause. This Court has never before claimed so much "ground for judicial supremacy under the banner of the dormant Commerce Clause." *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 347, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007). We see no reason to change course now. [1]

***377** IV

Failing in their first theory, petitioners retreat to a second they associate with *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Under *Pike*, they say, a court must at least assess " 'the burden imposed on interstate commerce' " by a state law and prevent its enforcement if the law's burdens are " 'clearly excessive in relation to the putative local benefits.' " Brief for Petitioners 44. Petitioners then rattle off a litany of reasons why they believe the benefits Proposition 12 secures for Californians do not outweigh the costs it imposes on out-of-state economic interests. We see problems with this theory too.

A

In the first place, petitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of our dormant Commerce Clause jurisprudence. As this Court has previously explained, "no clear line" separates the *Pike* line of cases from our core antidiscrimination precedents. *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, n. 12, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). While many of our dormant Commerce Clause cases have asked whether a law exhibits " 'facial discrimination,' " "several cases that have purported to apply [*Pike,*] including *Pike* itself," have "turned in whole or in part on the discriminatory character of the challenged state regulations." *Ibid.* In other words, if some of our cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose.

****1158** *Pike* itself illustrates the point. That case concerned an Arizona order requiring cantaloupes grown in state to be ***378** processed and packed in state. 397 U.S. at 138–140, 90 S.Ct. 844. The Court held that Arizona's order violated the dormant Commerce Clause. *Id.,* at 146, 90 S.Ct. 844. Even if that order could be fairly characterized as facially neutral, the Court stressed that it "requir[ed] business operations to be performed in [state] that could more efficiently be performed elsewhere." *Id.*, at 145, 90 S.Ct. 844. The "practical effect[s]" of the order in operation thus revealed a discriminatory purpose —an effort to insulate in-state processing and packaging businesses from out-of-state competition. *Id.*, at 140, 145, 90 S.Ct. 844.

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Other cases in the *Pike* line underscore the same message. In *Minnesota v. Clover Leaf Creamery Co.*, the Court found no impermissible burden on interstate commerce because, looking to the law's effects, "there [was] no reason to suspect that the gainers" would be in-state firms or that "the losers [would be] out-of-state firms." 449 U.S. 456, 473, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); see also *id.*, at 474–477, and n. 2, 101 S.Ct. 715 (Powell, J., concurring in part and dissenting in part) (asking whether the "actual purpose," if not the " 'avowed purpose,' " of the law was discrimination). Similarly, in *Exxon Corp. v. Governor of Maryland*, the Court keyed to the fact that the effect of the challenged law was only to shift business from one set of out-of-state suppliers to another. 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). And in *United Haulers*, a plurality upheld the challenged law because it could not "detect" any discrimination in favor of in-state businesses or against out-of-state competitors. 550 U.S. at 346, 127 S.Ct. 1786. In each of these cases and many more, the presence or absence of discrimination in practice proved decisive.

Once again, we say nothing new here. Some time ago, *Tracy* identified the congruity between our core dormant Commerce Clause precedents and the *Pike* line. 519 U.S. at 298, n. 12, 117 S.Ct. 811. Many lower courts have done the same. See, *e.g.*, *Rosenblatt v. Santa Monica*, 940 F.3d 439, 452 (C.A.9 2019); *Park Pet Shop, Inc. v. Chicago*, 872 F.3d 495, 501 (C.A.7 2017); ***379** *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (C.A.7 1989). So have many scholars. See, *e.g.*, R. Fallon, The Dynamic Constitution 311 (2d ed. 2013) (observing that *Pike* serves to " 'smoke out' a hidden" protectionism); B. Friedman & D. Deacon, A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 Va. L. Rev. 1877, 1927 (2011); Regan, 84 Mich. L. Rev., at 1286.

Nor does any of this help petitioners in this case. They not only disavow any claim that Proposition 12 discriminates on its face. They nowhere suggest that an examination of Proposition 12's practical effects in operation would disclose purposeful discrimination against out-of-state businesses. While this Court has left the "courtroom door open" to challenges premised on "even nondiscriminatory burdens," *Davis*, 553 U.S., at 353, 128 S.Ct. 1801, and while "a small number of our cases have invalidated state laws ... that appear to have been genuinely nondiscriminatory," *Tracy*, 519 U.S., at 298, n. 12, 117 S.Ct. 811,[2] ****1159** ***380** petitioners' claim falls well outside *Pike*'s heartland. That is not an auspicious start.

B

Matters do not improve from there. While *Pike* has traditionally served as another way to test for purposeful discrimination against out-of-state economic interests, and while some of our cases associated with that line have expressed special concern with certain state regulation of the instrumentalities of interstate transportation, see n. 2, *supra*, petitioners would have us retool *Pike* for a much more ambitious project. They urge us to read *Pike* as authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law's "costs" and "benefits."

That we can hardly do. Whatever other judicial authorities the Commerce Clause may imply, that kind of freewheeling power is not among them. Petitioners point to nothing in the Constitution's text or history that supports such a project. And our cases have expressly cautioned against judges using the dormant Commerce Clause as "a roving license for federal courts to decide what activities are appropriate for state and local government to undertake." *United Haulers*, 550 U.S., at 343, 127 S.Ct. 1786. While "[t]here was a time when this Court presumed to make such binding judgments for society, under the guise of

interpreting the Due Process Clause," we have long refused pleas like petitioners' "to reclaim that ground" in the name of the dormant Commerce Clause. *Id.*, at 347, 127 S.Ct. 1786.

Not only is the task petitioners propose one the Commerce Clause does not authorize judges to undertake. This Court has also recognized that judges often are "not institutionally suited to draw reliable conclusions of the kind that would be necessary ... to satisfy [the] *Pike*" test as petitioners conceive it. *Davis*, 553 U.S., at 353, 128 S.Ct. 1801.

Our case illustrates the problem. On the "cost" side of the ledger, petitioners allege they will face increased production ***381** expenses because of Proposition 12. On the "benefits" side, petitioners acknowledge that Californians voted for Proposition 12 to vindicate a variety of interests, many noneconomic. See App. to Pet. for Cert. 192a (alleging in their complaint that "Proposition 12's requirements were driven by [a] conception of what qualifies as 'cruel' animal housing" and by the State's concern for the " 'health and safety of California consumers' "). How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are ****1160** insusceptible to resolution by reference to any juridical principle. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (Scalia, J., concurring in judgment).

Faced with this problem, petitioners reply that we should heavily discount the benefits of Proposition 12. They say that California has little interest in protecting the welfare of animals raised elsewhere and the law's health benefits are overblown. But along the way, petitioners offer notable concessions too. They acknowledge that States may sometimes ban the in-state sale of products they deem unethical or immoral without regard to where those products are made (for example, goods manufactured with child labor). See Tr. of Oral Arg. 51 ("[A] state is perfectly entitled to enforce its morals in state"); see also *Western Union Telegraph Co. v. James*, 162 U.S. 650, 653, 16 S.Ct. 934, 40 L.Ed. 1105 (1896) (holding that States may enact laws to "promote ... public morals"). And, at least arguably, Proposition 12 works in just this way—banning from the State all whole pork products derived from practices its voters consider "cruel." Petitioners also concede that States may often adopt laws addressing even "imperfectly understood" health risks associated with goods sold within their borders. Reply Brief 13. And, again, no one disputes that some who voted for Proposition 12 may have done so with just that sort of goal in mind. See, *e.g.*, USDA ***382** Proposed Rule To Amend Organic Livestock and Poultry Production Requirements, 87 Fed. Reg. 48565 (2022) (affording animals more space "may result in healthier livestock products for human consumption").

So even accepting everything petitioners say, we remain left with a task no court is equipped to undertake. On the one hand, some out-of-state producers who choose to comply with Proposition 12 may incur new costs. On the other hand, the law serves moral and health interests of some (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours.

More accurately, your guess is *better* than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant "political and economic" costs and benefits for themselves, *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978), and "try novel social and economic experiments" if they wish, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). Judges cannot displace the cost-benefit analyses embodied in democratically adopted legislation guided by nothing more than their own faith in "Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting)—or, for that matter, Mr. Wilson Pond's Pork Production Systems, see W. Pond, J. Maner, & D. Harris, Pork Production Systems: Efficient Use of Swine and Feed Resources (1991).

If, as petitioners insist, California's law really does threaten a "massive" disruption of the pork industry, see Brief for Petitioners 2, 4, 19—if pig husbandry really does " 'imperatively demand' " a single uniform nationwide rule, *id*., at 27—they are free to petition Congress to intervene. Under the (wakeful) Commerce Clause, that body enjoys the power to adopt federal legislation that may preempt conflicting ***383** state ****1161** laws. That body is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country. And that body is certainly better positioned to claim democratic support for any policy choice it may make. But so far, Congress has declined the producers' sustained entreaties for new legislation. See Part I, *supra* (citing failed efforts). And with that history in mind, it is hard not to wonder whether petitioners have ventured here only because winning a majority of a handful of judges may seem easier than marshaling a majority of elected representatives across the street.

C

Even as petitioners conceive *Pike*, they face a problem. As they read it, *Pike* requires a plaintiff to plead facts plausibly showing that a challenged law imposes "substantial burdens" on interstate commerce *before* a court may assess the law's competing benefits or weigh the two sides against each other. Brief for Petitioners 44. And, tellingly, the complaint before us fails to clear even that bar.

To appreciate petitioners' problem, compare our case to *Exxon*. That case involved a Maryland law prohibiting petroleum producers from operating retail gas stations in the State. 437 U.S. at 119–121, and n. 1, 98 S.Ct. 2207. Because Maryland had no in-state petroleum producers, Exxon argued, the law's "divestiture requirements" fell "solely on interstate companies" and threatened to force some to "withdraw entirely from the Maryland market" or incur new costs to serve that market. *Id.*, at 125–127, 98 S.Ct. 2207. All this, the company said, amounted to a violation of the dormant Commerce Clause.

This Court found the allegations in Exxon's complaint insufficient as a matter of law to demonstrate a substantial burden on interstate commerce. Without question, Maryland's law favored one business structure (independent gas station retailers) over another (vertically integrated production and retail firms). *Ibid.* The law also promised to increase ***384** retail gas prices for Maryland consumers, allowing some to question its "wisdom." *Id*., at 124, 128, 98 S.Ct. 2207. But, the Court found, Exxon failed to plead facts leading, "either logically or as a practical matter, to [the] conclusion that the State [was] discriminating against interstate commerce." *Id.*, at 125, 98 S.Ct. 2207. The company failed to do so because, on its face, Maryland's law welcomed competition from interstate retail gas station chains that did not produce petroleum. *Id.*, at 125–126, 98 S.Ct. 2207. And as far as anyone could tell, the law's "practical effect" wasn't to protect in-state producers; it was to shift market share from one set of out-of-state firms (vertically integrated businesses) to another (retail gas station firms). *Id.*, at 125, 127, 98 S.Ct. 2207. This Court squarely rejected the view that this predicted " 'change [in] the market structure' " would "impermissibly burde[n] interstate commerce." *Id.,* at 127, 98 S.Ct. 2207. If the dormant Commerce Clause protects the "interstate market ... from prohibitive or burdensome regulations," the Court held, it does not protect "particular ... firms" or "particular structure[s] or methods of operation." *Id.,* at 127–128, 98 S.Ct. 2207.

If Maryland's law did not impose a sufficient burden on interstate commerce to warrant further scrutiny, the same must be said for Proposition 12. In *Exxon*, vertically integrated businesses faced a choice: They could divest their production capacities or withdraw from the local retail market. Here, farmers and vertically integrated processors have at least as much choice: They may provide all their pigs the space the law requires; they may segregate their ****1162** operations to ensure pork products entering California meet its standards; or they may withdraw from that State's market. In *Exxon*, the law posed a choice *only* for out-of-state firms. Here, the law presents a choice primarily—but not exclusively—for out-of-state businesses; California does

have some pork producers affected by Proposition 12. See App. to Pet. for Cert. 205a. In *Exxon*, as far as anyone could tell, the law threatened only to shift market share from one set ***385** of out-of-state firms to another. Here, the pleadings allow for the same possibility—that California market share previously enjoyed by one group of profit-seeking, out-of-state businesses (farmers who stringently confine pigs and processors who decline to segregate their products) will be replaced by another (those who raise and trace Proposition 12-compliant pork). In both cases, some may question the "wisdom" of a law that threatens to disrupt the existing practices of some industry participants and may lead to higher consumer prices. 437 U.S. at 128, 98 S.Ct. 2207. But the dormant Commerce Clause does not protect a "particular structure or metho[d] of operation." *Id.*, at 127, 98 S.Ct. 2207. That goes for pigs no less than gas stations.

Think of it another way. Petitioners must plead facts "plausibly" suggesting a substantial harm to interstate commerce; facts that render that outcome a "speculative" possibility are not enough. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In an effort to meet this standard, petitioners allege facts suggesting that certain out-of-state farmers and processing firms will find it difficult to comply with Proposition 12 and may choose not to do so. See App. to Pet. for Cert. 198a, 208a, 313a. But the complaint also acknowledges that many producers have already converted to some form of group housing, even if they have not all yet met Proposition 12's standards. *Id*., at 186a. From these facts, the complaint plausibly alleges that *some* out-of-state firms may face difficulty complying (or may choose not to comply) with Proposition 12. But from all anyone can tell, *other* out-of-state competitors seeking to enhance their own profits may choose to modify their existing operations or create new ones to fill the void. [3]

***386** Of course, as the complaint alleges, a shift from one set of production methods to another promises some costs. *Id*., at 214a. But the complaint concedes that complying producers will be able to "pas[s] along" at least "some" of their increased costs to consumers. *Id.,* at 178a. And no one thinks that costs ultimately borne by in-state consumers thanks to a law they adopted counts as a cognizable harm under our dormant Commerce Clause precedents. See ****1163** *United Haulers*, 550 U.S., at 345, 127 S.Ct. 1786 (holding that the dormant Commerce Clause is not offended by higher prices "likely to fall upon the very people who voted for the [challenged] la[w]"). Nor does the complaint allege facts plausibly suggesting that out-of-state consumers indifferent to pork production methods will have to pick up the tab (let alone explain how petitioners might sue to vindicate their interests). Instead, at least one declaration incorporated by reference into the complaint avers that some out-of-state consumers will "not value these changes and will not pay an increased price." App. to Pet. for Cert. 335a; see also Brief for Agricultural and Resource Economics Professors as *Amici Curiae* 15, 23 (suggesting negligible effect on out-of-state prices for consumers not interested in Proposition 12-compliant pork). Further experience may yield further facts. But the facts pleaded in this complaint merely allege harm to ***387** some producers' favored "methods of operation." *Exxon*, 437 U.S., at 127, 98 S.Ct. 2207. A substantial harm to interstate commerce remains nothing more than a speculative possibility. *Ibid.*

D

THE CHIEF JUSTICE's concurrence in part and dissent in part (call it "the lead dissent") offers a contrasting view. Correctly, it begins by rejecting petitioners' "almost *per se*" rule against laws with extraterritorial effects. *Post*, at 1167. And correctly, it disapproves reading *Pike* to endorse a "freewheeling judicial weighing of benefits and burdens." *Post*, at 1167 - 1168. But for all it gets right, in other respects it goes astray. In places, the lead dissent seems to advance a reading of *Pike* that would permit judges to enjoin the enforcement of any state law restricting the sale of an ordinary consumer good if the law threatens an " 'excessive' " "har[m] to the interstate market" for that good. *Post*, at 1168 - 1172. It is an approach that would go much further than our precedents permit. So much further, in fact, that it isn't clear what separates the lead dissent's approach from others it purports to reject.

Consider an example. Today, many States prohibit the sale of horsemeat for human consumption. See *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 552–555 (C.A.7 2007). But these prohibitions "har[m] the interstate market" for horsemeat by denying outlets for its sale. Not only that, they distort the market for animal products more generally by pressuring horsemeat manufacturers to transition to different products, ones they can lawfully sell nationwide. Under the lead dissent's test, all it would take is one complaint from an unhappy out-of-state producer and—presto—the Constitution would protect the sale of horsemeat. Just find a judge anywhere in the country who considers the burden to producers "excessive." *Post*, at 1171 - 1172. The same would go for all manner of consumer products currently banned by some States but not by others—goods ranging from fireworks, ***388** see, *e.g.,* Mass. Gen. Laws Ann., ch. 148, § 39 (2020), to single-use plastic grocery bags, see, *e.g.,* Me. Rev. Stat. Ann., Tit. 38, §§ 1611(2)(A), (4) (2022). Rather than respecting federalism, a rule like that would require any consumer good available for sale in one State to be made available in every State. In the process, it would essentially replicate under *Pike's* banner petitioners' "almost *per se*" rule against state laws with extraterritorial effects.

Seeking a way around that problem, the lead dissent stumbles into another. It suggests that the burdens of Proposition 12 are particularly "substantial" because California's law "carr[ies] implications for producers as far flung as Indiana and North Carolina." *Post*, at 1170. Why is that so? Justice KAVANAUGH's solo concurrence in part and dissent in part says the quiet ****1164** part aloud: California's market is so lucrative that almost any in-state measure will influence how out-of-state profit-maximizing firms choose to operate. *Post,* at 1173 - 1174. But if that makes all the difference, it means voters in States with smaller markets are constitutionally entitled to greater authority to regulate in-state sales than voters in States with larger markets. So much for the Constitution's "fundamental principle of *equal* sovereignty among the States." *Shelby County v. Holder*, 570 U.S. 529, 544, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (internal quotation marks omitted).

The most striking feature of both dissents, however, may be another one. They suggest that, in assessing a state law's burdens under *Pike*, courts should take into account not just economic harms but also all manner of "derivative harms" to out-of-state interests. *Post*, at 1169 - 1170 (opinion of ROBERTS, C. J.). These include social costs that are "difficult to quantify" such as (in this case) costs to the "national pig population," "animal husbandry" traditions, and (again) "industry practice." *Post,* at 1170 - 1172; see also *post,* at 1173 - 1174 (opinion of KAVANAUGH, J.). But not even petitioners read *Pike* so boldly. While petitioners argue that Proposition 12 does not benefit pigs (as California has asserted), they have ***389** not asked this Court (or any court) to treat putative harms to out-of-state animal welfare or other noneconomic interests as freestanding harms cognizable under the dormant Commerce Clause. Nor could they have proceeded otherwise. Our decisions have authorized claims alleging "burdens on commerce." *Davis*, 553 U.S., at 353, 128 S.Ct. 1801. They do not provide judges "a roving license" to reassess the wisdom of state legislation in light of any conceivable out-of-state interest, economic or otherwise. *United Haulers*, 550 U.S., at 343, 127 S.Ct. 1786. [4]

V

Before the Constitution's passage, Rhode Island imposed special taxes on imported "*New-England* Rum"; Connecticut levied duties on goods "brought into th[e] State, by Land or Water, from any of the United States of *America*"; and Virginia taxed "vessels coming within th[e S]tate from any of the United States." An Act Laying Certain Duties of Excise Upon Certain Articles, Feb. 24, 1783 R. I. Acts and Resolves 45; An Act for Levying and Collecting a Duty on Certain Articles of Goods, Wares and Merchandize Imported into this State, by Land or Water, 1784 Conn. Acts and Laws ***390** 271; An Act to Amend the Act for Ascertaining Certain Taxes and Duties, and for Establishing a Permanent Revenue (May 6, 1782), in 11 Statutes at Large, Laws of Virginia 70 (W. Hening ed. 1823).

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****1165** Whether moved by this experience or merely worried that more States might join the bandwagon, the Framers equipped Congress with considerable power to regulate interstate commerce and preempt contrary state laws. See U. S. Const., Art. I, § 8, cl. 3; Art. IV, § 2; see also Regan, 84 Mich. L. Rev., at 1114, n. 55; A. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 448–449 (1941). In the years since, this Court has inferred an additional judicially enforceable rule against certain, especially discriminatory, state laws adopted even against the backdrop of congressional silence. But " 'extreme caution' " is warranted before a court deploys this implied authority. *Tracy*, 519 U.S., at 310, 117 S.Ct. 811 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302, 64 S.Ct. 950, 88 L.Ed. 1283 (1944) (Black, J., concurring)). Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of "extreme delicacy," something courts should do only "where the infraction is clear." *Conway v. Taylor's Executor*, 1 Black 603, 634, 66 U.S. 603, 17 L.Ed. 191 (1862).

Petitioners would have us cast aside caution for boldness. They have failed—repeatedly—to persuade Congress to use its express Commerce Clause authority to adopt a uniform rule for pork production. And they disavow any reliance on this Court's core dormant Commerce Clause teachings focused on discriminatory state legislation. Instead, petitioners invite us to endorse two new theories of implied judicial power. They would have us recognize an "almost *per se*" rule against the enforcement of state laws that have "extraterritorial effects"—even though this Court has recognized since *Gibbons* that virtually all state laws create ripple effects beyond their borders. Alternatively, they would have ***391** us prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases they invoke has never before yielded such a result. Like the courts that faced this case before us, we decline both of petitioners' incautious invitations.

The judgment of the Ninth Circuit is

Affirmed.

Justice SOTOMAYOR, with whom Justice KAGAN joins, concurring in part.
I join all but Parts IV–B and IV–D of Justice GORSUCH's opinion. Given the fractured nature of Part IV, I write separately to clarify my understanding of why petitioners' *Pike* claim fails. In short, I vote to affirm the judgment because petitioners fail to allege a substantial burden on interstate commerce as required by *Pike*, not because of any fundamental reworking of that doctrine.

* * *

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), the Court distilled a general principle from its prior cases. "Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*, at 142, 90 S.Ct. 844. Further, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Ibid.*

As the Court's opinion here explains, *Pike*'s balancing and tailoring principles are most frequently deployed to detect the ****1166** presence or absence of latent economic protectionism. See *ante*, at 1157 - 1159. That is no surprise. Warding off state discrimination against interstate commerce is at the ***392** heart of our dormant Commerce Clause jurisprudence. See *ante*, at 1152 - 1153, 1154 - 1155, 1157 - 1158.

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As the Court's opinion also acknowledges, however, the Court has "generally le[ft] the courtroom door open" to claims premised on "even nondiscriminatory burdens." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 353, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008); see *ante*, at 1158 - 1159. Indeed, "a small number" of this Court's cases in the *Pike* line "have invalidated state laws ... that appear to have been genuinely nondiscriminatory" in nature. *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, n. 12, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997); see *ante*, at 1158 - 1159. Often, such cases have addressed state laws that impose burdens on the arteries of commerce, on "trucks, trains, and the like." *Ibid.*, n. 2. Yet, there is at least one exception to that tradition. See *Edgar v. MITE Corp.*, 457 U.S. 624, 643–646, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (invalidating a nondiscriminatory state law that regulated tender offers to shareholders).

Pike claims that do not allege discrimination or a burden on an artery of commerce are further from *Pike*'s core. As THE CHIEF JUSTICE recognizes, however, the Court today does not shut the door on all such *Pike* claims. See *ante*, at 1158 - 1159, and n. 2; *post*, at 1167 - 1168. Thus, petitioners' failure to allege discrimination or an impact on the instrumentalities of commerce does not doom their *Pike* claim.

Nor does a majority of the Court endorse the view that judges are not up to the task that *Pike* prescribes. Justice GORSUCH, for a plurality, concludes that petitioners' *Pike* claim fails because courts are incapable of balancing economic burdens against noneconomic benefits. See *ante*, at 1159 - 1161. I do not join that portion of Justice GORSUCH's opinion. I acknowledge that the inquiry is difficult and delicate, and federal courts are well advised to approach the matter with caution. See *ante*, at 1164 - 1165. Yet, I agree with THE CHIEF JUSTICE that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with ***393** some frequency. See *post*, at 1168 - 1169. The means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble Justice GORSUCH.

In my view, and as Justice GORSUCH concludes for a separate plurality of the Court, petitioners' *Pike* claim fails for a much narrower reason. Reading petitioners' allegations in light of the Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), the complaint fails to allege a substantial burden on interstate commerce. See *ante*, at 1160 - 1163. Alleging a substantial burden on interstate commerce is a threshold requirement that plaintiffs must satisfy before courts need even engage in *Pike*'s balancing and tailoring analyses. Because petitioners have not done so, they fail to state a *Pike* claim.

Justice BARRETT, concurring in part.

A state law that burdens interstate commerce in clear excess of its putative local benefits flunks *Pike* balancing. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). In most cases, *Pike*'s "general rule" reflects a commonsense principle: Where there's smoke, there's fire. *Ibid.* Under our dormant Commerce Clause jurisprudence, one State may not discriminate against another's ****1167** producers or consumers. A law whose burdens fall incommensurately and inexplicably on out-of-state interests may be doing just that.

But to weigh benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable. See *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 354–355, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008). I agree with Justice GORSUCH that the benefits and burdens of Proposition 12 are incommensurable. California's interest in eliminating allegedly inhumane

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products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians. *Ante*, at 1159 - 1161; ***394** *Davis*, 553 U.S., at 360, 128 S.Ct. 1801 (Scalia, J., concurring in part). None of our *Pike* precedents requires us to attempt such a feat.

That said, I disagree with my colleagues who would hold that petitioners have failed to allege a substantial burden on interstate commerce. *Ante*, at 1160 - 1163; *ante*, at 1166 (SOTOMAYOR, J., concurring in part). The complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California. See *post*, at 1170 - 1171 (ROBERTS, C. J., concurring in part and dissenting in part). For this reason, I do not join Part IV–C of Justice GORSUCH's opinion. If the burdens and benefits were capable of judicial balancing, I would permit petitioners to proceed with their *Pike* claim.

CHIEF JUSTICE ROBERTS, with whom Justice ALITO, Justice KAVANAUGH, and Justice JACKSON join, concurring in part and dissenting in part.

I agree with the Court's view in its thoughtful opinion that many of the leading cases invoking the dormant Commerce Clause are properly read as invalidating statutes that promoted economic protectionism. See *ante*, at 1153 - 1155. I also agree with the Court's conclusion that our precedent does not support a *per se* rule against state laws with "extraterritorial" effects. See *ante*, at 1155 - 1157. But I cannot agree with the approach adopted by some of my colleagues to analyzing petitioners' claim based on *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). See *ante*, at 1157 - 1164 (opinion of GORSUCH, J.); *ante*, at 1166 (SOTOMAYOR, J. concurring in part); *ante*, at 1166 - 1167 (BARRETT, J., concurring in part).

Pike provides that nondiscriminatory state regulations are valid under the Commerce Clause "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142, 90 S.Ct. 844. A majority of the Court thinks that petitioners' complaint does not make for "an auspicious start" on that claim. *Ante*, at 1159. ***395** In my view, that is through no fault of their own. The Ninth Circuit misapplied our existing *Pike* jurisprudence in evaluating petitioners' allegations. I would find that petitioners' have plausibly alleged a substantial burden against interstate commerce, and would therefore vacate the judgment and remand the case for the court below to decide whether petitioners have stated a claim under *Pike*.

I

The Ninth Circuit stated that "[w]hile the dormant Commerce Clause is not yet a dead letter, it is moving in that direction." 6 F.4th 1021, 1033 (2021). Today's majority does not pull the plug. For good reason: Although *Pike* is susceptible to misapplication as a freewheeling judicial weighing of ****1168** benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there be "free private trade in the national marketplace." *General Motors Corp. v. Tracy*, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980)); see also *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (*Pike* protects "a national 'common market' "). "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949).

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The majority's discussion of our *Pike* jurisprudence highlights two types of cases: those involving discriminatory state laws and those implicating the "instrumentalities of interstate transportation." *Ante*, at 1158, n. 2. But *Pike* has not been so narrowly typecast. As a majority of the Court acknowledges, "we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing ***396** that those burdens clearly outweigh the benefits of a state or local practice." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 353, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008); see also *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 346, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (plurality opinion) (*Pike* applies to "a nondiscriminatory statute like this one"). Nor have our cases applied *Pike* only where a State regulates the instrumentalities of transportation. *Pike* itself addressed an Arizona law regulating cantaloupe packaging. See 397 U.S. at 138, 90 S.Ct. 844. And we have since applied *Pike* to invalidate nondiscriminatory state laws that do not concern transportation. *Edgar v. MITE Corp.*, 457 U.S. 624, 643–646, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). As a majority of the Court agrees, *Pike* extends beyond laws either concerning discrimination or governing interstate transportation. See *ante*, at 1165 - 1166 (opinion of SOTOMAYOR, J.); *post*, at 1172 - 1173 (KAVANAUGH, J., concurring in part and dissenting in part).

Speaking for three Members of the Court, Justice GORSUCH objects that balancing competing interests under *Pike* is simply an impossible judicial task. See *ante*, at 1159 - 1161. I certainly appreciate the concern, see *United Haulers*, 550 U.S., at 343, 347, 127 S.Ct. 1786, but sometimes there is no avoiding the need to weigh seemingly incommensurable values. See, *e.g.*, *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162, 60 S.Ct. 146, 84 L.Ed. 155 (1939) (weighing "the purpose to keep the streets clean and of good appearance" against the "the constitutional protection of the freedom of speech and press"); *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) ("The reasonableness" under the Fourth Amendment "of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure."); *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ("In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in ***397** committing the emotionally disturbed under a particular standard ****1169** of proof."). Here too, a majority of the Court agrees that it is possible to balance benefits and burdens under the approach set forth in *Pike*. See *ante*, at 1165 - 1166 (opinion of SOTOMAYOR, J.); *post*, at 1172 - 1173 (opinion of KAVANAUGH, J.).

II

This case comes before us on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, and in my view the court below erred in how it analyzed petitioners' allegations under *Pike*. The Ninth Circuit reasoned that "[f]or dormant Commerce Clause purposes, laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce." 6 F.4th at 1032. The panel then dismissed petitioners' claim under *Pike* by concluding that the complaint alleged only an increase in compliance costs due to Proposition 12. 6 F.4th at 1033. But, as I read it, the complaint alleges more than simply an increase in "compliance costs," unless such costs are defined to include all the fallout from a challenged regulatory regime. Petitioners identify broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce. I would therefore find that petitioners have stated a substantial burden against interstate commerce, vacate the judgment below, and remand this case for the Ninth Circuit to consider whether petitioners

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have plausibly claimed that the burden alleged outweighs any "putative local interests" under *Pike*. 397 U.S., at 142, 90 S.Ct. 844.

A

Our precedents have long distinguished the costs of complying with a given state regulation from other economic harms to the interstate market. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959), illustrates the point. In that case, we considered an Illinois law requiring that trucks and trailers use a particular kind of mudguard. The "cost ***398** of installing" the mudguards was "$30 or more per vehicle," amounting to "$4,500 to $45,840" for the trucking companies at issue. *Id.*, at 525, 79 S.Ct. 962. But beyond documenting those direct costs of complying with the Illinois law, we also noted other derivative harms flowing from the regulation. The mudguard rule threatened "significant delay in an operation where prompt movement may be of the essence." *Id.*, at 527, 79 S.Ct. 962. Also, changing mudguard types when crossing into Illinois from a State with a different standard would require "two to four hours of labor" and could prove "exceedingly dangerous." *Ibid.* We concluded that "[c]ost taken into consideration" together with those "*other* factors" could constitute a burden on interstate commerce. *Id.*, at 526, 79 S.Ct. 962 (emphasis added). Subsequent cases followed *Bibb*'s logic by analyzing economic impact to the interstate market separately from immediate costs of compliance. See *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 674, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (plurality opinion) (separating "increas[ed] ... costs" from the fact that the challenged "law may aggravate ... the problem of highway accidents" in describing the burden on interstate commerce); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445, and n. 21, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978) (analyzing an increase in "cost" independently of other consequential effects, such as "slow[ing] the movement of goods").

Pike itself did not conflate harms to the interstate market with compliance costs. In *Pike*, we analyzed an Arizona law requiring that cantaloupes grown in the State be packed prior to shipment across state lines. 397 U.S. at 138, 90 S.Ct. 844. ****1170** We noted repeatedly that the regulation would require the appellee to construct an unneeded packing facility in Arizona at a cost of $200,000. *Id.*, at 140, 144, 145, 90 S.Ct. 844. But we considered that cost together with the "nature" of a regulation "requiring business operations to be performed in the home State." *Id.*, at 145, 90 S.Ct. 844. The Court in *Pike* found both compliance costs and consequential market harms cognizable in determining whether the law at issue impermissibly burdened interstate commerce.

***399** The derivative harms we have long considered in this context are in no sense "noneconomic." *Ante*, at 1164 (opinion of GORSUCH, J.). Regulations that "aggravate ... the problem of highway accidents," *Kassel*, 450 U.S., at 674, 101 S.Ct. 1309, or "slow the movement of goods," *Rice*, 434 U.S., at 445, 98 S.Ct. 787, impose economic burdens, even if those burdens may be difficult to quantify and may not arise immediately. Our cases provide no license to chalk up *every* economic harm—no matter how derivative—to a mere cost of compliance.

Nor can the foregoing cases be dismissed because they either involved the instrumentalities of transportation or a state law born of discriminatory purpose. As discussed above, we have applied *Pike* to state laws that neither concerned transportation nor discriminated against commerce. See *Edgar*, 457 U.S., at 643–646, 102 S.Ct. 2629. The *Pike* balance may well come out differently when it comes to interstate transportation, an area presenting a strong interest in "national uniformity." *Tracy*,

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519 U.S., at 298, n. 12, 117 S.Ct. 811. But the error below does not concern a particular balancing of interests under *Pike*; it concerns how to analyze the burden on interstate commerce in the first place.

B

As in our prior cases, petitioners here allege both compliance costs and consequential harms to the interstate market. With respect to compliance costs, petitioners allege that Proposition 12 demands significant capital expenditures for farmers who wish to sell into California. “Producers ... will need to spend” between $290 and $348 million “of additional capital in order to reconstruct their sow housing and overcome the productivity loss that Proposition 12 imposes.” App. to Pet. for Cert. 214a. All told, compliance will “increase production costs per pig by over $13 dollars per head, a 9.2% cost increase at the farm level.” *Ibid.*

Separate and apart from those costs, petitioners assert harms to the interstate market itself. The complaint alleges that the interstate pork market is so interconnected that producers ***400** will be “forced to comply” with Proposition 12, “even though some or even most of the cuts from a hog are sold in other States.” *Id.*, at 213a; *id.*, at 239a. Proposition 12 may not expressly regulate farmers operating out of State. But due to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California. The panel below acknowledged petitioners’ allegation that, “[a]s a practical matter, given the interconnected nature of the nationwide pork industry, all or most hog farmers will be forced to comply with California requirements.” 6 F.4th at 1028.

We have found such sweeping extraterritorial effects, even if not considered as a *per se* invalidation, to be pertinent in applying *Pike*. In *Edgar*, we assessed the constitutionality of an Illinois corporate takeover statute that authorized the secretary of state to scrutinize tender offers, even for transactions occurring wholly beyond ****1171** the State's borders. As the majority explains, only a plurality of the Court in *Edgar* concluded that the Illinois statute constituted a *per se* violation of the dormant Commerce Clause. See *ante*, at 1157, n. 1. But a majority in *Edgar* analyzed those same extraterritorial effects under our approach in *Pike*, concluding that the “nationwide reach” of Illinois's law constituted an “obvious burden ... on interstate commerce.” 457 U.S. at 643, 102 S.Ct. 2629. The Ninth Circuit did not consider whether, by effectively requiring compliance by farmers who do not even wish to ship their product into California, Proposition 12 has a “nationwide reach” similar to the regulation at issue in *Edgar*.

The complaint further alleges other harms that cannot fairly be characterized as mere costs of compliance but that the panel below seems to have treated as such. Because of Proposition 12's square footage requirements, farms will be compelled to adopt group housing, which is likely to produce “worse health outcome[s]” and “sprea[d] pathogens and disease.” ***401** App. to Pet. for Cert. 229a. Such housing changes will also “upen[d] generations of animal husbandry, training, and knowledge.” *Id.*, at 211a. And “[b]y preventing the use of breeding stalls during the 30 to 40 day period between weaning and confirmation of pregnancy, Proposition 12 puts sows at greater risk of injury and stress during the vulnerable stages of breeding and gestation.” *Id.*, at 223a. These consequential threats to animal welfare and industry practice are difficult to quantify and are not susceptible to categorization as mere costs of compliance.

Writing for a plurality of the Court, Justice GORSUCH relies on this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), to conclude that petitioners’ complaint does not plead a substantial burden against interstate commerce. See *ante*, at 1160 - 1163; see also *ante*, at 1166 (opinion of SOTOMAYOR, J.) (also relying on *Exxon*). In *Exxon*, petroleum producers sued after Maryland prohibited their sale of retail gas within the State. 437 U.S. at 119, 98 S.Ct. 2207. The Court concluded that “interstate commerce is not subjected to an impermissible burden simply

because an otherwise valid regulation causes some business[es] to shift from one interstate supplier to another." *Id.*, at 127, 98 S.Ct. 2207. Fair enough. But the complaint before us pleads facts going far beyond the allegations in *Exxon*. The producers in *Exxon* operated within Maryland and wished to continue doing so. By contrast, petitioners here allege that Proposition 12 will force compliance on farmers who do not wish to sell into the California market, exacerbate health issues in the national pig population, and undercut established operational practices. In my view, these allegations amount to economic harms against "the interstate market"—not just "particular interstate firms," *ibid.*—such that they constitute a substantial burden under *Pike*. At the very least, the harms alleged by petitioners are categorically different from the cost of installing $30 mudguards, *Bibb*, 359 U.S., at 525, 79 S.Ct. 962, or of ***402** constructing a $200,000 cantaloupe packing facility, *Pike*, 397 U.S., at 140, 90 S.Ct. 844.

Justice GORSUCH asks what separates my approach from the *per se* extraterritoriality rule I reject. *Ante*, at 1163. It is the difference between mere cross-border effects and broad impact requiring, in this case, compliance even by producers who do not wish to sell in the regulated market. And even then, we only invalidate a regulation if that burden proves "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S., at 142, 90 S.Ct. 844. Adhering to that established approach in this case would not convert the inquiry ****1172** into a *per se* rule against extraterritorial regulation.

Rather than analyze petitioners' alleged harms to the interstate market on their own terms, the Ninth Circuit reasoned that the "crux" of the complaint is "the cost of compliance with Proposition 12." 6 F.4th at 1033. Such "cost increases," the panel below concluded, "do not qualify as a substantial burden to interstate commerce." *Ibid.* Those statements ignore the industry-wide harms discussed above.

The panel below itself recognized that petitioners "plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide." *Ibid.* Yet it nevertheless reduced the myriad harms detailed by petitioners in their complaint to so-called "compliance costs" and wrote them off as independently insufficient to state a claim under *Pike*. Our precedents do not support such an approach. A majority of the Court agrees that—were it possible to balance benefits and burdens in this context—petitioners have plausibly stated a substantial burden against interstate commerce. See *ante*, at 1167 (opinion of BARRETT, J.) ("The complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California.").

***403**

* * *

In my view, petitioners plausibly allege a substantial burden against interstate commerce. I would therefore remand the case for the Ninth Circuit to decide whether it is plausible that the "burden ... is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S., at 142, 90 S.Ct. 844.

Justice KAVANAUGH, concurring in part and dissenting in part.

In today's fractured decision, six Justices of this Court affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations. *Ante,* at 1165 (SOTOMAYOR, J., joined by KAGAN, J., concurring in part); *ante,* at 1167 - 1168 (ROBERTS, C. J., joined by ALITO, KAVANAUGH, and JACKSON, JJ., concurring in part and dissenting in part); see *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Although Parts IV–B and IV–D of Justice GORSUCH's opinion would essentially overrule the *Pike* balancing test, those subsections are not controlling precedent, as I understand it.

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But Part IV–C of Justice GORSUCH's opinion is controlling precedent for purposes of the Court's judgment as to the plaintiffs' *Pike* claim. There, a four-Justice plurality of the Court applies *Pike* and rejects the plaintiffs' dormant Commerce Clause challenge under *Pike*. The plurality reasons that the plaintiffs' complaint did not sufficiently allege that the California law at issue here imposed a substantial burden on interstate commerce under *Pike*. I respectfully disagree with that conclusion for the reasons well stated in THE CHIEF JUSTICE's separate opinion. [1]

I add this opinion to point out that state economic regulations like California's Proposition 12 may raise questions not ***404** only under the Commerce Clause, but also under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

I

In the 1780s, the Framers in Philadelphia and the people of the United States ****1173** discarded the Articles of Confederation and adopted a new Constitution. They did so in order to, among other things, create a national economic market and overcome state restrictions on free trade—and thereby promote the general welfare. By the summer of 1787, when the delegates met in Philadelphia, state interference with interstate commerce was cutting off the lifeblood of the Nation. See *Tennessee Wine and Spirits Retailers Assn.* v. *Thomas*, 588 U. S. ––––, ––––, 139 S.Ct. 2449, 2459-2460, 204 L.Ed.2d 801 (2019). For the delegates, therefore, "removing state trade barriers was a principal reason for the adoption of the Constitution." *Ibid.* In the state ratifying conventions, moreover, "fostering free trade among the States was prominently cited as a reason for ratification." *Id.,* at ––––, 139 S.Ct., at 2460.

The Constitution crafted by the Framers contains several provisions protecting free trade among the States. The Constitution's protection of free trade among the States has resulted in an extraordinary 234-year record of progress: It has facilitated robust economic activity within the United States and has helped generate remarkable (albeit at times uneven) economic prosperity and growth in America relative to the other nations of the world.

This case involves the American pork industry, which today is a $20 billion-plus industry that generates hundreds of thousands of American jobs and serves millions of American consumers. Importantly for this case, the vast majority of pig farms are located in States other than California—such as Iowa, Minnesota, Illinois, Indiana, and North Carolina. And the vast majority of pork is likewise produced in States other than California.

***405** In 2018, California voters nonetheless passed a ballot initiative, Proposition 12, that not only regulates pig farming and pork production in California, but also in effect regulates pig farming and pork production *throughout the United States*. Under Proposition 12, all pork sold to consumers in California must be derived from pigs raised in compliance with California's strict standards for pig farming, including California's minimum square footage of space required for housing individual pigs. By its terms, Proposition 12 applies to pigs raised and pork produced *outside California*.

California's requirements for pig farms and pork production depart significantly from common agricultural practices that are lawful in major pig-farming and pork-producing States such as Iowa, Minnesota, Illinois, Indiana, and North Carolina. See Brief for Indiana et al. as *Amici Curiae* 24–32. Moreover, according to various *amici*, some of the scientific literature suggests that California's requirements could worsen animal health and welfare. See, *e.g.,* Brief for American Association of Swine Veterinarians as *Amicus Curiae* 4–19; Brief for State Pork Producers Association of Iowa et al. as *Amici Curiae* 25–34. Regardless of whether the *amici* are correct on that point, it is evident that absent California's Proposition 12, relatively few pig farmers and pork producers in the United States would follow the practices that California now demands. Yet American

pig farmers and pork producers have little choice but to comply with California's regulatory dictates. It would be prohibitively expensive and practically all but impossible for pig farmers and pork producers to segregate individual pigs based on their ultimate marketplace destination in California or elsewhere. And California's 13-percent share of the consumer pork market makes it economically infeasible for many pig farmers and pork producers to exit the California market.

California's required changes to pig-farming and pork-production practices ****1174** throughout the United States will cost American farmers and pork producers hundreds of millions ***406** (if not billions) of dollars. And those costs for pig farmers and pork producers will be passed on, in many cases, to American consumers of pork via higher pork prices nationwide. The increased costs may also result in lower wages and reduced benefits (or layoffs) for the American workers who work on pig farms and in meatpacking plants. See generally Brief for Indiana et al. as *Amici Curiae* 29–32; Brief for North Carolina Chamber Legal Institute et al. as *Amici Curiae* 9–13.[2]

In short, through Proposition 12, California is forcing massive changes to pig-farming and pork-production practices throughout the United States. Proposition 12 therefore substantially burdens the interstate pork market. See *ante,* at 1170 - 1172 (opinion of ROBERTS, C. J.).

Under the Constitution, Congress could enact a national law imposing minimum space requirements or other regulations on pig farms involved in the interstate pork market. In the absence of action by Congress, each State may of course adopt health and safety regulations for products sold *in that State*. And each State may regulate as it sees fit with respect to farming, manufacturing, and production practices *in that State*. Through Proposition 12, however, California has tried something quite different and unusual. It has attempted, in essence, to unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the Nation. It has sought to deny market access to out-of-state pork producers unless their farming and production practices in those other States comply with California's dictates. The State has aggressively propounded ***407** a “California knows best” economic philosophy—where California in effect seeks to regulate pig farming and pork production in *all* of the United States. California's approach undermines federalism and the authority of individual States by forcing individuals and businesses in one State to conduct their farming, manufacturing, and production practices in a manner required by the laws of a *different* State.

Notably, future state laws of this kind might not be confined to the pork industry. As the *amici* brief of 26 States points out, what if a state law prohibits the sale of fruit picked by noncitizens who are unlawfully in the country? Brief for Indiana et al. as *Amici Curiae* 33. What if a state law prohibits the sale of goods produced by workers paid less than $20 per hour? Or as those States suggest, what if a state law prohibits “the retail sale of goods from producers that do not pay for employees’ birth control or abortions” (or alternatively, that do pay for employees’ birth control or abortions)? *Ibid.*

If upheld against all constitutional challenges, California's novel and far-reaching regulation could provide a blueprint for other States. California's law thus may foreshadow a new era where States shutter their markets to goods produced in a way that offends their moral or policy preferences—and in doing so, effectively force other States to regulate in accordance with those idiosyncratic state demands. That is not the Constitution the Framers adopted in Philadelphia in 1787.[3]

***408** ****1175** II

Thus far, legal challenges to California's Proposition 12 have focused on the Commerce Clause and this Court's dormant Commerce Clause precedents.

Although the Court today rejects the plaintiffs’ dormant Commerce Clause challenge as insufficiently pled, state laws like Proposition 12 implicate not only the Commerce Clause, but also potentially several other constitutional provisions, including the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

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First, the Import-Export Clause prohibits any State, absent "the Consent of the Congress," from imposing "any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing" its "inspection Laws." Art. I, § 10, cl. 2. This Court has limited that Clause to imports from *foreign countries*. See *Woodruff v. Parham*, 8 Wall. 123, 133–136, 75 U.S. 123, 19 L.Ed. 382 (1869). As Justice Scalia and Justice THOMAS have explained, that limitation may be mistaken as a matter of constitutional text and history: Properly interpreted, the Import-Export Clause may also prevent States "from imposing certain especially burdensome" taxes and duties on imports from other States—not just on imports from foreign countries. *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 573, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015) (Scalia, J., dissenting); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621–637, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (THOMAS, J., dissenting); *Brown v. Maryland*, 12 Wheat. 419, 438−439, 449, 6 L.Ed. 678 (1827).

In other words, if one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State where the good was grown or made, serious questions may arise under the Import-Export Clause. I do not take a position here on whether such an argument ultimately would prevail. I note only that the question warrants additional consideration in a future case.

Second, the Privileges and Immunities Clause provides that the "Citizens of each State shall be entitled to all Privileges ***409** and Immunities of Citizens in the several States." Art. IV, § 2, cl. 1; see *South Dakota* v. *Wayfair, Inc.*, 585 U. S. ——, ——– ——, 138 S.Ct. 2080, 2100-2101, 201 L.Ed.2d 403 (2018) (GORSUCH, J., concurring); see also *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 265, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (Scalia, J., concurring in part and dissenting in part); J. Eule, Laying the Dormant Commerce Clause To Rest, 91 Yale L. J. 425, 446−448 (1982). Under this Court's precedents, one State's efforts to effectively regulate farming, manufacturing, or production in other States could raise significant questions under that Clause. Again, I express no view on whether such an argument ultimately would prevail. But the issue warrants further analysis in a future case.

Third, the Full Faith and Credit Clause requires each State to afford "Full Faith and Credit" to the "public Acts" of "every other State." Art. IV, § 1. That Clause prevents States from "adopting any policy ****1176** of hostility to the public Acts" of another State. *Carroll v. Lanza*, 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183 (1955). A State's effort to regulate farming, manufacturing, and production practices in another State (in a manner different from how that other State's laws regulate those practices) could in some circumstances raise questions under that Clause. See, *e.g.,* M. Rosen, State Extraterritorial Powers Reconsidered, 85 Notre Dame L. Rev. 1133, 1153 (2010) ("[T]he Full Faith and Credit Clause is the more natural source for limitations on state extraterritorial powers because that clause at its core is concerned with extraterritoriality"); see also D. Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 290, 296−301 (1992).

For example, the plaintiffs in this case say that Ohio law expressly authorizes pig farmers in Ohio to do precisely what California's Proposition 12 forbids. Brief for Petitioners 30–31; see Ohio Admin. Code §§ 901:12−8−02(G)(4), (5) (2011). If so, the Full Faith and Credit Clause might preclude California from enacting conflicting regulations on Ohio pig farmers.

***410** Once again, I express no view on whether such an argument ultimately would succeed. But the question deserves further examination in a future case.

* * *

As I understand it, the controlling plurality of the Court (reflected in Part IV–C of Justice GORSUCH's opinion) today rejects the plaintiffs' dormant Commerce Clause challenge on the ground that the plaintiffs' complaint does not sufficiently allege that the California law at issue here imposes a substantial burden on interstate commerce under *Pike*. See *ante,* at 1160 –

1163 (plurality opinion); *ante,* at 1165 – 1166 (opinion of SOTOMAYOR, J.). It appears, therefore, that properly pled dormant Commerce Clause challenges under *Pike* to laws like California's Proposition 12 (or even to Proposition 12 itself) could succeed in the future—or at least survive past the motion-to-dismiss stage. Regardless, it will be important in future cases to consider that state laws like Proposition 12 also may raise substantial constitutional questions under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

All Citations

598 U.S. 356, 143 S.Ct. 1142, 215 L.Ed.2d 336, 23 Cal. Daily Op. Serv. 4176, 2023 Daily Journal D.A.R. 4133, 29 Fla. L. Weekly Fed. S 763

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Beyond *Baldwin*, *Brown-Forman*, and *Healy*, petitioners point to *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982), as authority for the "almost *per se*" rule they propose. Invoking the dormant Commerce Clause, a plurality in that case declined to enforce an Illinois securities law that "*directly* regulate[d] transactions which [took] place ... wholly outside the State" and involved individuals "having no connection with Illinois." *Id.*, at 641–643, 102 S.Ct. 2629 (emphasis added). Some have questioned whether the state law at issue in *Edgar* posed a dormant Commerce Clause question as much as one testing the territorial limits of state authority under the Constitution's horizontal separation of powers. See, *e.g.,* D. Regan, Siamese Essays: (I) *CTS Corp. v. Dynamics Corp. of America* and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1875–1880, 1897–1902 (1987); cf. *Shelby County v. Holder*, 570 U.S. 529, 535, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) ("[A]ll States enjoy equal sovereignty"). But either way, the *Edgar* plurality opinion does not support the rule petitioners propose. That decision spoke to a law that *directly* regulated out-of-state transactions by those with *no* connection to the State. Petitioners do not allege those conditions exist here. To the contrary, they acknowledge that Proposition 12 regulates only products that companies choose to sell "within" California. Cal. Health & Safety Code Ann. § 25990(b).

2 Most notably, *Tracy* referred to, and petitioners briefly allude to, a line of cases that originated before *Pike* in which this Court refused to enforce certain state regulations on instrumentalities of interstate transportation—trucks, trains, and the like. See, *e.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523–530, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) (concerning a state law specifying certain mud flaps for trucks and trailers); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 763–782, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) (addressing a state law regarding the length of trains). Petitioners claim these cases support something like the extraterritoriality or balancing rules they propose. But at least some decisions in this line might be viewed as condemning state laws that "although neutral on their face ... were enacted at the instance of, and primarily benefit," in-state interests. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978); see also B. Friedman & D. Deacon, A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 Va. L. Rev. 1877, 1927 (2011). In any event, this

Court "has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede *the flow* of interstate goods." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (emphasis added). Nothing like that exists here. We do not face a law that impedes the flow of commerce. Pigs are not trucks or trains.

3 Though it is unnecessary to adorn the point, we note that a number of smaller out-of-state pork producers have filed an *amicus* brief in this Court hailing the "opportunities" Proposition 12 affords them to compete with vertically integrated firms with " 'concentrated market power' " that are wedded to their existing processing practices. Brief for Small and Independent Farming Businesses et al. as *Amici Curiae* 1, 12, 19–20. Other *amici* have noted that even some large vertically integrated processing firms have already begun to modify (or else have indicated their intention to modify) their operations to comply with Proposition 12. See Brief for Perdue Premium Meat Co., Inc., as *Amicus Curiae* 3–7; see also Brief for Economic Research Organizations as *Amici Curiae* 16–17 (reciting public statements from Hormel, Smithfield, and Tyson). Another large processing firm, Cargill, has boasted that, " '[b]efore we sold our pork business in 2015, we led the industry in removing gestation stalls to house pregnant sows.' " *Id.*, at 16. Petitioner National Pork Producers Council lists Cargill as an "allied industry compan[y]." National Pork Producers Council, Pork Alliance Program, https://nppc.org/get-involved/join-the-pork-alliance/.

4 Both dissents seek to characterize today's decision as "fractured" in an effort to advance their own overbroad readings of *Pike* and layer their own gloss on opinions they do not join. *Post*, at 1172, 1176 (opinion of KAVANAUGH, J.); see also *post* at 1167 - 1169, 1171 - 1172 (opinion of ROBERTS, C. J.). But the dissents are just that—dissents. Their glosses do not speak for the Court. Today, the Court unanimously disavows petitioners' "almost *per se*" rule against laws with extraterritorial effects. See Parts II and III, *supra*. When it comes to *Pike*, a majority agrees that heartland *Pike* cases seek to smoke out purposeful discrimination in state laws (as illuminated by those laws' practical effects) or seek to protect the instrumentalities of interstate transportation. See Part IV–A, *supra*. A majority also rejects any effort to expand *Pike*'s domain to cover cases like this one, some of us for reasons found in Part IV–B, others of us for reasons discussed in Part IV–C. Today's decision depends equally on the analysis found in both of these sections; without either, there is no explaining the Court's judgment affirming the decision below. A majority also subscribes to what follows in Part V.

1 The Court also unanimously rejects plaintiffs' separate claim under *Healy v. Beer Institute*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

2 The majority opinion dismisses this case as not presenting a "weighty" issue. *Ante,* at 1150. That phrasing is misplaced. This case presents a weighty constitutional question, as the Framers surely would have recognized. And it is important for the American workers, farmers, and consumers who will be significantly affected by the outcome of today's decision.

3 The portions of Justice GORSUCH's opinion that speak for only three Justices (Parts IV–B and IV–D) refer to THE CHIEF JUSTICE's opinion as a "dissent." *Ante,* at 1159 - 1161, 1163 - 1164. But on the question of whether to retain the *Pike* balancing test in cases like this one, THE CHIEF JUSTICE's opinion reflects the majority view because six Justices agree to retain the *Pike* balancing test: THE CHIEF JUSTICE and Justices ALITO, SOTOMAYOR, KAGAN, KAVANAUGH, and JACKSON. On that legal issue, Justice GORSUCH's opinion advances a minority view.

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395 F.2d 920
United States Court of Appeals Second Circuit.

NORWALK CORE et al., Plaintiffs-Appellants,
v.
NORWALK REDEVELOPMENT AGENCY et al., Defendants-Appellees.

No. 227, Docket 31761.
|
Argued Jan. 10, 1968.
|
Decided June 7, 1968.

Synopsis

Appeal from judgment of the United States District Court for the District of Connecticut, Robert C. Zampano, J., 42 F.R.D. 617, dismissing action by displacees for relief against actions under urban renewal program. The Court of Appeals, J. Joseph Smith, Circuit Judge, held, inter alia, that complaint by individuals, who had been displaced from city urban renewal project and who claimed to represent other displaced persons alleging, in substance, that in planning and implementing project local defendants did not assure or attempt to assure relocation for Negro and Puerto Rican displacees to the same extent that they did for whites was sufficient to allege denial of equal protection of laws, and require federal court to consider claim on its merits.

Judgment reversed and remanded.

Hays, Circuit Judge, dissented.

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Before SMITH, KAUFMAN and HAYS, Circuit Judges.

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Opinion

J. JOSEPH SMITH, Circuit Judge:

This appeal raises timely and fundamental questions regarding the availability of the federal courts to persons who, displaced by urban renewal programs, claim that they have been deprived of the equal protection of the laws in connection with government efforts to assure their relocation, and that such relocation efforts have not been adequate under the mandate of a federal statute. The plaintiffs' complaint, which attempted to raise these two issues, was dismissed by the District Court for the District of Connecticut. ***923** Norwalk CORE v. Norwalk Redevelopment Agency, 42 F.R.D. 617 (1967). We hold that the District Court was in error, and remand for further proceedings not inconsistent with this opinion.

The program involved here is being carried out in the City of Norwalk, Connecticut, and is designated South Norwalk Renewal Project No. 1 (Project No. Conn. R-34). (Hereinafter 'the project.') The project plan was approved by the Common Council of Norwalk (the city's legislative body) on August 28, 1962, and on June 24, 1963 the Norwalk Redevelopment Agency ('the Agency') entered into a Loan and Capital Grant Contract ('the Contract') with the Housing and Home Finance Agency (now the Department of Housing and Urban Development, 'HUD') under the Housing Acts of 1949 and 1954 ('the Act'). 63 Stat. 413 (1949), as amended, 42 U.S.C. §§ 1441-1460 (Supp.1967); and 68 Stat. 590 (1954), as amended, 42 U.S.C. §§ 1446-1460 (Supp.1967). [1]

Pursuant to section 105(c) of the Act, 42 U.S.C. § 1455(c), the Contract required that the Agency provide, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, decent, safe and sanitary dwellings within the financial means of the families displaced by the project, equal in number to the number of displaced families, available to them, and reasonably accessible to their places of employment.

The plaintiffs are the Norwalk, Connecticut chapter of the Congress of Racial Equality, two nonprofit tenants' associations comprised of low-income Negroes and Puerto Ricans, and eight individuals representing four classes of low-income Negroes and Puerto Ricans who were allegedly subjected to discrimination in connection with the project. [2] They brought this class action in June 1967 against the Norwalk Housing Authority, its Executive Director and its members; the Norwalk Redevelopment Agency, its Administrator and its members; the City of Norwalk, its mayor and city clerk; Towne House Gardens, Inc.; David Katz & Sons, Inc.; Charles J. Horan, Assistant Regional Administrator for Renewal Assistance of the United States Department of Housing and Urban Development; and Robert C. Weaver, Secretary of the United States Department of Housing and Urban Development. [3]

***924** Since the action was dismissed, the allegations of the complaint, summarized in the following paragraphs, must be accepted as true.

The Agency made its redevelopment plans without providing for the construction of low-rent housing on the ground that the existing low-rent public housing in the City, with its predicted turnover, would adequately meet the relocation needs of the low-income Negro and Puerto Rican families living within the project area. Prior to the time when it entered into the Contract, however, the Agency knew: (1) that its turnover figures were exaggerated, arrived at so as to present apparent facilities for relocation; (2) that there was a long waiting list for low-rent public housing in the City, substantially all Negro and Puerto Rican families and that any plan giving priority to families from the project area in the public housing would impair the housing opportunities of the Negroes and Puerto Ricans on the waiting list; and (3) that there was discrimination against Negroes and Puerto Ricans in the private housing market in the City. Thereafter, the Agency learned from reports by the Commission on Civil Rights of the State of Connecticut and by the Agency's 'relocation experts,' Urban Dynamics Consultants, that vacancies in housing projects in the City were running less than one-half of the predicted number, that the Housing Authority received an average of over 300 applications per year for public housing units, and that discrimination in rentals in the private or open market was rampant, rentals to Negro and Puerto Rican families averaging twice as much as that charged to white families

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for comparable housing. The annual report of the City's Department of Health for the year 1964 stated that families formerly living in the project area were being crowded into already overcrowded homes, and that multiple dwelling units were being created from homes which were barely adequate for one family. The Agency knew, plaintiffs allege, that Negro and Puerto Rican families were being subjected to such hardships and deprivations in connection with relocation (not experienced to any substantially equal degree by white families in the City) that many were being forced to leave the City entirely, but it continued, nonetheless, to demolish the homes of low-income Negro and Puerto Rican families in the project area and continued to make additions and revisions in its plans without making any provision for the construction of low-rent housing to be made available to the Negro and Puerto Rican families being relocated. The Agency also entered into a contract with defendant Towne House in May 1967 for the sale of a six-acre parcel of land in the project area to be used for 90 units of moderate-income housing at rentals beyond the financial means of the Negro and Puerto Rican families being displaced, and that parcel is the only plot of land owned by the City which is currently available for the construction of low-income housing.

Despite the requests of various groups and citizens of the City, including some of the plaintiffs, HUD has refused to require the construction of low-cost housing, and has approved the sale of the six-acre parcel. 'Further recourse to HUD would be futile.'[4]

***925** The complaint goes on to allege that the homes of various of the plaintiffs and other Negro and Puerto Rican families and individuals have been demolished, that some of them have been moved to rental units within the project area on a temporary basis, and that the City and Agency have 'pursued a course of conduct to force the said Negro and Puerto Rican families out of the on-site housing structures by rendering such housing unsafe, unsanitary and indecent, by charging rents beyond the financial means of the families and individuals, by forcing excessive moving of families and individuals from one onsite location to another * * * and by carrying on heavy construction activities around the said on-site houses.' Some of the displaced Negro and Puerto Rican families have been compelled to move into overcrowded housing, some into housing at rentals substantially in excess of their financial means, and some into housing outside of the City.

The plaintiffs make three claims based upon the foregoing allegations: (1) that they and those whom they represent have been denied the equal protection of the laws guaranteed by the Fourteenth Amendment and by the laws of the United States; (2) that the local defendants have intended to deprive low-income Negro and Puerto Rican families of the equal protection of the laws, and have intended to force such families out of the City; and (3) that the defendants have acted in violation of section 105(c) of the Act.

Plaintiffs' prayer for relief included requests that the Agency and City, and Towne House and Datz, be enjoined from transferring or encumbering the six-acre parcel, that the Agency be enjoined from demolishing any residential structure within the project area until the residents have been relocated into safe and decent housing at rentals they can afford, and that the District Court require the Agency, City and Authority to proceed 'with all deliberate speed,' under the supervision of the Court, to propose a plan for and to construct low-income income housing units on the six-acre parcel.

The essential ground upon which the District Court dismissed the complaint was that both the association and individual plaintiffs 'have no standing to challenge the official conduct here in question.' 42 F.R.D. at 622. The District Court also held that the action was not a proper class action under Rule 23, F.R.Civ.P.

The court took into account that the relief asked for in the complaint was in its view inappropriate, but we are not sure of the extent to which this underlay its decision. The opinion concluded that 'It is the use of (the) six acre tract for moderate-income housing rather than low-income rental units that forms the basis of the instant action.' 42 F.R.D. at 619. This characterization of the action in terms of the prayer for relief was, in a sense, correct, for the complaint summarized the action as one for an injunction restraining the defendants from proceeding with the sale of the six-acre parcel and directing them to build low-rent housing on the parcel, and for an injunction restraining the defendants from evicting families living in the project area until all of the families were permanently relocated in housing within their financial means. Nevertheless, if the complaint was dismissed on the basis that the relief requested was inappropriate, or beyond the Court's power to grant, the Court moved too quickly. Rule 54(c), F.R.C.P., states in relevant part that

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

When a motion to dismiss a complaint is made, this rule is read in conjunction with Rules 8, 12 and 15, and its clear and long-accepted meaning is that a complaint should not be dismissed for legal insufficiency except where there is a ***926** failure to state a claim on which some relief, not limited by the request in the complaint, can be granted. [5]

We hold that the allegations of this complaint state constitutional and statutory claims on which relief can be granted, that the individual plaintiffs have standing to make the claims, and that this action was appropriately brought as a class action. We turn first to the issues presented by plaintiffs' constitutional claim.

I.

The plaintiffs contend that they were denied the equal protection of the laws when the defendants acted, knowingly and deliberately, so as to compound the problem of racial discrimination in the Norwalk housing market, with the inevitable and intended result that some Negroes and Puerto Ricans would be forced to leave the city altogether. [6]

The District Court never reached the merits of this claim, for it concluded that

Members of the public, whether living inside or outside a project area, ordinarily have no standing to challenge planning of an urban renewal project * * * nor, by alleging civil rights violations, do they gain standing they would otherwise not have (citing cases). If residents of a project area cannot challenge a project while it is in the planning stages and before construction has begun, certainly they can have no standing to assert the same kind of challenge at a time when planning has been implemented, most of the land has been purchased and conveyed to developers, and construction of new buildings has been almost completed.

42 F.R.D. at 622. [7] It is true that courts have been reluctant to interfere with urban renewal planning. The fact that the reasons for this reluctance have been lumped together under the rubric of ‘lack of standing to sue’ should not be allowed to obscure the distinction, necessary albeit not altogether clear, between the propriety of allowing particular plaintiffs to bring litigation (their standing to sue) and the propriety of judicial attempts to resolve the problem which the plaintiffs are attempting to bring before the court (the question of justiciability). [8]

We consider first the issue of standing. The courts will not, it is clear, entertain a suit by one who does not ***927** have some personal stake in the outcome of the litigation. See Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Stark v. Wickard, 321 U.S. 288, 304, 64 S.Ct. 559, 88 L.Ed. 733 (1944); cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 151, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (opinion of Mr. Justice Frankfurter). In Frothingham v. Mellon, 262 U.S. 447, 486-89, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), the Supreme Court refused to allow a federal taxpayer to challenge the constitutionality of a federal statute where the plaintiff's claimed interest in the outcome was simply that ‘the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law.’ 262 U.S. at 486, 43 S.Ct. at 600. The burden of future taxation was held to be essentially a matter of public, not individual, concern.

Even where a plaintiff has a personal stake in the outcome of a case, he may be denied standing to sue on the ground that the right which he is attempting to assert is not one which the courts will recognize. Thus, one cannot as a general matter object to governmental action on the basis that it aids one's competitors, for it is said that no legal wrong results from lawful competition. Alabama Power Co. v. Ickes, 302 U.S. 464, 468-469, 58 S.Ct. 300, 82 L.Ed. 374 (1938); Kansas City Power & Light Company v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924, cert. denied 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955). [9] This court has, accordingly, refused to grant standing to plaintiffs who object to urban renewal planning on this basis. Taft Hotel

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Corp. v. Housing and Home Finance Agency, 262 F.2d 307 (2 Cir. 1958), cert. denied 359 U.S. 967, 79 S.Ct. 880, 3 L.Ed.2d 835 (1959); Berry v. Housing and Home Finance Agency, 340 F.2d 939 (2 Cir. 1965).

Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency, 310 F.2d 99 (7 Cir. 1962), cert. denied 373 U.S. 914, 83 S.Ct. 1297, 10 L.Ed.2d 414 (1963), relied on by the District Court, is similar to Taft and Berry. Plaintiffs there sought to bar the acquisition and clearing, under an urban renewal program, of an area in Chicago for the use of the University of Illinois. They alleged that they would suffer economic injury if the plan were carried out, and that some of them had relied on past promises and representations of government officials in connection with previously announced plans for residential and commercial development in the area. The court held that it did not appear that any of the plaintiffs' 'private legal rights' had been violated. [10]

The plaintiffs in the case before us are in a very different position. Their stake in the outcome of the case is immediate and personal, and the right which they allege has been violated— the right not to be subjected to racial discrimination in government programs— is one which the courts will protect. Their standing to sue is clear. Cf. Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 (6 Cir. 1967), cert. denied 390 U.S. 921, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968).

The District Court opinion also raised, at least by implication, the question of justiciability. Holding that the plaintiffs could not 'gain standing they would otherwise not have' by alleging 'civil rights violations,' the Court cited Green Street Association v. Daley, 373 F.2d 1 (7 Cir.), cert. denied ***928** 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967). [11] The complaint in Green Street alleged, inter alia, that the urban renewal project which the plaintiffs were attempting to bring before the court was not undertaken in good faith, but was a 'deliberate plan to create a no-Negro 'buffer zone' between (a) shopping area and (a) surrounding residential community so that the shopping area (would) be more attractive to white customers * * *,' and that the plan proposed 'relocation of the residents in the cleared area in accordance with segregated housing patterns * * *.' 373 F.2d at 4.

The Seventh Circuit characterized the first count of the complaint, which attempted to raise constitutional issues as to the reasons for which the plan was undertaken, as 'an attempt to obtain federal judicial review of a program of urban renewal prior to the exercise of the power of eminent domain.' 373 F.2d at 6. It held that cases presenting such challenges are matters for condemnation proceedings in the state courts if the taking is ostensibly for a public purpose, and that only in exceptional cases such as Progress Dev.Corp. v. Mitchell, 286 F.2d 222 (7 Cir. 1961), [12] 'where the facts alleged indicate to all outward appearances that the taking is designed solely to deny constitutional rights, is the power of eminent domain subject to the prior scrutiny of the federal courts.' 373 F.2d at 7.

The fourth count of the complaint in Green Street dealt with the alleged deficiencies in the relocation program. Claims were made under section 105 of the Housing Act of 1949, 42 U.S.C. § 1455(c), section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the equal protection clause of the Fourteenth Amendment. The court discussed the issue of standing to sue under the two statutes, but not standing to raise the equal protection claim.

The Seventh Circuit thus did not say that the Green Street plaintiffs lacked standing to raise their constitutional claims. Much of what the court said about the first count of the complaint, however, implies that it harbored some doubt as to the justiciability of the issues which the plaintiffs were attempting to raise in that count. It was a concern for 'the practical and efficient administration of urban renewal programs,' 373 F.2d at 5, and a reluctance to inquire into the subjective reasons of the legislative authority seeking to acquire the land in question, id. at 6, which underlay the court's refusal to review the urban renewal program prior to the exercise of the power of eminent domain. [13] The holding reached was narrow, however: that the issues should ***929** be raised, if at all, in state court condemnation proceedings.

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It was contended at oral argument in this case that plaintiffs' constitutional claim is non-justiciable; in particular, that cases such as this one cannot be heard without involving the courts in over-all urban renewal planning, and thus in the resolution of questions which are ultimately political. We need not concern ourselves with the problem raised by the first count of the complaint in Green Street: the justiciability of a challenge to the basic validity of an urban renewal program, on the ground that the program as a whole, is intended to achieve or perpetuate racial segregation. [14] Plaintiffs here complain that they were denied the equal protection of the laws in the planning and implementation of the relocation program, and this, at least, is a justiciable claim. (The Seventh Circuit agrees, for it reached the merits of the constitutional issues raised by the fourth count of the complaint in Green Street.)
We cannot doubt the necessity of discretionary decision making in urban renewal planning. This necessity would render unfit for judicial decision many questions concerning urban renewal. See Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); cf. Berman v. Parker, 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27 (1954). This does not mean, however, that every case or controversy touching this area lies beyond judicial cognizance. Case-by-case inquiry is necessary, with due regard for the need for judicially discoverable and manageable standards for resolving problems to be undertaken, and with recognition of the role played by the coordinate branches of the Federal Government in the planning and implementation of urban renewal. See Baker v. Carr, supra, 369 U.S. at 208-217, 82 S.Ct. at 691.

The extent to which relocation of those displaced by urban renewal is required will necessarily affect the pace at which urban renewal can take place, and the priority of goals in urban renewal planning. Issues are at stake which are, in the truest sense of the word, political. For example, if public housing were required to be available for every displacee of urban renewal, then it would follow, at least in the present condition of the nation's cities, that the building of public housing would be assigned very high priority. The standard for relocation is thus appropriately set by the legislative and executive branches of government, and not by the courts. Congress has provided, in section 105(c) of the Act, that the standard for relocation is 'decent, safe and sanitary dwellings' in the urban renewal area or in other areas not generally less desirable, within the financial means of the families displaced. The executive branch (HUD) is entrusted with the primary responsibility for enforcing this standard.

The basic constitutional claim raised by the allegations of the complaint, as we understand it, is that in Norwalk this standard was less sufficiently met in the relocation of Negroes and Puerto Ricans than in the relocation of whites. We need not consider the political question of the adequacy of the standard to conclude, as we have for reasons set out below, that proof of these allegations would make out a case of violation of the equal protection clause, and we see no reason to believe that the courts are incapable of fashioning remedies to insure that the standard is equally met for all citizens. With this case only at the pleadings stage, we do not think that we should speculate on what specific remedies might be appropriate if the plaintiffs' allegations are proved. As a general matter, the most appropriate form of judicial relief in cases such as this would be to require proof that the relocation standard is being met in ***930** general as adequately for non-whites as it is for whites before allowing the project to go forward. An affirmative form of relief, such as an order requiring the construction of low-income housing, would of course be much less appropriate, since it would necessarily involve the court in areas foreign to its experience and competence.

If the defendants' argument is that requiring that the relocation standard be met equally for all displacees, non-white as well as white, will result in delays in the implementation of some urban renewal programs, the answer is that such delays would be due to the standard, rather than its equal implementation for all. Whether or not such delays must be prevented is much more in the nature of a political question than is the constitutional issue which plaintiffs are attempting to raise.

Nothing we have said so far would require considering plaintiffs' constitutional claims, of course, if the complaint did not allege a deprivation of equal protection of the laws, in violation of the Fourteenth Amendment. [15] As we read the District Court's opinion, it was held below, on the authority of Green Street, supra, that no such deprivation was alleged. [16]

One of the allegations in Green Street, as we have noted above, was that the relocation provisions of the urban renewal plan expressly acknowledged the existence of a segregated residential pattern in the City of Chicago, and it was contended that

implementation of these provisions was in violation of the plaintiffs' rights to equal protection of the laws. With respect to this, the Court said:

The existing 'segregated' residential pattern is accidental to the Plan. The city admittedly could not require relocation in any particular area; it may only determine what housing is available in fact and offer whatever assistance it can in furnishing this information to displacees. The local defendants may not be enjoined from proceeding with the Plan simply because the Plan fails to include what the local defendants would be powerless to enforce— 'integrated' relocation.

373 F.2d at 9. Similarly, the District Court in the case before us said that the defendants' relocation program 'is designed to prevent displacees from suffering any consequences or change in circumstances, if and when they are relocated into the discriminatory housing market. They cannot owe a greater duty to end a situation which is merely 'accidental' to the plan.' 42 F.R.D. at 623.

We do not understand plaintiffs' constitutional argument to be that defendants must end discrimination in the Norwalk open housing market through the relocation plan, or even that defendants must find integrated housing for those displaced by the Project. Those are arguments we need not consider until they are appropriately put to us.

What plaintiffs' complaint alleges, in substance, is that in planning and implementing the Project, the local defendants did not assure, or even attempt to assure, relocation for Negro and Puerto ***931** Rican displacees in compliance with the Contract to the same extent as they did for whites; indeed, they intended through the combination of the Project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the City of Norwalk. The argument is that proof of these allegations would make out a case of violation of the equal protection clause. We agree.
Section 105(c) of the Act provides that contracts for loans or capital grants entered into under the Act shall require the availability or the provision of relocation housing for displacees which meets the standard set out in that section. That standard is designed, as the District Court recognized, to prevent displacees from suffering a change for the worse in their living conditions. It is no secret that in the present state of our society discrimination in the housing market means that a change for the worse is generally more likely for members of minority races than for other displacees. [17] This means that in many cases the relocation standard will be easier to meet for white than for non-white displacees. [18] But the fact that the discrimination is not inherent in the administration of the program, but is, in the words of the District Court, 'accidental to the plan,' surely does not excuse the planners from making sure that there is available relocation housing for all displacees. 'Equal protection of the laws' means more than merely the absence of governmental action designed to discriminate; as Judge J. Skelly Wright has said, 'we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.' Hobson v. Hansen, 269 F.Supp. 401, 497 (D.D.C.1967). [19]

Since the plaintiffs are admittedly displaced as a result of the Project, there is no question of the presence of 'state action' within the meaning of the Fourteenth Amendment. Where the relocation standard set by Congress is met for those who have access to any housing in the community which they can afford, but not for those who, by reason of their race, are denied free access to housing they can afford and must pay more for what they can get, the state action affirms the discrimination in the housing market. This is not 'equal protection of the laws.' [20]

What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining ***932** racial inequality. [21] Where it is drawn for the purpose of achieving equality it will be allowed, [22] and to the extent it is necessary to avoid unequal treatment by race, it will be required. [23]
We hold that plaintiffs' complaint alleges a denial of the equal protection of the laws, and that the District Court should have proceeded to consider that claim on its merits.

II.

The plaintiffs' statutory claim is that the federal and local defendants have violated section 105(c) of the Act, 42 U.S.C. 1455(c) (Supp. 1967). [24] The District Court concluded that plaintiffs lacked standing to raise this issue. Since the section requires provision for the relocation of displaced families, it can hardly be thought that displaced families such as plaintiffs, do not have the required personal stake in the outcome of litigation where a violation of the section is claimed. If anybody can raise this claim, it is these plaintiffs. The question we must answer is whether actions taken by HUD and local public agencies under section 105(c) are ever subject to judicial review.
The proposition is now firmly established that 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). [25] We have concluded that ***933** plaintiffs are aggrieved, and that there is no persuasive reason to believe that Congress intended to cut off judicial review.

The defendants maintain that plaintiffs cannot obtain judicial review of action under section 105(c) unless they can show that Congress, in enacting that section, intended to confer upon them a 'legal right' to protection. A 'legal right' to protection means, in the abstract, nothing at all. The specific and practical question here is whether or not plaintiffs may seek enforcement of the section, and the cases make it clear that the answer turns on whether Congress' purpose in enacting it was to protect their interests. Hardin v. Kentucky Utilities Company, 390 U.S. 1, 5-7, 88 S.Ct. 651, 19 L.Ed.2d 787 (1968); Chicago Junction Case, 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667 (1924). [26] That was precisely Congress' purpose, as the legislative history of the Act clearly indicates:

The bill sets up adequate safeguards against any undue hardship resulting from the undertaking of slum clearance under current conditions. It requires, first, that no slum-clearance project shall be undertaken by a local public agency unless there is a feasible means for the temporary relocation of the families to be displaced, and unless adequate permanent housing is available or is being made available to them. [27]

Congress was deeply concerned that slum conditions be eliminated, not merely displaced to grow up elsewhere. The Senate Report stated, in words which have when read today a somewhat prophetic ring:

Approximately one out of every five of our urban families is living today under slum conditions which, in turn, are the breeding ground for disease, juvenile delinquency, and crime. Your committee is convinced that the Nation cannot and should not tolerate indefinitely the social costs resulting from the impact of these conditions. [28]

The relocation requirements of section 105(c) were not enough, of course, to ensure the elimination of slum conditions, and Congress recognized this fact. [29] But they were designed to work toward that and by guaranteeing that, in clearing slum areas, government would not be driving into still worse ***934** conditions the people who lived in those areas. As the Senate Committee put it, the bill set up adequate safeguards against any undue hardship.

It has been suggested to us that since section 105(c) only provides that the relocation requirements be included in loan or capital grant contracts, the requirements are merely contract rights possessed by the federal government, which cannot be enforced by displacees. This is a proposition we cannot accept, for much more is involved here than a narrow issue of contract rights. As we have already said, the fact that Congress intended to protect the specific interests of displacees when it enacted the section is enough to give the displacees standing, in the absence of a persuasive reason to believe that Congress intended to cut off judicial review. Judicial review obtains not only to advance what have traditionally been viewed as 'legal rights,' but also to vindicate the public interest, [30] and Congress has made clear its view that adequate relocation is in the public interest. That Congress provided for enforcement of the relocation provisions through contracts with the local agencies does not weaken the

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appropriateness of judicial review, for such a method of enforcement is natural where Congress is specifying what requirements local agencies must meet in order to receive federal aid. The possibility that an administrative agency, charged with enforcing a requirement established by Congress in the public interest, will not adequately perform the task is equally great whether enforcement is through contract or through direct regulation. Accordingly, the reasons for allowing those who have a direct, personal interest in furthering the Congressional purpose to seek judicial review of administrative action are as compelling in one situation as in the other.

We have found no reason to believe that Congress intended to cut off judicial review under the Act. Nothing in the Act or its legislative history indicates such an intent,[31] and we do not think that it can be inferred from the nature of the subject with which the Act deals. The defendants have argued that urban renewal does not readily lend itself to judicial review, and, in the words of the Supreme Court in Perkins v. Lukens Steel Co., 310 U.S. 113, 131-132, 60 S.Ct. 869, 1879, 84 L.Ed. 1108 (1940), that 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief * * *.' We have already indicated in part I of this opinion our general views on the appropriate scope of judicial review in this area. We are not subjecting to judicial scrutiny the planning of urban renewal programs, see Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), nor are we considering the adequacy of the relocation standard set by Congress.[32] The judicial review which we make available to the displacees in this case is entirely different from the sweeping judicial action sought by the respondents in Perkins, who could point to no statute enacted for ***935** their protection and giving them standing. See especially 310 U.S. at 126-127, 60 S.Ct. at 869.

Since this case has not advanced past the pleadings stage, and there is nothing before us to indicate what efforts HUD has made to require relocation in compliance with the standard of section 105(c), or what the plaintiffs claim HUD should have done, it would be a mistake for us to attempt at this time to state specifically what we would expect of HUD in this respect.[33]

The defendants have relied heavily in their briefs and oral argument upon Johnson v. Redevelopment Agency of the City of Oakland, California, 317 F.2d 872 (9 Cir.), cert. denied 375 U.S. 915, 84 S.Ct. 216, 11 L.Ed.2d 154 (1963), and Green Street Association v. Daley, 373 F.2d 1 (7 Cir.), cert. denied 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967). We decline to follow those cases to the extent they are inconsistent with what we have said here.

The Seventh Circuit held in Green Street[34] that the plaintiffs there had no standing to claim that relocation provisions were inadequate under section 105(c), relying entirely on tis decision in Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency, 310 F.2d 99 (7 Cir. 1962), cert. denied 373 U.S. 914, 83 S.Ct. 1297, 10 L.Ed.2d 414 (1963). The plaintiffs in Harrison-Halsted objected to certain land use decisions in an urban renewal project. They claimed that they had standing to seek judicial review of actions of the Housing and Home Finance Agency (predecessor of HUD) because they would suffer economic injury as a result of those actions. The court's conclusion that the interest asserted was not sufficient to support standing was based on a long line of cases holding that injury through economic competition is generally not a sufficient basis for standing to sue.[35] But none of those cases supports a holding that displacees have no standing to seek judicial review of agency action under section 105(c). It has always been held that a competitive interest of the kind asserted in those cases is sufficient to support standing where the statute, under which the action sought to be reviewed has been taken, is one intended to protect that interest.[36] The interest which displacees have in being relocated in decent, ***936** safe and sanitary housing is no less important than any other interest, 'competitive' or otherwise, which has been given statutory protection. Since Congress specifically intended to protect the displacees' interest in adequate relocation, the displacees have standing.

It has been suggested that Johnson v. Redevelopment Agency of the City of Oakland, California, supra, need not be read to preclude altogether judicial review of agency action under 105(c).[37] We think that a fair reading of the opinion in that case indicates that the Ninth Circuit viewed Congress' decision to incorporate relocation requirements in contracts with the local agencies as precluding judicial review. See 317 F.2d at 874. We have already given our reasons for rejecting that view.[38]

The approach we have taken is consistent with our decision in Gart v. Cole, 263 F.2d 244 (2 Cir.), cert. denied 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959). The appellants in that case claimed standing to assert violations of the Housing Act's alleged requirement of open bidding on all property sold as part of the project involved. We concluded that the sections allegedly establishing the requirements were 'designed to protect not the interests of landowners or tenants in a redevelopment area, but those of the public at large,' and we held, on the basis of familiar authority already discussed in this opinion, that the appellants could not challenge an expenditure of funds 'as representatives of so broad an interest.' 263 F.2d at 250. We went on to hold that the plaintiffs did have standing to challenge a refusal to grant them an oral hearing on the feasibility of the project's relocation plan, and to claim that the Administrator had improperly delegated his duty to review the feasibility of the project's relocation provisions. Our inquiry there, as here, was explicitly whether the relevant statutory provisions were designed to protect the interests which the plaintiffs were asserting.[39] See 263 F.2d at 251. The defendants have argued that Gart v. Cole should be distinguished as involving procedural claims, rather than substantive ones. Although the scope of judicial review of substantive questions may differ from the scope of review where procedural questions are at issue, this does not make Gart v. Cole irrelevant. The question before us is standing, not the ultimate scope of review.

We hold, then, that judicial review of agency action under section 105(c) of the Act is available to displacees.[40] ***937** This does not mean, of course, that the courts are to intervene in relocation activities at the behest of every displacee disappointed in his relocation. Familiar doctrines limit the occasions on which particular judicial remedies, if any, are appropriate. In determining whether there has been compliance with section 105(c) of the Act, courts will evaluate agency efforts and success at relocation with a realistic awareness of the problems facing urban renewal programs. Objections by individual displacees based on too literal an interpretation of the Act's standards could unnecessarily interfere with programs of benefit to the entire community.

III.

The District Court held that this suit could not properly be brought as a class action under Rule 23 of the Federal Rules because there were no questions of law or fact common to the class or classes which the plaintiffs claim to represent. We think that the District Court erred in reading the complaint as requesting ultimately that the Court concern itself with the particular circumstances of each displacee's relocation.[41] The complaint alleges both that Negroes and Puerto Ricans were discriminated against in connection with relocation and that the relocation standards of section 105(c) were generally not met for Negro and Puerto Rican displacees. These allegations clearly raise questions of fact common to the class which plaintiffs represent. The fact that some members of the class were personally satisfied with the defendants' relocation efforts is irrelevant. Cf. Potts v. Flax, 313 F.2d 284, 288-289 (5 Cir, 1963).[42]

The association plaintiffs were denied standing below because they are 'not themselves members of the classes whose rights they claim to be asserting.' 42 F.R.D. at 622. We think that the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its raison d'etre is to represent the interests of that class. We do not decide, however, whether the association plaintiffs have standing. The answer to that question depends on whether there is a compelling need to grant them standing in order that the constitutional rights of persons not immediately before the court might be vindicated. See NAACP v. State of Alabama, ex rel. Patterson, 357 U.S. 449, 458-460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).[43] It appears to us ***938** that the individual plaintiffs can adequately represent the interests of all members of the relevant class, but we will not preclude the plaintiffs from trying to show to the District Court's satisfaction that it is only the association plaintiffs which can perform this function.

Judgment reversed. Remanded for further proceedings not inconsistent with this opinion.

HAYS, Circuit Judge (dissenting):

I would affirm the determination of the district court.

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The issues which the plaintiffs offer are not justiciable and the remedies they seek are not within the power of the court to grant. See Perkins v. Lukens Steel Co., 310 U.S. 113, 131-132, 60 S.Ct. 869, 879, 84 L.Ed. 1108 (1940) ('The interference of the courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief,' quoting Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516, 10 L.Ed. 559 (1840)); Berman v. Parker, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954) ('We do not sit to determine whether a particular housing project is or is not desirable').

The holding that plaintiffs do not have standing to bring the action is another formulation of the same principles. See Green Street Association v. Daley, 373 F.2d 1 (7th Cir.), cert. denied, 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967); Berry v. Housing and Home Finance Agency, 340 F.2d 939 (2d Cir. 1965) (per curiam); Johnson v. Redevelopment Agency, 317 F.2d 872 (9th Cir.), cert. denied, 375 U.S. 915, 84 S.Ct. 216, 11 L.Ed.2d 154 (1963); Pittsburgh Hotels Association v. Urban Redevelopment Authority, 309 F.2d 186 (3d Cir. 1962), cert. denied sub. nom. Hilton Hotels Corp. v. Urban Redevelopment Authority, 372 U.S. 916, 83 S.Ct. 730, 9 L.Ed.2d 723 (1963); Taft Hotel Corp. v. Housing and Home Finance Agency, 262 F.2d 307 (2d Cir. 1958) (per curiam), cert. denied, 359 U.S. 967, 79 S.Ct. 880, 3 L.Ed.2d 835 (1959); Allied-City Wide, Inc. v. Cole, 97 U.S.App.D.C. 277, 230 F.2d 827 (1956) (per curiam).

The Federal courts cannot administer the housing program.

All Citations

395 F.2d 920, 8 A.L.R. Fed. 388, 12 Fed.R.Serv.2d 368

Footnotes

1 The functions of the Housing and Home Finance Agency were transferred to the Secretary of Housing and Urban Development by section 5 of the Department of Housing and Urban Development Act, 79 Stat. 669 (1965), as amended, 42 U.S.C. § 3534 (Supp.1967). See also 81 Stat. 17 (1967). We will use the initials HUD throughout this opinion to refer to both the Department of Housing and Urban Development and its predecessor, the Housing and Home Finance Agency.

2 The four classes are: (1) those still occupying homes within the project area; (2) those whose homes in the project area have been demolished, and who now occupy 'overcrowded' rental units outside of the project area but within the City of Norwalk; (3) those whose homes in the project area have been demolished, and who now occupy rental units 'at excessive rentals' outside of the project area but within the City of Norwalk; and (4) those who formerly lived in Norwalk, but 'by virtue of the acts of defendants' complained of, now occupy rental units outside of the City. It is alleged that each class is too numerous to make it practicable to bring all of its members before the Court, that each will be fairly and adequately represented by those plaintiffs who are members of it, that there are common questions of law and fact affecting the rights of all members of each class, and that as to each a common relief is sought.

The Spring Street Tenants Association is composed of low-income Negroes who formerly lived in the project area, and who, it is alleged, have not been relocated into decent and proper housing at rentals within their financial means and reasonably accessible to their places of employment. The Day Street-Washington Village Tenants Association is composed of low-income Negroes and Puerto Ricans living outside the project area, allegedly in 'unsafe and indecent housing beyond their financial means.'

3 Where it is necessary to distinguish among the defendants, we will call Horan and Weaver the 'federal defendants,' Towne House Gardens, Inc. and David Katz & Sons, Inc. the 'private defendant,' Katz & Sons, Inc. the 'private

defendants,' 'local defendants.' Towne House is described in the complaint as a Connecticut corporation to which the City and the Agency have agreed to sell sex acres of land in the project area; David Katz & Sons, Inc. is described as a Connecticut corporation, the sponsor of the project, the owner and/or operator of the largest number of apartments and apartment structures in the City, and the owner of one-half of the stock of Towne House.

4 Nothing we say in this opinion precludes defendants from trying to show to the District Court's satisfaction that plaintiffs have failed to take advantage of available administrative remedies.

5 6 Moore's Federal Practice P54.60 (2d ed. 1966) and cases there cited; 2A Moore's Federal Practice P12.08; see also A.T. Brod & Co. v. Perlow, 375 F.2d 393, 398 (2 Cir. 1967).

6 The complaint asserts that the jurisdiction of the District Court is based upon 28 U.S.C. § 1343(3) and (4); and 42 U.S.C. §§ 1981, 1982, 1983 and 1988. Additionally, it is alleged that the matter in controversy exceeds the sum of $10,000, and that there is jurisdiction under 28 U.S.C. § 1331. The complaint was not dismissed for want of jurisdiction, and none of the defendants has contended before us that jurisdiction is wanting. It is clear that the District Court has subject matter jurisdiction.

7 The District Court did not distinguish the issue of plaintiffs' standing to raise their equal protection claim from that of plaintiffs' standing to seek judicial review of action which the federal defendants have taken under section 105(c) of the Act. Given the allegations of the complaint, its holding necessarily covered both issues. Insofar as the question of standing relates to the personal stake which plaintiffs have in the outcome of the litigation, the issues are the same. But the question whether the constitutional right which plaintiffs are claiming is one which the courts will protect must be considered separately from the question whether the courts will ever review the administrative action which is challenged. Where such review is not available, the situation is usually characterized as 'lack of standing.' The question of standing to seek judicial review of the administrative action is the subject of part II of this opinion.

8 On the unclear distinction between standing and justiciability, see note 13 infra. Our discussion of 'standing' in this part of the opinion is limited to the standing of the individual plaintiffs. We consider the standing of the association plaintiffs separately in part III.

9 One may, of course, have standing based on competitive interests where it is provided by statute. See F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940), and see part II of this opinion, infra.

10 The main question in Harrison-Halsted was whether the plaintiffs had a right to judicial review of administrative action taken under the Housing Act of 1949. See part II, infra.

11 The Court also cited Johnson v. Redevelopment Agency of the City of Oakland, California, 317 F.2d 872 (9 Cir.), cert. denied 375 U.S. 915, 84 S.Ct. 216, 11 L.Ed.2d 154 (1963), on this issue. While violation of the Fifth and Fourteenth Amendments was alleged in that case, upon appeal the issues had narrowed to whether or not the defendant had formulated and was carrying out a feasible plan of relocation as required by section 105(c) of the Act.

12 In progress, the plaintiffs were subdivision developers who had announced their intention to sell some of the houses they proposed to construct to Negroes. The complaint alleged, inter alia, that the defendants were abusing their power to condemn land and to enforce local building ordinances so as to discriminate against plaintiffs because of their announced intention to sell to Negroes. The Seventh Circuit, characterizing the case as one concerning 'the corporate right to engage in business and make a profit,' 286 F.2d at 234, held that the District Court had 'erred in granting summary judgment (for defendants) on the complaint.' Ibid.

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13 Similar concerns underlay the decision in Harrison-Halstead, supra. 'Lack of standing' and 'want of justiciability' (or, in different words, the presence of a 'political question') are doctrines serving the same general purpose of assuring that the courts pass only on questions which are raised in actual cases or controversies and which are ripe and appropriate for judicial determination. They are, therefore, doctrines between which no clear distinction is generally found. See Bickel, The Least Dangerous Branch, 125-126 (1962) and Note, 77 Yale L.J. 966, 976-987 (1968).

14 We note that an overall challenge of this type was considered on the merits in Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 (6 Cir. 1967), cert. denied 390 U.S. 921, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1968).

15 U.S.Const. amend. XIV; § 1: '* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

16 The opinion below could be read as holding only that plaintiffs had no standing to challenge administrative action under the Housing Act of 1949, and that the Civil Rights Act of 1964 conferred no standing privileges on plaintiffs. See 42 F.R.D. at 622-623. But the complaint clearly raised an equal protection claim against the local and private defendants, the jurisdiction of the court was properly alleged (see note 6, supra), and we must read the opinion as having passed on the equal protection claims.

17 See, e.g., U.S. Advisory Commission on Intergovernmental Relations, Relocation: Unequal Treatment of People and Businesses Displaced by Governments (1965); and Hartman, The Housing of Relocated Families, 30 J.Am.Inst.Planners 266, 273-274 (1964).

18 We wish to stress that the specific problem is not that non-white displacees are, on the average, poorer than white displacees. That may be so, but it is a more general problem. What we are concerned with is that discrimination which forecloses much of the housing market to some racial groups, thereby driving up the price they must pay for housing. The situation is made worse by the fact that most people displaced by urban renewal are non-white. See Note, 77 Yale L.J. 966, 967 (1968).

19 See generally Black, Foreword: 'State Action,' Equal Protection, and California's Proposition 14, 81 Harv.L.Rev. 69 (1967).

20 We need not consider whether the state has so involved itself in acts of private discrimination in the housing market as to make those otherwise private acts 'state action.' See Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); cf. Jones v. Alfred H. Mayer Company, 379 F.2d 33 (8 Cir.), cert. granted 389 U.S. 968, 88 S.Ct. 479, 19 L.Ed.2d 459 (1967) (No. 645).

21 See, e.g., Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92, L.Ed. 1161 (1947); Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958).

22 Offerman v. Nitkowski, 378 F.2d 22 (2 Cir. 1967); Springfield School Committee v. Barksdale, 348 F.2d 261, 266 (1 Cir. 1965).

23 United States v. Jefferson County Board of Education, 380 F.2d 385, 386 (5 Cir., en banc, 1967), affirming 372 F.2d 836 (5 Cir. 1966), cert. denied Bd. of Education of the City of Bessemer v. United States, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed.2d 104.

24 Section 105 provides, in relevant part:

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'Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that— (c)(1) There shall be a feasible method for the temporary relocation of individuals and families displaced from the urban renewal area, and there are or are being provided, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the individuals and families displaced from the urban renewal area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced individuals and families and reasonably accessible to their places of employment. * * *'

The section's coverage was extended to displaced individuals by the Housing and Urban Development Act of 1965, and that extension does not apply to this project. See section 305(c) of that Act, 79 Stat. 476 (1965). So far as now appears, the plaintiffs all represent displaced families.

25 See also Cappadora v. Celebrezze, 356 F.2d 1, 6 (2 Cir. 1966); 4 Davis, Administrative Law Treatise § 28.21 (1965 Supp.); Jaffe, Judicial Control of Administrative Action, 372-374 (1965).

As the Supreme Court said in Abbott Laboratories v. Gardner, the Administrative Procedure Act, 5 U.S.C. §§ 701-706, under which plaintiffs here seek judicial review, reinforced the early cases in which judicial review of administrative action was entertained. See 387 U.S. at 140, 87 S.Ct. 1507.

5 U.S.C. § 701 provides that 'This chapter applies * * * except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.' There is no need for us to consider whether these exceptions apply only where Congress' intent in the matter is explicit, for we discern no Congressional intent, implied or explicit, to preclude review or to commit determinations under section 105(c) to HUD's absolute discretion. See Davis, 'Judicial Control of Administrative Action': A Review, 66 Colum.L.Rev. 635, 651-52 (1966). The Supreme Court, by framing the test as 'persuasive reason to believe that such was the purpose of Congress,' appears to say that the intent may be implied. 387 U.S. at 140, 87 S.Ct. at 151.

26 The Administrative Procedure Act, 5 U.S.C. § 702, provides that 'A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.' We do not think that this language is to be construed as limiting judicial review to those situations where Congress has explicitly referred to persons 'adversely affected' or 'aggrieved' by agency action. That would not be a 'hospitable' interpretation of the Act's 'generous' review provisions. Abbott Laboratories v. Gardner, 387 U.S. at 140-141, 87 S.Ct. at 1507. We will, in accordance with what the Supreme Court has said in Hardin v. Kentucky Utilities Company, supra, consider any person attempting to assert an interest, personal to him, which the 'relevant statute' was specifically designed to protect, and which he claims is not being protected, as 'adversely affected or aggrieved' within the meaning of that statute.

27 S.Rep. No. 84, 81st Cong., 1st Sess., in U.S.Code Cong.Serv. (1949) pp. 1550, 1564.

28 Id. at p. 1560.

29 See id. at 1561; and see generally Note, Judicial Review of Displacee Relocation in Urban Renewal, 77 Yale L.J. 966 (1968).

30 See Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 615-627 (2 Cir. 1965), cert. denied Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conference, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966); Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994, 1000-1006 (D.C.Cir. 1966). See generally Reich, The Law of the Planned Society, 75 Yale L.J. 1227 (1966).

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31 It has been pointed out that where Congress intends that administrative determinations under the Act may be unreviewable, it has said so explicitly: under section 114 of the Act, added in 1964, 78 Stat. 788-90, as amended 42 U.S.C. § 1465(e) (Supp. 1967), determinations with regard to relocation assistance payments may be made unreviewable. Note, 77 Yale L.J. 966, 972 n. 28 (1968).

32 See text following note 14, supra.

33 The provisions of the Administrative Procedure Act on scope of judicial review are set out in 5 U.S.C. § 706. We note that the plaintiffs are requesting review of a substantive determination, rather than of the procedures followed by HUD in making the determination sought to be reviewed.

34 We have discussed other aspects of the Green Street decision in part I of this opinion.

35 Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938); Berry v. Housing and Home Finance Agency, 340 F.2d 939 (2 Cir. 1965); Taft Hotel Corp. v. Housing and Home Finance Agency, 262 F.2d 307 (2 Cir. 1958), cert. denied 359 U.S. 967, 79 S.Ct. 880, 3 L.Ed.2d 835 (1959); Pennsylvania Railroad Company v. Dillon, 335 F.2d 292 (D.C.Cir.), cert. denied American-Hawaiian S.S.Co. v. Dillon, 379 U.S. 945, 85 S.Ct. 437, 13 L.Ed.2d 543 (1964); Allied-City Wide v. Cole, 97 U.S.App.D.C. 277, 230 F.2d 827 (1956); Kansas City Power & Light Company v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924, cert. denied 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955); Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh, 309 F.2d 186 (3 Cir. 1962), cert. denied Hilton Hotels Corp. v. Urban Redevelopment Authority of Pittsburgh, 372 U.S. 916, 83 S.Ct. 730, 9 L.Ed.2d 723 (1963). Defendants have relied upon some of these cases in their briefs, pointing to language suggesting that the availability of judicial review turns upon the presence of Congressional intent to bestow a 'legal right' to protection, or, in other cases, upon the invasion of a 'legally protected right.' The results reached in these cases are entirely consistent with the result reached here.

36 Hardin v. Kentucky Utilities Company, supra; Chicago Junction Case, supra.

37 Note, 73 Yale L.J. 1080 (1964).

38 The opinion in Johnson makes reference to Hunter v. City of New York, 121 N.Y.S.2d 841 (Sup.Ct.1953). We read that case as holding that state courts have no jurisdiction to review the actions of agencies of the federal government.

39 Cf. Merge v. Sharott, 341 F.2d 989 (3 Cir. 1965).

40 The plaintiffs contend that section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, is an independent basis on which they have standing to sue. That contention presents a question which we do not think we should decide at this stage of this case. We do not read the section to set forth requirements differing from what is required of the states by the Fourteenth Amendment, and thus the plaintiffs need not rely on the section to assert their claims of discrimination against the local defendants or to obtain relief against them. Since we do not know what the plaintiffs would have the District Court require of the federal defendants, we do not know whether section 601 is relevant so far as the federal defendants are concerned. The Framework of sections 601-605 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4, indicates that those sections are intended to assign to federal agencies an independent responsibility to bar discrimination in federally assisted programs.

We note that in Bossier Parish School Board v. Lemon, 370 F.2d 847 (5 Cir.), cert. denied 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967), where it was held that the plaintiffs had standing to sue under section 601, the defendants

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contended that the Fourteenth Amendment was inapplicable because the school children being segregated were 'federal children.' But cf. Gautreaux v. Chicago Housing Authority, 265 F.Supp. 582 (N.E.Ill., 1967).

41 The local defendants assert in their brief that it was held in Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F.2d 648, 653 (4 Cir. 1967), that unless abuse is shown the trial court's decision as to whether or not a proper class action has been brought is final. The Fourth Circuit said nothing of the kind in that case. The Court was addressing itself specifically to the question whether the number of members of the class was sufficiently large to meet the requirement of Rule 23(a)(1) that the class be so numerous that joinder of all members is impracticable. That is a question of fact which the court naturally held to be within the competence of the District Court to determine. It is alleged in this case that the class is sufficiently numerous, and the District Court did not find otherwise.

42 We further hold that the requirements of Rule 23(b) have been met. The District Court concluded that Rule 23(b)(2) was not satisfied because the specific relief requested by the plaintiffs was not, in its view, appropriate. We have already given our reasons for holding that the court is not limited to granting the relief requested, and it appears to us that final injunctive or declaratory relief with respect to the class as a whole would be appropriate if the allegations of the complaint are proved.

43 We reject the local defendants' contention that an association cannot represent the rights of its members unless the interests of the association itself are involved. In NAACP v. State of Alabama, ex rel. Patterson, the Supreme Court specifically referred to the likelihood that the association itself would be adversely affected as a 'further factor' pointing towards the holding of standing. 357 U.S. at 459-60, 78 S.Ct. at 1163.

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872 F.3d 495
United States Court of Appeals, Seventh Circuit.

PARK PET SHOP, INC., et al., Plaintiffs-Appellants,
v.
CITY OF CHICAGO, et al., Defendants-Appellees.

No. 15-3711
|
Argued May 24, 2016
|
Decided September 21, 2017

Synopsis
Background: Pet stores and dog breeder brought action seeking to invalidate city's “puppy mill” ordinance, which limited sources from which pet stores could obtain certain animals for resale. The United States District Court for the Northern District of Illinois, Jorge L. Alonso, J., 2015 WL 6756288, granted city's motion to dismiss. Stores and breeder appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:

ordinance did not exceed city's home-rule authority under Illinois Constitution;

rational basis review was the proper standard for dormant Commerce Clause analysis; and

ordinance passed rational basis review.

Affirmed.

Hamilton, Circuit Judge, filed an opinion dissenting in part.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

***497** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 15 C 1450 —**Jorge L. Alonso**, *Judge*.

Attorneys and Law Firms

Sean P. Patrick, Attorney, Rifkind Patrick LLC, Chicago, IL, for Plaintiffs-Appellants.

Jonathon D. Byrer, Attorney, Office of the Corporation Counsel, Appeals Division, Chicago, IL, for Defendants-Appellees.

Before Rovner, Sykes, and Hamilton, Circuit Judges.

Opinion

Sykes, Circuit Judge.

This case challenges Chicago's "puppy mill" ordinance, which limits the sources from which pet stores may obtain dogs, cats, and rabbits for resale. The ordinance provides that pet retailers in the city "may offer for sale only those dogs, cats, or rabbits" obtained from an animal control or care center, pound, or kennel operated by local, state, or federal government or "a humane society or rescue organization." CHICAGO, ILL., CODE § 4-384-015(b) (2016).

Two Chicago pet stores and a Missouri dog breeder sued to invalidate the ordinance. They allege that it exceeds Chicago's home-rule powers under the Illinois Constitution and violates the implied limits on state power imposed by the Commerce Clause of the United States Constitution. The district court dismissed the suit for failure to state a claim.

We affirm. The Illinois Constitution permits home-rule units like Chicago to regulate animal control and welfare concurrently with the state. And the puppy-mill ***498** ordinance doesn't discriminate against interstate commerce, even in mild practical effect, so it requires no special cost-benefit justification under the Commerce Clause. Rational-basis review is the default standard, and the ordinance easily passes that test.

I. Background

In 2014 the Chicago City Council acted to address concerns that pet stores in the city sourced their animals from large mill-style breeders, which are notorious for deplorable conditions and abusive breeding practices, including over-breeding, inbreeding, crowded and filthy living conditions, lack of appropriate socialization, and inadequate food, water, and veterinary care. The Council determined that mill-bred pets develop health and behavioral problems, creating economic and emotional burdens for pet owners and imposing financial costs on the City as owners abandon their physically or emotionally challenged pets or surrender them to the shelter operated by the City's Commission on Animal Care and Control. Nearly a third of all animals that come into the City's care are owner surrenders—the second largest source of dogs and cats taken in by the Commission (strays are the largest). Chicago budgets about $300,000 each year for its shelter service and spends more than $500,000 every year to euthanize animals.

The Council determined that extinguishing the supply of puppy-mill pets to local pet stores would serve several important policy goals. Among other things, it would (1) limit financial support to mill operators; (2) reduce the financial and emotional toll on Chicago consumers who purchase mill-bred pets with latent physical and behavioral problems; (3) boost placement of shelter pets; and (4) reduce the City's animal-care and euthanization costs. The Council also determined that banning the retail sale of mill-bred pets may also promote pet adoption from the City's shelter, which would benefit Chicago residents because the $65 pet adoption fee both offsets the cost to taxpayers of operating the shelter and gives Chicagoans ready access to cheaper pets.

The Council accordingly adopted the following ordinance restricting the sources from which pet stores in the city may obtain dogs, cats, or rabbits for resale:

> (b) *Restrictions on the retail sale of animals.* A retailer may offer for sale only those dogs, cats, or rabbits that the retailer has obtained from:
>
> > (1) an animal control center, animal care facility, kennel, pound or training facility operated by any subdivision of local, state or federal government; or
> >
> > (2) a humane society or rescue organization.

CHICAGO, ILL., CODE § 4-384-015(b) (2016).

Two Chicago pet stores—Park Pet Shop and Pocket Pets—joined forces with Cedar Woods Farm, a Missouri dog breeder, seeking to invalidate the ordinance. They allege that it exceeds Chicago's home-rule powers under the Illinois Constitution and amounts to an unconstitutional regulation of interstate commerce in violation of the dormant aspect of the Commerce Clause.

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Amended complaints followed—the operative version is the second amended complaint—and the City moved to dismiss for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6). The district judge granted the motion, holding that the ordinance is a valid exercise of the City's home-rule authority under the Illinois Constitution and is not an unconstitutional regulation of interstate commerce under the Commerce Clause. The judge entered final judgment for the City, and the plaintiffs appealed.

***499 II. Discussion**

We review a dismissal order without deference to the district court's decision, accepting as true the well-pleaded facts in the complaint and drawing reasonable inferences in the plaintiffs' favor. *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016). To survive a motion to dismiss under Rule 12(b)(6), the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable" as alleged in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

A bit of background about Chicago's regulatory scheme helps to place the state and federal constitutional claims in proper context. To operate a pet shop in Chicago requires a license from the City. CHICAGO, ILL., CODE § 4-384-020(a) (2016). The City's animal-care ordinance defines "pet shop" broadly as "any person primarily engaged in the business of selling or offering to sell animals suitable for use as pets," but excludes "the isolated or occasional sale of animals by a person who sells only such animals that he has produced and raised" and "any person engaged in the business of breeding who owns, has possession of, or harbors 5 or fewer female dogs or cats capable of reproductions and sells only those breeding dogs or cats or their offspring." *Id.* § 4-384-010. Also excluded are "any animal control center, animal care facility, kennel or pound or training facility" operated by a local, state, or federal government. *Id.*

Licensees must comply with a host of regulations governing the housing and care of animals offered for sale. For example, the ordinance imposes requirements designed to ensure a sanitary environment for the animals. *Id.* § 4-384-050. It sets basic standards of animal care. *Id.* § 4-384-055. It regulates cage size and quality. *Id.* § 4-384-100. And it requires licensees to submit to regular inspections by city inspectors. *Id.* § 4-384-130.

Though Chicago's existing regulatory scheme was already extensive, the puppy-mill ordinance is a far more significant restriction. It narrowly limits the sources from which pet retailers may obtain animals for resale: "A retailer may offer for sale only those dogs, cats or rabbits" obtained from an animal care or control facility operated by a unit of local, state, or federal government or from "a humane society or rescue organization." *Id.* § 4-384-015(b). A "retailer" is "any person licensed or required to be licensed under this chapter who offers for sale any dog, cat or rabbit in the City." *Id.* § 4-384-015(a).

The ordinance thus effectively prohibits large commercial breeders from supplying dogs, cats, and rabbits to pet retailers in the city. This dramatically changes the business model of Chicago's pet retailers, so it's no surprise that litigation commenced soon after the City adopted the ordinance. This suit alleges that the ordinance is constitutionally infirm in two respects—one state, one federal. We'll begin with the state constitutional claim.

A. Home-Rule Authority Under the Illinois Constitution

As a home-rule municipality under the Illinois Constitution, Chicago "may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." ***500** ILL. CONST art. VII, § 6(a). This constitutional provision "was written with the intention that home rule units be given the broadest powers possible." *Scadron v. City of Des Plaines*, 153 Ill.2d 164, 180 Ill.Dec. 77, 606 N.E.2d 1154, 1158 (1992). The state constitution further provides that a municipality with home-rule status may "exercise and perform concurrently with the State any power or function of a home rule

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unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." ILL. CONST. art. VII, § 6(i).

To determine whether the puppy-mill ordinance is a permissible exercise of Chicago's home-rule powers, we follow the Illinois Supreme Court's instructions and evaluate the "nature and extent of the problem" at hand and whether the state has a "vital interest and a traditionally exclusive role" in regulating it. *City of Chicago v. StubHub, Inc.*, 366 Ill.Dec. 43, 979 N.E.2d 844, 852–53 (2011). These are commonly referred to as the *Kalodimos* factors. *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483, 83 Ill.Dec. 308, 470 N.E.2d 266 (1984) (developing the doctrine).

The puppy-mill ordinance is aimed at reducing the social problems and economic costs associated with mill-bred pets: the emotional and financial costs incurred by individual Chicagoans who find themselves with sick or troubled pets and the financial strain on the public fisc caused by mill-bred animals. State and local governments alike are vitally concerned with issues of animal control and welfare, and both governments have long regulated animal welfare concurrently. *See, e.g.*, *County of Cook v. Village of Bridgeview*, 380 Ill.Dec. 733, 8 N.E.3d 1275, 1279 (2014), *appeal denied*, 388 Ill.Dec. 2, 23 N.E.3d 1200 (2015) ("In Illinois, the problem of animal control, over-population, and the spread of rabies is both a local and statewide concern."). State government has never had an exclusive role in addressing animal-control issues; concurrent regulation is the norm.

In areas of concurrent authority, the Illinois Constitution expressly requires a clear statement from the state legislature to oust a municipality's home-rule power. *See* 5 ILL. COMP. STAT. 70/7 (2015) ("No law enacted after January 12, 1977, denies or limits any power or function of a home rule unit, pursuant to paragraphs (g), (h), (i), (j), or (k) of Section 6 of Article VII of the Illinois Constitution, unless there is specific language limiting or denying the power or function and the language specifically sets forth in what manner and to what extent it is a limitation on or denial of the power or function of a home rule unit."). No state animal-control statute explicitly ousts or limits Chicago's power to regulate in this area.

To the contrary, state law *preserves* municipal power to regulate animal care and welfare:

> Nothing in this Act shall be held to limit in any manner the power of any municipality or other political subdivision to prohibit animals from running at large, nor shall anything in this Act be construed to, in any manner, limit the power of any municipality or other political subdivision to further control and regulate dogs, cats or other animals in such municipality or other political subdivision provided that no regulation or ordinance is specific to breed.

510 ILL. COMP. STAT. 5/24 (2015).

The plaintiffs point to *Village of Bridgeview* as support for their home-rule challenge, but that case is inapposite. ***501** At issue there was a dispute between Cook County and the Village of Bridgeview, a municipality within the county's borders. 380 Ill.Dec. 733, 8 N.E.3d at 1277–78. The two governmental units had promulgated conflicting regulations aimed at eradicating the problem of rabid feral cats. *Id.* To resolve the regulatory conflict, the state appellate court had to decide which governmental unit had a more traditional role and vital interest in controlling and preventing the spread of rabies.

The court held that rabies control is a matter of statewide concern and "do[es] not strictly pertain to the government and affairs of Bridgeview as a home rule unit." *Id.*, 380 Ill.Dec. 733, 8 N.E.3d at 1280. The court noted as well that the state and county governments had a "more traditional role" in addressing problems of rabies control. *Id.* Moreover, county government has a "greater geographical reach" and "can more comprehensively and effectively address feral cat control than local municipalities."

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Id., 380 Ill.Dec. 733, 8 N.E.3d at 1279. In short, the *Kalodimos* factors all pointed in the same direction: the county ordinance prevailed over the village ordinance. *Id.,* 380 Ill.Dec. 733, 8 N.E.3d at 1280.

No similar regulatory conflict exists here. Illinois is not trying to regulate in this space, much less regulate exclusively. The puppy-mill ordinance does not exceed the City's home-rule authority under the Illinois Constitution.

B. Dormant Commerce Clause

The Commerce Clause grants Congress the power to "regulate Commerce ... among the several States," U.S. CONST. art. I, § 8, cl. 3, but the Supreme Court has long held that a "dormant" or "negative" component of the Clause implicitly limits the states from "erecting barriers to the free flow of interstate commerce" even where Congress hasn't acted, *see, e.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978). The doctrine is not generally applicable. It does not apply to *every* state and local law that affects interstate commerce. "Because even 'local' activities displace the movement of goods, services, funds, and people, almost every state and local law—indeed almost every private transaction—affects interstate commerce." *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995). Dormant Commerce Clause doctrine applies only to laws that *discriminate* against interstate commerce, either expressly or in practical effect. *Id.* at 1130–31.

We have explained that state and local laws fall into one of three categories for purposes of dormant Commerce Clause analysis. "The first category comprises laws that explicitly discriminate against interstate commerce"; laws of this type are treated as presumptively unconstitutional. *Id.* at 1131. "The second category comprises laws that appear to be neutral among states but that bear more heavily on interstate commerce than on local commerce." *Id.* Facially nondiscriminatory laws sometimes have a discriminatory effect on interstate commerce, and "[w]hen the effect is powerful, acting as an embargo on interstate commerce without hindering intrastate sales," the law is treated as the equivalent of a facially discriminatory statute. *Id.*

On the other hand, laws that are facially nondiscriminatory but have "mild disparate effects and potential neutral justifications" are analyzed under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), which established a balancing test that requires the reviewing court to weigh the burden on interstate commerce against the nature and strength of the state or local interest at stake. *Nat'l Paint*, 45 F.3d at 1131. ***502** More specifically, *Pike* holds that when a state or local statute

> regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142, 90 S.Ct. 844 (citation omitted). Importantly for our purposes, however, *Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application. *Pike* is not the default standard of review for any state or local law that affects interstate commerce. *Nat'l Paint*, 45 F.3d at 1131.

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"If the first category may be called disparate treatment, and the second disparate impact, the third category comprises laws that affect commerce without any reallocation among jurisdictions"—in other words, laws "that do not give local firms any competitive advantage over those located elsewhere." *Id.* In this third category, "the normal rational-basis standard is the governing rule." *Id.* "Unless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification." *Id.* at 1132. To put the point in plainer terms: "No disparate treatment, no disparate impact, no problem under the dormant commerce clause." [1] *Id.*

The puppy-mill ordinance does not expressly discriminate against interstate commerce. By limiting Chicago pet stores to dogs, cats, and rabbits sourced from public or private nonprofit shelters, the ordinance evenhandedly prohibits *all* large commercial breeders—whether located in Illinois or out of state—from selling dogs, cats, and rabbits to Chicago pet stores. Because there is no disparate treatment, the ordinance does not fall within the first category.

It does not fall within the second category either. The puppy-mill ordinance does not have a disparate impact on out-of-state breeders; breeders in Illinois enjoy no competitive advantage over their counterparts outside the state. All breeders are similarly disadvantaged. And unless the challenged law discriminates against interstate commerce in practical effect, the dormant Commerce Clause does not come into play and *Pike* balancing does not apply.

The plaintiffs ask us to infer that Chicagoans will respond to the puppy-mill ordinance in part by turning directly to breeders for their purebred pets. Indulging that inference doesn't support a conclusion that the ordinance has a discriminatory effect on interstate commerce. While it's plausible ***503** to infer that Chicago consumers may prefer to patronize breeders located closer to the city over those that are farther away, that inference would show only that the ordinance may confer a competitive advantage on breeders that are not too distant from Chicago. But those breeders are as likely to be located in nearby Wisconsin or Indiana as they are in suburban Chicago or downstate Illinois. So the supposition that Chicagoans will turn directly to breeders for their pure-bred pets does not establish that the ordinance has a discriminatory effect on breeders located out of state.

Perhaps Chicago consumers might respond to the ordinance by turning to small breeders rather than traveling to a large breeder outside Chicago (whether in state or out of state). But that would have the effect of simply shifting sales among different sources of pets without regard to location. "Favoritism for [small breeders over pet stores and large breeders] does not pose a constitutional problem...." *Baude v. Heath*, 538 F.3d 608, 615 (7th Cir. 2008). Again, dormant Commerce Clause doctrine is concerned only with regulation that discriminates against out-of-state firms. *Nat'l Paint*, 45 F.3d at 1131–32; *Amanda Acquisition Corp. v. Universal Foods Corp.,* 877 F.2d 496, 505 (7th Cir. 1989).

Perhaps Chicagoans might turn not to breeders (whether large or small, in state or out of state) but to pet stores in the surrounding suburbs or directly to the City's shelter or a shelter operated by a local private nonprofit. This just shifts business within the state; it has no effect on interstate commerce. *See Missouri Pet Breeders Ass'n v. County of Cook*, 106 F.Supp.3d 908, 923 (N.D. Ill. 2015) ("[N]either of these outcomes imposes a burden on interstate commerce [because] business would simply shift between entities within Illinois." (citing *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 126 n.16, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978))).

The plaintiffs argue that the puppy-mill ordinance is a de facto ban on pets bred out of state. It is not. Chicago has not attempted to regulate beyond its borders. The ordinance doesn't ban animals from out-of-state breeders, either expressly or in practical effect. It affects large breeders—wherever they're located—in exactly the same way. Both can sell directly to Chicago consumers, but they may not sell to city-licensed pet retailers.

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Finally, the plaintiffs maintain that dismissal on the pleadings is improper because *Pike* balancing requires a factual record. It's true as a general matter that "[a]ny balancing approach, of which *Pike* is an example, requires evidence." *Baude*, 538 F.3d at 612. As we've explained, however, *Pike* balancing is required *only* if the challenged law has a discriminatory effect on interstate commerce. And conclusory allegations of disparate impact are not sufficient; to survive the City's motion to dismiss, the plaintiffs needed to plead specific facts to support a plausible claim that the ordinance has a discriminatory effect on interstate commerce. *Adams v. City of Indianapolis*, 742 F.3d 720, 733 (7th Cir. 2014). Because they haven't done so, *Pike* balancing is not required. *See New York Pet Welfare Ass'n v. City of New York*, 850 F.3d 79, 90–91 (2d Cir. 2017) (affirming a Rule 12(b)(6) dismissal of an analogous challenge to a puppy-mill ordinance).

Accordingly, the ordinance falls into the third category, which comprises state and local laws that "affect commerce without any reallocation among jurisdictions"; that is, laws that "do not give local firms any competitive advantage over those located elsewhere." *Nat'l Paint*, 45 F.3d at 1131. For laws in this category, the default rational-basis standard of review ***504** applies. *Id.* No surprise, the ordinance easily survives review for rationality. Chicago's justifications for the ordinance are plentiful and plausible. The City's policy goals are to reduce financial support for mill breeders, curb the emotional and financial burdens on consumers who unwittingly buy mill-bred pets, and reduce the cost of sheltering and euthanizing unwanted problem pets. These are unquestionably legitimate governmental interests, and it's rational to think that the puppy-mill ordinance will serve them.

Because the plaintiffs did not plead a plausible claim that the puppy-mill ordinance violates either the Illinois Constitution or the dormant Commerce Clause, the case was properly dismissed for failure to state a claim.

AFFIRMED.

Hamilton, Circuit Judge, dissenting in part.
I agree that the Illinois Constitution does not bar Chicago's ordinance. On two points critical to the federal Commerce Clause claim, however, I view the law differently than my colleagues do, so I respectfully dissent regarding the federal claim.

First, the Supreme Court itself has not yet confined the balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), as narrowly as my colleagues suggest. The majority writes that *Pike* balancing comes into play *"only* when the law *discriminates* against interstate commerce in practical application." Ante at 502 (emphasis in original), citing *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995). In *Pike* itself, however, the Court wrote that this balancing test applies where "the statute regulates *even-handedly* to effectuate a legitimate local public interest, and its effects on interstate commerce are *only incidental*...." 397 U.S. at 142, 90 S.Ct. 844 (emphasis added). In such cases, and this is one, the law will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*

The majority tries to confine *Pike* balancing to cases of "discrimination," but it can do so only by using a notion of "discrimination" so broad that it applies to "even-handed" legislation with "only incidental" effects on interstate commerce. The majority would apply *Pike* only when the challenged law gives "local firms any competitive advantage over those located elsewhere." Ante at 502, quoting *National Paint*, 45 F.3d at 1131.

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The Supreme Court's more recent discussions of *Pike*, since we decided *National Paint* in 1995, are difficult to reconcile with this approach. For example, the Court has explained that federal courts "generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even *nondiscriminatory* burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice." *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 353, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (emphasis added); see also *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (plurality opinion of Roberts, C.J.) ("Under the *Pike* test, we will uphold a *nondiscriminatory* statute like this one 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.' ") (emphasis added). Given these developments, we should no longer use *National Paint* to avoid *Pike* balancing in Commerce Clause cases like this one.

***505** I confess that I write this with some diffidence and a sense of irony. *Pike* balancing has been criticized harshly in courts and the academy, and I am among those who have suggested it should ultimately be abandoned. See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) (opinion of Scalia, J.) (*Pike* balancing inquiry is "ill suited to the judicial function and should be undertaken rarely if at all"); *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 468–69 (7th Cir. 2012) (Hamilton, J., concurring in the judgment) (endorsing criticism); *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009) ("The judiciary lacks the time and the knowledge to be able to strike a fine balance between the burden that a particular state regulation lays on interstate commerce and the benefit of that regulation to the state's legitimate interests."); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1207–08 (1986) (introducing review of Supreme Court cases); see also *Department of Revenue v. Davis*, 553 U.S. at 353–56, 128 S.Ct. 1801 (describing difficulty in applying *Pike* to state law exempting in-state government bonds from state income tax, and deferring to Congress to make policy choice). For now, though, the Supreme Court has left *Pike* open as a potential path to challenge economic regulations that do not discriminate against interstate commerce but that have incidental and perhaps unintended effects on interstate commerce.

Second, the majority errs by applying a stringent version of *Iqbal* and *Twombly* to find that plaintiffs have not plausibly alleged sufficiently burdensome effects on interstate commerce. Ante at 503-04, citing *Adams v. City of Indianapolis*, 742 F.3d 720, 733 (7th Cir. 2014) (applying stringent pleading standard to affirm dismissal of Title VII claim of disparate racial impact). Plaintiffs' complaint offers a plausible forecast of those effects, though. The operative complaint alleges that the ordinance prohibits out-of-state breeders from selling pets in Chicago except by direct sales to customers, who would have to visit the breeder to pick up the purchased pet or otherwise arrange for delivery. ¶ 72. Perhaps the effects would be like those for distant in-state breeders, but that would be an empirical question. The complaint also alleges that the ordinance will be counter-productive, depriving consumers of purebred puppies, depriving consumers of a regulated and accountable sources for such puppies, and leaving consumers with the only practical alternative of going to less regulated and less accountable brokers and breeders on the internet and elsewhere. ¶ 74.

Those allegations might or might not be true, but they seem to me at least plausible. It's easy to imagine that the Chicago ordinance will not actually reduce the demand for high-cost, pure-bred pets. Meeting that demand might well be much more difficult and expensive, with greater effects on out-of-state breeders and without obvious gain in terms of health and safety or humane treatment of animals. In addition, plaintiffs offer at least some allegations of a discriminatory purpose, alleging that when the ordinance was enacted, the city clerk portrayed the ordinance as aligning Chicagoans against the interests of an out-of-state industry with its "powerbase in Iowa, Missouri and Indiana." ¶ 66 & Ex. B.

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To affirm dismissal on the pleadings, the majority relies further on *National Paint*, but there we addressed factual findings made after a trial. We wrote: "*Pike* may be impossible to apply without some factual inquiries (albeit limited as *Clover Leaf Creamery* requires)." *National Paint*, 45 F.3d at 1132. Plaintiffs lost in *National Paint* because they had offered no evidence ***506** of impacts on interstate commerce. *Id.*; see also *id.* at 1134 (Rovner, J., concurring) (noting that district court may need to conduct evidentiary hearing or trial to test the actual benefits and burdens of legislation if there is an allegation of a disparate impact on interstate commerce); *Baude v. Heath,* 538 F.3d 608, 612 (7th Cir. 2008)(*Pike* "requires evidence"). I don't know whether the plaintiffs in this case could ultimately meet the demands of the *Pike* balancing test. They should be permitted to try, though, particularly now that the ordinance has taken effect and evidence of actual effects should be available. I would reverse the dismissal for failure to state a claim and remand for further proceedings.

All Citations

872 F.3d 495

Footnotes

1 As Judge Hamilton reads the legal terrain, *National Paint* is no longer valid in light of intervening developments in dormant Commerce Clause doctrine—specifically, the Supreme Court's decisions in *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008), and *United Haulers Association v. Oneida–Herkimer Solid Waste Management Authority*, 550 U.S. 330, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007). Dissent at p. 504-05. We disagree. We do not read the quoted passages of *Davis* and *United Haulers* as extending *Pike* balancing to *all* state laws—even those that have no discriminatory effect on interstate commerce. Read in context, the Court's references to "nondiscriminatory" laws in these passages must be understood to mean *facially* nondiscriminatory laws that have discriminatory *practical effects* on interstate commerce—or in the *National Paint* taxonomy, state laws that have a *disparate impact* on interstate commerce.

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90 S.Ct. 844
Supreme Court of the United States

Loren J. PIKE, etc., Appellant,
v.
BRUCE CHURCH, INC.

No. 301.
|
Argued Jan. 13, 1970.
|
Decided March 2, 1970.

Synopsis

Action by grower of high quality cantaloupes against official charged with enforcing the Arizona Fruit and Vegetable Standardization Act to enjoin order prohibiting grower from transporting uncrated cantaloupes from its Arizona ranch to a nearby California city for packing and processing as unconstitutional. A three-judge District Court for the District of Arizona issued a permanent injunction, and state official appealed. The Supreme Court, Mr. Justice Stewart, held that the order, which would compel grower to build packing facilities in Arizona that would cost approximately $200,000, constituted an unlawful burden upon interstate commerce.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****845** ***138** Rex E. Lee, Phoenix, Ariz., for appellant.

Jacob Abramson, Salinas, Cal., for appellee.

Opinion

Mr. Justice STEWART delivered the opinion of the Court.

The appellee is a company engaged in extensive commercial farming operations in Arizona and California. The appellant is the official charged with enforcing the Arizona Fruit and Vegetable Standardization Act. [1] A provision of the Act requires that, with certain exceptions, all cantaloupes grown in Arizona and offered for sale must 'be packed in regular compact arrangement in closed standard containers approved by the supervisor * * *.' [2] Invoking his authority under that provision, the appellant issued an order prohibiting the appellee company from transporting uncrated cantaloupes from its Parker, Arizona, ranch to nearby Blythe, California, for packing and processing. The company then brought this action in a federal court to enjoin the order as unconstitutional. A three-judge court was convened. 28 U.S.C. ss 2281, 2284. After first granting temporary relief, the court issued a permanent injunction upon the ground that the challenged order constituted an unlawful burden upon interstate commerce. This appeal followed. 28 U.S.C. s 1253. 396 U.S. 812, 90 S.Ct. 91, 24 L.Ed.2d 65.
***139** The facts are not in dispute, having been stipulated by the parties. The appellee company has for many years been engaged in the business of growing, harvesting, processing, and ****846** packing fruits and vegetables at numerous locations in Arizona and California for interstate shipment to markets throughout the Nation. One of the company's newest operations is at Parker, Arizona, where, pursuant to a 1964 lease with the Secretary of the Interior, the Colorado River Indian Agency, and the Colorado River Indian Tribes, it undertook to develop approximately 6,400 acres of uncultivated, arid land for agricultural use.

The company has spent more than $3,000,000 in clearing, leveling, irrigating, and otherwise developing this land. The company began growing cantaloupes on part of the land in 1966, and has harvested a large cantaloupe crop there in each subsequent year. The cantaloupes are considered to be of higher quality that those grown in other areas of the State. Because they are highly perishable, cantaloupes must upon maturity be immediately harvested, processed, packed, and shipped in order to prevent spoliage. The processing and packing operations can be performed only in packing sheds. Because the company had no such facilities at Parker, it transported its 1966 Parker cantaloupe harvest in bulk loads to Blythe, California, 31 miles away, where it operated centralized and efficient packing shed facilities. There the melons were sorted, inspected, packed, and shipped. In 1967 the company again sent its Parker cantaloupe crop to Blythe for sorting, packing, and shipping. In 1968, however, the appellant entered the order here in issue, prohibiting the company from shipping its cantaloupes out of the State unless they were packed in containers in a manner and of a kind approved by the appellant. Because cantaloupes in the quantity involved can be so packed only ***140** in packing sheds, and because no such facilities were available to the company at Parker or anywhere else nearby in Arizona, the company faced imminent loss of its anticipated 1968 cantaloupe crop in the gross amount of $700,000. It was to prevent this unrecoverable loss that the District Court granted preliminary relief.[3]

After discovery proceedings, an agreed statement of facts was filed with the court. It contained a stipulation that the practical effect of the appellant's order would be to compel the company to build packing facilities in or near Parker, Arizona, that would take many months to construct and would cost approximately $200,000. After briefing and argument, the court issued a permanent injunction, finding that 'the order complained of constitutes an unlawful burden upon interstate commerce.'[4]

The appellant's threshold contention here is that even though the challenged order expressly forbids the interstate bulk shipment of the company's cantaloupes, it imposes no burden upon interstate commerce. If the Arizona Act is complied with, he argues, all that will be regulated will be the intrastate packing of goods destined for interstate commerce. Articles being made ready for interstate movement are not necessarily yet in interstate commerce, which, he says, begins only when the articles are delivered to the interstate shipper. In making this argument, the appellant relies on this Court's ***141** decisions in Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622, and Chassaniol v. City of Greenwood, 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004. Both of those cases involved taxes imposed ****847** by Mississippi on a cotton warehouse and compress business located within that State. The taxes were non-discriminatory and were levied both on the warehoused cotton itself and on certain processes necessary to ready it for subsequent resale. The taxes were challenged as unlawful burdens on interstate commerce, since most of the taxed cotton was ultimately to be shipped to out-of-state buyers. The Court upheld the constitutionality of the Mississippi taxes. It is not entirely clear from the Court's opinions whether their rationale was that the taxes were imposed before interstate commerce had begun, or that the burden upon commerce was at the most indirect and remote.

But in any event, the decisions do not support the argument that the order in the present case does not offect interstate commerce. In the first place, those cases involved cotton that had come to rest in Mississippi and '(b)efore shipping orders (were) given, it (had) no ascertainable destination without the state.' 291 U.S., at 21, 54 S.Ct. at 269. Here, by contrast, the perishable cantaloupes were destined to be shipped to an ascertainable location in California immediately upon harvest. Even more to the point, the taxes in Federal Compress and Chassaniol were imposed on goods and operations within the State, whereas the application of the statute at issue here would require that an operation now carried on outside the State must be performed instead within the State so that it can be regulated there. If the appellant's theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge. Yet such statutes ***142** have been consistently invalidated by this Court under the Commerce Clause. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147; Johnson v. Haydel, 278 U.S. 16, 49 S.Ct. 6, 73 L.Ed. 155; Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460. See also Lemke v. Farmers Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458; Shafer v. Farmers Grain Co., 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909. Thus it is clear that the appellant's order does affect and burden interstate commerce, and the question then becomes whether it does so unconstitutionally.

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Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed.2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See, e.g., Shafer v. Farmers Grain Co., supra.

At the core of the Arizona Fruit and Vegetable Standardization Act are the requirements that fruits and vegetables shipped from Arizona meet certain standards of wholesomeness and quality, and that they be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not 'materially ***143** misrepresent' the ****848** quality of the lot as a whole. [5] The impetus for the Act was the fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced. It was to prevent this that the Act was passed in 1929. The State has stipulated that its primary purpose is to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging.

We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized,' [6] or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State. These are surely legitimate state interest. Sligh v. Kirkwood, 237 U.S. 52, 61, 35 S.Ct. 501, 503, 59 L.Ed. 835. We have upheld a State's power to require that produce packaged in the State be packaged in a particular kind of receptacle, Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138. And we have recognized the legitimate interest of a State in maximizing the financial return to an industry within it. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. Therefore, as applied to Arizona growers who package their produce in Arizona, we may assume the constitutional validity of the Act. We may further assume that Arizona has full constitutional power to forbid the misleading use of its name on produce that was grown or packed elsewhere. And, to the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is 'not the legitimate ***144** subject of trade or commerce, nor within the protection of the commerce clause of the Constitution.' Sligh v. Kirkwood, supra, 237 U.S., at 60, 35 S.Ct., at 502; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032.

But application of the Act through the appellant's order to the appellee company has a far different impact, and quite a different purpose. The cantaloupes grown by the company at Parker are of exceptionally high quality. The company does not pack them in Arizona and cannot do so without making a capital expenditure of approximately $200,000. It transports them in bulk to nearby Blythe, California, where they are sorted, inspected, packed, and shipped in containers that do not identify them as Arizona cantaloupes, but bear the name of their California packer. [7] The appellant's order would forbid the company to pack its cantaloupes outside Arizona, not for the purpose of keeping the reputation of its growers unsullied, but to enhance their reputation through the reflected good will of the company's superior produce. The appellant, in other words, is not complaining because the company is putting the good name of Arizona on an inferior or deceptively packaged product, but because it is not putting that name on a product that is superior and well packaged. As the appellant's brief puts the matter, 'It is within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality ****849** Parker fruit was grown in Arizona'. [8]

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***145** Although it is not easy to see why the other growers of Arizona are entitled to benefit at the company's expense from the fact that it produces superior crops, we may assume that the asserted state interest is a legitimate one. But the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147; Johnson v. Haydel, 278 U.S. 16, 49 S.Ct. 6, 73 L.Ed. 155; Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460.

The appellant argues that the above cases are different because they involved statutes whose express or concealed purpose was to preserve or secure employment for the home State, while here the statute is a regulatory one and there is no hint of such a purpose. But in Toomer v. Witsell, supra, the Court indicated that such a burden upon interstate commerce is unconstitutional even in the absence of such a purpose. In Toomer the Court held invalid a South Carolina statute requiring that owners of shrimp boats licensed by the State to fish in the maritime belt off South Carolina must unload and pack their catch in that State before 'shipping or transporting it to another State.' What we said there applies to this case as well:
'There was also uncontradicted evidence that appellants' costs would be materially increased by the ***146** necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.' 334 U.S., at 403—404, 68 S.Ct., at 1166.[9]

While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

The judgment is affirmed.

All Citations

397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174

Footnotes

1 Ariz.Rev.Stat.Ann., Tit. 3, c. 3, Art. 4.

2 Ariz.Rev.Stat.Ann. s 3—503, subsec. C. (Supp.1969).

3 In view of the emergency situation presented, and the fact that only a narrow and specific application of the Act was challenged as unconstitutional, the court was fully justified in not abstaining from the exercise of its jurisdiction pending

litigation in the state courts. Compare Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329, 84 S.Ct. 1293, 1296, 12 L.Ed.2d 350 with Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68.

4 The opinion of the District Court is unreported.

5 Ariz.Rev.Stat.Ann. s 3—481, subsecs. 7 and 8.

6 Southern Pacific Co. v. Arizona, 325 U.S. 761, 796, 65 S.Ct. 1515, 1533, 89 L.Ed. 1915 (Douglas, J., dissenting).

7 California Agric. Code s 45691. The California Fruit, Nut and Vegetable Standardization Act, California Agric. Code, Division 17, is virtually identical to the Arizona Act. Each statute has the same primary purpose of preventing deceptive packs, and it is stipulated that the standard containers required for cantaloupes in the two States are exactly the same.

8 Appellant's Brief, 43.

9 Because of the State's recognized common-law property interest in its fish and wild game, Toomer presented an especially strong case for state control.

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77 Mich. 632
Supreme Court of Michigan.

RICHARDSON
v.
BUHL ET AL.

Nov. 15, 1889.

Synopsis
Appeal from circuit court, Wayne county; GARTNER, Judge.

Bill by David M. Richardson against Christian H. Buhl and Russell A. Alger to recover certain money paid to defendants under a contract. There was a decree for plaintiff, and defendants appeal.

Attorneys and Law Firms

****1102** ***633** *Henry A. Harmon,* for appellants.

W. M. Lillibridge, for appellee.

Opinion

SHERWOOD, C. J.

In 1879 the Richardson Match Company was located at Detroit. It was organized under the laws of this state, and the complainant owned or controlled all of its stock. Its business was manufacturing matches, but for 16 months previous to the 3d day of July, 1879, its factory had not been in operation. The capital stock ***634** of the company then was $75,000, consisting of 3,000 shares of $25 each. On the representations of the complainant to defendant Buhl as to the earning capacity of the match factory, the defendants became security for complainant on his bond to the government for $80,000, and indorsed the commercial paper of the company to the amount of about $50,000. To secure the defendants on these liabilities Mr. Richardson assigned to defendant Buhl 1,800 shares of the stock in the Richardson Match Company, and received from him therefor the following receipt and agreement. "Received of Mr. D. M. Richardson one thousand eight hundred shares of the stock of the Richardson Match Company, to be held by me for three years from July 1, 1879, as trustee, for the following purposes: To vote the same at all stockholders' meetings, both regular and special; to receive the dividends paid thereon, and retain the same, except one–sixth portion thereof, which I am to pay to D. M. Richardson. At the expiration of said three years, if all the obligations which I or R. A. Alger have assumed for said company are fully paid and satisfied, I am to transfer said stock to said D. M. Richardson. [Signed] C. H. BUHL. Detroit, July 3d, 1879." The 1,800 shares of stock thus assigned to Buhl gave him and Alger control of the Richardson Match Company, and the agreement that they should retain five–sixths of the dividends made upon that stock gave them one–half of all the dividends or profits earned by the company. After the receipt was given, Gen. Alger became president of the company and a director, and Mr. Buhl and two of his sons, with Mr. Richardson, were the other directors. Frank Buhl, one of the sons, was made secretary and treasurer, at a salary of $1,200 per year. The Richardson Match Company was conducted under ***635** the arrangement above stated until December 24, 1880. The paper indorsed by Buhl & Alger was discounted at 7 per cent. at the Detroit National Bank, in which they were interested, and the interest paid by the company in its ordinary course of business.

The Diamond Match Company was organized on the 3d day of December, 1880, under the laws of the state of Connecticut, for the purpose of uniting in one corporation all the match manufactories in the United States. Its object was to monopolize and control the business of making all the friction matches in the country, and to establish the price thereof; and it became

necessary to buy many plants which had become established in the business, or were preparing therefor, and all the property used in connection therewith, and to obtain promises from the owners and manufacturers that they would not engage in the business themselves, or indirectly, through others, for 10 or more years thereafter; and, for the purpose of obtaining the control and good–will of such factories and their properties, large powers were given by the legislature to the Diamond Match Company when organized, and under the by–laws by which it was controlled. The extent to which it was allowed to go in this direction in the accomplishment of its purposes appears in the articles of incorporation, in which it is stated, among other things, that the business of the company is "to manufacture, buy, sell, and deal in friction matches of all kinds, and all articles entering into the composition and manufacture thereof; to manufacture, buy, sell, and deal in machines and machinery, whether applicable to the manufacture of friction matches or to other purposes; to purchase, own, and sell exclusive rights under letters patent relating to the manufacture of friction matches, and to machines and machinery, ****1103** whether applicable to the manufacture of friction matches or to other purposes; to manufacture, buy, sell, and deal in animal pokes, tobacco pipes, curry combs, brushes, ***636** shoe–blacking, and shoe–dressing, and all articles entering into the composition and manufacture thereof; to purchase, own, and sell exclusive rights under letters patent relating to the manufacture of all the articles herein enumerated, and to machines and machinery applicable to the manufacture thereof; to buy, sell, own, and deal in any real or personal property necessary or convenient to the prosecution of said business,–and generally to do all things incidental to said business, and the proper management thereof."

The Diamond Match Company, in carrying out its purposes, found it necessary, in many instances, to buy a large quantity of useless material, and to pay large and exorbitant prices for the property purchased, which they could not make available; and in many cases in no other way was it possible to purchase the inactivity of manufacturers, and those who intended to enter into the business, and who would otherwise become competitors of the company in the trade. For the purpose of showing upon the books of the company the amount it was obliged to pay for unnecessary and useless property, and the excess in prices for the property they could use, and to silence and prevent all competition, the company opened two accounts,–one headed "Real Estate and Machinery," and the other "Purchase Account." The capital stock of the company consisted of $2,250,000, divided into $1,400,00 of common stock, and $850,000 of preferred stock. For five years the preferred stock was entitled to an annual dividend of 10 per cent. before any dividend was to be paid on the common stock. All corporations and individuals in the country, engaged in the business of making friction matches, desiring or consenting to transfer their property to the Diamond Match Company, did so upon valuations agreed upon, and received their pay therefor in the stock of the Diamond Match Company at par, and gave a bond to the company of the tenor and effect of that given by the ***637** Richardson Match Company when it entered the company, a copy of the condition of which reads as follows: "And the Richardson Match Co., hereby covenant and agree to and with the said the Diamond Match Company, that it shall not and will not at anytime or times, within twenty years from the date hereof, directly or indirectly engage in the manufacture or sale of friction matches, and that it will not aid, assist, or encourage any one else in said business, in the state of Michigan or anywhere else, where its doing so may conflict with the business and interests, or diminish the sales, or lessen the profits, of the Diamond Match Co.; and it is understood by it that the above covenant not to engage in the match business is a valuable and influencing consideration, without which the Diamond Match Company would not have purchased the above property; and for the true and faithful performance of said covenant it hereby binds itself, its successors and assigns, heirs, executors, and administrators, unto the said the Diamond Match Company in the sum of fifty thousand dollars, to be recovered and paid as and for liquidated damages." Mr. Richardson's individual bond is in substantially the same form, in a penalty of $25,000. Each proprietor subscribed for a certain amount of preferred stock, which he paid for by transferring to the company such matches and match materials as he or it had on hand when they entered the company, at an appraised value, and, if this was insufficient to pay for such stock, the balance was paid in cash; but common stock was paid for all real estate, machinery, patents, good–will, bonds to stay out of the business, and all other property transferred to the company at the valuation agreed upon when the proprietor or proprietors came into the company, except matches and match materials, for which preferred stock was issued. Under the arrangement by which any party sold and conveyed a match factory or other property to the company, he was to buy at its par value one–half as much preferred stock as he ***638** had received in common stock for his property. This was intended as the working capital for the new company, and every person who conveyed property to the company was obliged to give to the company a bond, such as is hereinbefore mentioned.

Under the policy above stated, through the energy of its officers and managers, the Diamond Match Company succeeded in securing control, substantially of all the factories in the country, with their several properties, and the owners thereof were

brought under its dictation, and the great monopoly became complete, and, as was expected by its proprietors, the gains realized by the company were enormous. Schedule A of the testimony shows that among the match factories that passed into the control of the Diamond Match Company at the time of its organization was that of the Richardson Match Company of Detroit, and at that time the agreement of July 3, 1879, between Richardson and Buhl, hereinbefore referred to, was in full force, as was the bond to the United States, and the liability of defendants, as Richardson's indorsers, was also in existence. One was for $65,000, and the other about $30,000 or $35,000, and as security against the payment of which defendants held 1,800 shares of the Richardson Match Company's stock; and, as further security, the company had been reorganized, and its management and control placed under the direction of the defendants, as hereinbefore stated, and which was successful. Its earnings after its reorganization were $29,675.39, and no dividends were declared, and it is conceded the defendants are entitled to $14,837.69 of these earnings; and it further appears that the defendants have never been called upon to pay anything on account of their said liability for the complainant, ****1104** or the Richardson Match Company. This was the situation of the Richardson Match Company, and Mr. Richardson, who had been in ***639** its employ since its reorganization, as general manager, at the time the Diamond Match Company was formed. It was, however, necessary, in consequence of the uncanceled liabilities of the defendants, and the desire of Mr. Richardson to raise more money to take the position he wished to in the new company, that a different agreement should be made from that of July 3, 1879, and that it should be between the complainant and defendants, and consummated before the Richardson Match Company became finally merged in the Diamond Match Company; and for this purpose Mr. Richardson, on the 22d day of November, 1880, submitted to the defendants the following proposition: “Detroit, Mich., Nov. 22, 1880. Messrs. Buhl & Alger: Proposition by me is as follows, viz.: *First.* To terminate the existing contract on the first day of January next, and to divide the net earnings on the basis of an inventory to be taken at that time, and to receive the dividend therefor. *Second.* To indorse my notes for the necessary amount to purchase $100,000 of the preferred stock of the proposed new company, or so much thereof as shall be equal to 50 per cent. of the value of the factory, after deducting my share of the net earnings, allowance to be made for the payment of my personal debts. Their interest in the earnings of said stock to cease on the 1st day of July, 1882, provided said notes shall have been paid from the dividends upon said stock, or otherwise, on or before said 1st day of July, 1882; the dividends received upon said stock to be applied to the payment of said notes. Said Buhl & Alger to receive one–half the dividends on the common and preferred stock of said company up to said 1st day of July, 1882, at the time of final settlement; provided, however, that in the event that no inventory of the assets and debts of the proposed new company shall be made on the 1st day of July, 1882, then the basis of settlement shall be as follows: Said Buhl & Alger shall receive one–quarter of the dividends made for the year 1882, and one–half the dividends for 1881, after deducting therefrom the ***640** amount paid for interest on the mortgage on the factory property, and upon the notes so indorsed. The common and preferred stock to be assigned to Mr. C. H. Buhl, except $30,000, which is to be assigned to said proposed new company as collateral security for the payment of the mortgages on the factory, and a further sum of $5,000 to be held by me. *Third.* In the event said notes shall not have been paid, and the debt duly liquidated, on or before the 1st day of July, 1882, said Buhl and Alger shall receive one–half the dividends for the full term of two years from January 1, 1881, to January 1, 1883, after deducting from the total dividends of said company the interest on said mortgage and said notes. Upon settlement being made under the second or the third proposition, as herein stated, [said stock] shall be reconveyed to me.” This proposition was accepted, with the following addition, made by Gen. Alger, and which was assented to by Mr. Richardson: “If, upon the expiration of two years from January 1, 1881, said notes are not paid, then Buhl and Alger are authorized to sell the necessary amount of stock to pay for the same, unless some further arrangement for carrying them along is agreed upon between them and myself.” Mr. Richardson testifies that, upon the basis of the contract contained in the foregoing proposition, as modified by Gen. Alger's addition thereto, he attended the meeting for the organization of the Diamond Match Company, and put into the new company the factory of the Richardson Match Company, at the sum of $190,000, and subscribed for $95,000 of the preferred stock. The $190,000 for the factory was paid for in common stock.

The defendants gave their indorsements to the amount of $35,000 to enable the complainant to pay for his preferred stock, which he paid into the Diamond Match Company. The contract, as modified by Gen. Alger had not yet been signed by the parties. At the general's ***641** suggestion, a meeting of the parties was had on the 27th of December, 1880, in Detroit, at which Gen. Alger proposed that an additional claim should be made to the modified contract. Mr. Richardson objected to the proposed change, but to which, he claims, under the then situation and circumstances, he was finally compelled to yield his assent, and the contract, as finally concluded, reads as follows: “Memorandum of agreement between David M. Richardson, of the first part, and Christian H. Buhl and Russell A. Alger, of the second part, all of Detroit, Michigan, witnesseth as follows:

Whereas, it is deemed expedient to wind up the business of the Richardson Match Company, and to unite its interests with the other match manufacturing interests of the United States in one corporation, to be known as the 'Diamond Match Company,' organized under the laws of Connecticut; and whereas, said Richardson desires to furnish ninety–five thousand dollars towards the necessary working capital of said Diamond Match Company, and also to sell his factory, and the machinery connected with same, to said Diamond Match Company: Now, therefore, for the purpose of making such consolidation, the parties hereto consent that the lands, buildings, machinery, tools and fixtures of the Richardson Match Company be sold and conveyed to the said Diamond Match Company for the sum of one hundred and ninety thousand dollars, ($190,000,) to be paid for in the common stock of said Diamond Match Company at its par value. And as it will be necessary for said Richardson to borrow the principal part of said ninety–five thousand dollars, for which he is to receive ninety–five thousand dollars of the preferred stock of said Diamond Match Company at its par value, ****1105** the said second parties agree to indorse the said Richardson's notes for such sum as is required to make up said ninety–five thousand dollars, ($95,000,) after deducting the amount of the net earnings due said Richardson from the proceeds of the Richardson Match Company since July 1st, 1879, and to raise the money on said notes. ***642** An inventory of all the matches and match materials of the said Richardson Match Company on hand January 1st, 1881, shall be made, and such property sold. The inventory and valuation of said personal property, upon which the same is sold, shall be the basis of settlement between the parties in the division of the profits of the Richardson Match Company. The first party is to assume the payment of the principal and interest of a mortgage on the property of the Richardson Match Company for $28,200, held by the Connecticut Mutual Life Insurance Company, and is to deposit with said Diamond Match Company $40,000 of said common stock, at its par value, as security for such payment. All the remaining stock, both preferred and common, is to be taken in the name of the first party, and, with the exception of ten shares of said common stock, is to be immediately transferred by him to said C. H. Buhl, to be held by said Buhl as security for the indorsements as above stated, and any and all other indebtedness of said first party or said Richardson Match Company to said parties, or either of them, and also as security to said second parties for their interest in the profits upon the said stock of the Diamond Match Company. The debts due to the said Richardson Match Company are to be collected, and its indebtedness paid. A settlement is to be made between the parties hereto, and the profits divided, as provided in the agreement of July 3, 1879, except that the share of the profits belonging to said first party shall be applied to the payment of his debt to the Richardson Match Company, and in payment of any moneys due from him to either of said second parties; and what remains shall be contributed by him as a part of said $95,000, and on the sum contributed he shall receive interest from the dividends paid on said stock. The dividends on the stock of the Diamond Match Company, both common and preferred, including the $40,000 pledged as aforesaid, and the 10 shares retained by said Richardson, for one year and six months from the first day of January, 1881, shall be applied–*first,* to the payment of interest on said mortgage to the Connecticut Mutual Life Insurance Company; *second,* to the payment of interest on the notes so indorsed by said second parties; and, *third,* to the payment of interest to each of the parties ***643** hereto on the money advanced by them respectively in making up said sum of $95,000. Of what there remains, one–quarter shall be paid to each of the said second parties, and the other half applied to the payment of the principal of the notes so indorsed by said second parties, and of any advances that may be made by them. The said second parties agree that they will advance to said first party the dividends belonging to them as aforesaid, to be used in taking up said notes indorsed by them, and take therefor the notes of said first party, payable on or before March 1st, 1883, with interest at the rate of seven per cent. per annum, and hold said stock as security for the payment thereof. If all said notes indorsed by said second parties as aforesaid are not paid by September 1st, 1882, then said second parties shall be entitled each to one–fourth of the dividends on all said stock for the whole of the year 1882. The notes to be given by said first party to said second parties for any cash that they may advance to make up said $95,000 shall bear interest at seven per cent. per annum, and be payable on or before September 1st, 1882. If all of the notes indorsed by said second parties as aforesaid, and any notes given by said first party to said second parties, are not paid by March 1st, 1883, the said second parties are hereby authorized to sell said stock at public auction after thirty days' published notice, and apply the proceeds, or so much thereof as may be required, to the payment of said notes, interest, and expenses; the above provisions to apply to all original notes and renewals thereof. *It is expressly understood that said second parties are to receive one–half,* [*each one–quarter,*] *after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one–half the dividends; and in settlement with said first party, he is to pay them, in addition to one–half the dividends declared, the one–half of any surplus or reserved fund which, if divided, would pertain to said stock; and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account, and, if such settlement is made at the end of a half–year, the earnings of the whole year*

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shall be averaged so that the said second parties shall receive the full half of the earnings of said stock for the whole year; provided, that on such settlement the second parties shall estimate such earnings from the trial balance or books of said ***644** *Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company, and shall take into consideration improvements that have been made out of the earnings thereof.* [SIGNED] DAVID M. RICHARDSON. R. A. ALGER. C. H. BUHL. Detroit, Dec. 28th, 1880." That portion of this contract printed in italics is the clause added at the suggestion of Gen. Alger, and objected to by Mr. Richardson. In other respects, the agreement is substantially the same as that agreed upon in Richardson's proposition, dated November 22, 1880.

A supplementary agreement was entered into November 22, 1881, extending the contract of December 28, 1880, so that it should ****1106** cover the entire period of two years. It is as follows: "It is also agreed that the earnings of the stock of the Diamond Match Company. both common and preferred, including the $40,000 pledged to the Diamond Match Company, and the ten shares held by said Richardson, for two years after the first day of January, 1881, shall be applied, as stated in said agreement of December 28, 1880; it being the intention hereof to provide that said second parties shall each receive one–quarter of the earnings of said stock for two years from the first day of January, 1881,–that is, one–quarter of the full earnings of the stock for 1881 and 1882, instead of for one year and six months, as stated in said agreement. In all other respects, except providing security for additional loans, as hereinbefore stated, said agreement is to remain in force and unchanged."

It is conceded that the liability of the defendants for the complainant upon their indorsements did not exceed at any time $85,000, and that at the time of the commencement of this suit such liability of defendants, both upon such indorsements and upon the bond to the government, except a small note of $3,150, had been paid, and that said note has since been satisfied, and that said ***645** defendants have never been obliged to pay a dollar on account of such liability. The Richardson stock, held by Buhl, in the Richardson Match Company was exchanged for stock in the Diamond Match Company, which took the place of the other. The dividends received on the Richardson stock amounted to $114,000, and the Richardson Match Company, when its business was closed up, showed profits to be divided of $29,675.39, on an aggregate of profits of $143,675.39. The interest paid on the mortgage on the Richardson match factory and on the paper indorsed amounted to $9,609.29, showing a net profit to be divided of $134,066, and leaving $67,033 to go to Buhl & Alger, and the same amount to Richardson. At the time the bill was filed Buhl & Alger had received $68,400, and since that time $24,400, making an aggregate of $25,767,–more than one–half of the amount to be divided, as claimed by complainant. It is this last amount, with interest thereon, making a total of $35,319.25, for which complainant claimed and obtained at the circuit a decree, and from which defendants appeal. "Complainant alleges that the said sum of $68,400, so received by the said defendants, comprises the full one–half of all the net earnings of said stock so held by the defendant Buhl during the years 1881 and 1882, together with the amounts received as aforesaid by them from the net earnings of the stock of the Richardson Match Company; not charging against said stock any loss on account of the purchase and sale by said Diamond Match Company of other match factories. And your orator, upon like information and belief, avers that, during the said two years, the said stock has earned no surplus, and that there is no reserve fund which, if divided, would pertain to said stock, and that the said defendants have now received all that is due them upon the said stock, under the terms of the three contracts above referred to." ***646** The foregoing allegations are denied by the defendants, and they allege that the net earnings of the Richardson stock in the Diamond Match Company for 1881 were $81,099.31, and for 1882 are $139,757.92; and that there is still due them on their share thereof $58,683, less the dividend of $24,400, received by them since the bill was filed. Thus it will be discovered that the issue in the case is made upon the proper construction of the contract of December 28, 1880, assuming that said contract is in all respects a valid instrument.

When the Diamond Match Company opened the books containing the account of its transactions, as has been hereinbefore alluded to, all of its purchases were kept in two accounts. Under the head of "Purchase Account," were matches and match material, appraised at cash value; and it would appear that under the head of "Real Estate and Machinery Account," everything else purchased by the company as taken and appraised was included. This account was represented by the common stock of the company, with which it was purchased; the other by preferred stock, which was given for it. There seems to be a general understanding that the property contained in the purchase account, or very much of it, was taken by the company at a large overvaluation,–in some instances many times its worth was given; and it is claimed in like manner was there an overvaluation made and listed under the head of "Real Estate and Machinery Account;" that this became necessary in order to make the desired purchases, and secure the complete monopoly intended,–that is to say, to increase the value of the company's stock and

its gains by destroying all competition, whether the result of individual enterprise or corporate action, and to secure the non–action of the proprietors of the factories taken in or purchased. The ***647** parties to this suit were all benefited by such action in proportion to the amount of stock held by each, as all were stockholders. It is true the complainant's stock, or a large portion of it, was at the time held by defendants as security, but that does not change the rules or the results which govern and follow the action taken by the company.

There appear in the record, as returned to this court from the books of the Diamond Match Company, commencing with August 1, 1881, 19 trial balances, ending with August 1, 1883. That of December 31, 1881, shows a credit to the profit and loss account of $647,433.42, and a debit of $7,175.67, leaving a balance to the credit of that account of $640,257.76. The trial balance of December 30, 1882, shows a credit to the profit and loss account of $1,118,848.42, and a debit of $15,496.29, leaving a balance to the credit of that account of $1,102,352.13. The board of directors, on February 9, 1882, adopted the following ****1107** preamble and resolutions: "Whereas, the several ledgers and general balance sheets of the company, at date of December 31, 1881, show the aggregate net earnings of all the factories earning a profit to be the sum of $647,433.43, and the aggregate losses of the factories making losses to be $7,175.67, making total net earnings, $640,257.76; and whereas, there are standing on the several ledgers of the company various purchase accounts, which are debited with an aggregate sum of $173,733.89, which represent the cost of same up to December 31, 1881; and whereas, the actual value of said purchase accounts is $5,500: therefore, resolved, that the difference of $168,233.39 between the actual value and the book value of these purchase accounts be charged to Dr. of net earnings of the company for 1881, and that the president be instructed to furnish the managers with the proper forms of entries to carry this resolution into effect. Whereas, many of the real–estate and machinery accounts of this company have a book value, or are ***648** charged with a cost sum in excess of their actual value; therefore, resolved, that $247,023.87 of the sum described as net earnings be applied to the reductions of the book values of such real–estate and machinery accounts, and in such proportions as the executive committee may approve, and that the president be requested to furnish the managers with the proper entries to carry this resolution into effect on the several books of account and ledgers of the company." At the same meeting of the board of directors, a 10 per cent. dividend was declared. Three 10 per cent. dividends were declared for 1882; the last one at a meeting of the board February 14, 1883. At the same meeting it was resolved "that the balance remaining as credit of profit and loss account, after providing for the dividend declared at this meeting, be applied to the reduction of the book values of the company's real–estate and machinery accounts, such reduction to be apportioned among the several properties by the executive committee; the amount so to be applied being $310,922.26." Subsequently a reduction was made in the purchase account of $117,429.87. This fact is admitted by a stipulation of the parties, and by said stipulation the following is given as a tabulated statement of the action of the company's board of directors in disposing of the profit and loss account for the two years in question:

.... 1881		
To the credit of profit and loss account...........................		$640,257 26
Dividends...	$225,000 00	
Charged off purchase acct..	168,233 89	
Charged off real estate and machinery acct......................	247,023 87	
		$640,257 76
.... 1882		
To the credit of profit and loss acct.................................		$1,103,352 13
Dividends...	$675,000 00	
Charged off purchase acct..	117,429 87	
Charged off real estate and machinery account................	310,922 26	

$1,103,352 13

***649** The defendants claim that they are entitled under their agreement to their share of the amounts charged off, the same as though these amounts had not been so disposed of upon the books. Complainant claims that defendants are entitled to one–half of the dividends paid, and no more; that dividends and net earnings mean the same thing, as used in the contract between the parties in this case; and that they have received the amount to which they are entitled. It is undoubtedly true that "the function of a profit and loss account is to show earnings, or the lack of them; and that every item being credited which ought to be credited, and everything being charged which ought to be charged, the profit and loss account will show what the net earnings or losses are;" and I am satisfied that the learned counsel for the complainant is correct when he says "that the first thing to be done by any manufacturer, who would ascertain his net earnings during the preceding year, is to take a careful inventory of what he has left, including his plant and machinery, and then make just and full allowances for all losses and shrinkages of every kind that he has suffered in his property during the year, and for all expenses of every kind, ordinary or extraordinary, that have occurred during the year, and, having made such inventory, and deducted such losses and shrinkage of every kind, his net earnings will be the difference between all his investments in his business and all his expenses of every kind on the one hand, and this new inventory, with the deductions properly made, and all that he has received of every kind on the other hand; and if his books are properly kept, and proper deductions made, these net earnings will finally appear on the balance sheet to the credit of the profit and loss account." There is no dispute as to what the items "charged off" in the account represented, and that they stood upon the books of the company, under the direction of ***650** its managers, in the account as debited to the company. It represented the agreed valuation of the property purchased by the company, or taken into it at its organization, and for which common stock of the company was issued or given to the owner or owners, and included therein is the bond, required in each instance where a purchase was made, that the vendor would not prosecute the business for a series of years thereafter.

The stock was taken at par, the amount of the valuation and the amount of the stock being equal, and the value of the stock was never less than when taken, and remained at par except when it sold for more; and it is a little difficult to see why it should be said, so long as this was the case, that there was a loss to the company or a shrinkage in value. It is true the value of the chattel property and real estate conveyed to the company may have greatly depreciated; but at the same time the rights surrendered to the company by the owner under his bond might, in the mean time, have greatly appreciated. It ****1108** seems quite certain that no means are shown, if any exist, by which such loss or depreciation could be made to appear to a board of directors or to any one else with any degree of certainty.

But in this case a different question arises. Alger & Buhl, as regards the complainant, and their rights under this contract, occupy the position of third parties, and their interests are controlled by these relations to the company. The amount they were to receive for their indorsements in no way depended upon the discretionary power of the board of directors. The net profits of the company mentioned in the contract served only to fix the amount they were to receive for their indorsements of the complainant's commercial paper. He had their indorsements to the extent he desired, and greatly to his pecuniary advantage, as the record plainly shows. ***651** Notwithstanding the success of the company's operations has given to the terms upon which he received the aid of defendants almost the appearance of extortionate requirements, however, the hazard of the venture very much modifies this appearance when it is considered that a failure of the enterprise might have resulted in great financial disaster to defendants.

No question is raised as to the validity of the contract between the parties, or upon its invalidity upon the ground of public policy, or for any other cause. It is treated by the parties on both sides as a valid instrument, to be construed and enforced by the court as such, and no unwillingness is expressed by either side to abide the correct construction when ascertained; but it is claimed by complainant that, if the construction is to be given to it contended for by defendants' counsel, equity and good conscience will have been violated to an extent requiring the exercise of the restraining power of a court of chancery to prevent the injury and wrong, not intended by the defendants when the instrument was made, and which at that time was entirely unanticipated by complainant. But it must be recollected that the object to be accomplished by the reorganization of the enterprise was by all the parties the same; that the means to be resorted to in the accomplishment of the object desired, if successful, had no respect for the equitable or first right of any person under other and different circumstances; and that the complainant, as well as the defendants, were active participants in the business of the company and its proceeds, seeking the accomplishment of the same object, and participated largely in adopting the means to be employed for that purpose; and if such object or means were

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reprehensible or inequitable, all the parties, the complainant as well as the defendants, are "under the same condemnation," and a court of equity will leave the parties, ***652** when such is the case, where it finds them,–outside the rules of courts of justice, "*in pari delicto*,"–and they must settle their own grievances and unlawful transactions.

The fact in this case appears plainly that the amount promised the defendants, and for which defendants ask payment, was to enable the complainant to occupy a place in the company which would give him a better position to share in the profits of the monopoly equally with the defendants. If it were our duty to adjudicate the rights of these parties, we should, under the circumstances, give the same construction to the contract in question, and apply the same rules, we would to any other agreement where no equitable considerations are involved. There is nothing ambiguous in the language used, nor is the object intended obscure. It was to organize and put into operation one of the greatest monopolies of the age, or rather to aid in so doing. This is not a case where the complainant, as a stockholder, is seeking to obtain profits or dividends wrongfully withheld from him, or applied by a board of directors to an improper purpose, and the same rules do not govern the question that would be raised upon such an issue; but the simple question in the case is, what should the parties be held to mean from the language they have used, and does the action taken by the board of directors in disposing of the earnings of the stock during the two years in question bind the defendants as to the amount they are entitled to receive under their contract? It is evident to me that it does not, but that the defendants, independent of such action, may go behind it if necessary, and show that there has been no shrinkage of values,–no losses sustained,–and first what the net earnings of the stock have been during the two years. Except in case it becomes necessary to make estimates ***653** of earnings of the stock, it must be made from the trial balances, as they appear upon the books of the company, and in which case the defendants are to make proper allowances for the loss and shrinkage of the company's property, and shall take into consideration improvements that have necessarily been made in the proper conduct of the business. It is expressly stated in the agreement that the defendants were not to receive one–half of the dividends merely which might be declared, but one–half of the net earnings of the stock; and it is not stated in the contract how or by whom such net earnings are to be ascertained. That portion of the contract upon which the contest arises best speaks for itself, and I do not think there is any chance for two opinions upon the subject of its proper construction. It says: "It is expressly understood that said second parties are to receive one–half, [each one–quarter,] after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one–half of the dividends; and in settlement with said first party he is to pay them, in addition to one–half the dividends declared, the one–half of any surplus or reserved fund which, if divided, would pertain to said stock; and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond ****1109** Match Company of other match factories shall be taken into account; and, if such settlement is made at the end of a half–year, the earnings of the whole year shall be averaged so that the said second parties shall receive the full half of the earnings of said stock for the whole year: provided, that on such settlement the second parties shall estimate such earnings from the trial balance on books of said Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company, and shall take into consideration improvements that have been made out of the earnings thereof." A close inspection of this paragraph of the contract ***654** very clearly discloses, I think, that in the settlement to be made between these parties it was expressly provided that in ascertaining the half of the net earnings of the stock, to which the defendants were entitled, no such "charging off" from such earnings was to be allowed; and I do not think, as is urged by complainant's counsel, "that, in the absence of bad faith or mistake, the action of the board of directors in reducing the amounts to the credit of the profits and loss accounts is conclusive upon the parties to this suit as to the amount of the earnings or profits to be divided between them;" and it is of no consequence whether their action in this regard can be impeached or not, if the defendants are not bound by the action of the board of directors. There is no doubt but that the Diamond Match Company in doing a legitimate business would have had the right to have the par value of its shares of stock maintained out of the profits or earnings of the company, and it was maintained; and for that purpose it was entirely unnecessary for its board of directors to direct any "charging off," as was done in this case. Its stock was not only at all times at par, but, as we have before said, largely above par, and has always been at a premium; and from its earnings the year after the agreement ended the complainant himself received a stock dividend amounting to $70,000. If it were necessary, but little difficulty would be found, I think, in showing that the sums "charged off" were not properly expenses or losses in running the business of the company. I think the learned counsel for defendants was right in saying "it was an acquisition of the very property the company at the outset had determined to acquire, and was of more permanent value than if it had been invested in new ***655** factories. The object of the company was to crush others, that it might be valuable. It did that, and expended out of its earnings for 1881 and 1882 $285,663.76, not as an expense of running the business, but for the purpose, and with the inevitable effect, of increasing its

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property. What was acquired with this money was none the less property because intangible. Every dollar thus expended added itself to the value of the business, and became a permanent part of it. Richardson owns $285,000 of the stock of this company, [exclusive of the $70,000 acquired by stock dividend from earnings of 1883,] every dollar of which was permanently enhanced in value by these expenditures. It was a permanent investment. The company had determined to monopolize the business, and therefore the more perfect the monopoly became the more valuable its property became. Every factory it bought and closed, every patent it acquired, every good–will it purchased, every man it bought up, added to the value of its stock not only the amount paid, but, from the very necessity of the case, very much more. Of course, when the agreement between these parties now before us for construction was entered into, no one could certainly tell that the defendants could even realize a dollar of profits from this venture, while their liabilities assumed were very large. It could not be known that the dividends would ever be sufficient even to pay the interest on the notes indorsed, or the mortgage of $28,000 covering the property, which was their only security, and which was to be first paid before they could realize any thing by way of profit. The success of the enterprise was one not altogether free from doubt. Upon this point, Richardson himself says in his testimony he considered he was assuming a great risk in turning his factory into the Diamond Match Company. Such was the complexion of things at the time the contract was made, as viewed by him, and he had then had 25 years' experience in the business. If the parties could have known then what they know now, or could they have foreseen the ***656** almost fabulous future pecuniary success of this company, the contract made would have been regarded as both unconscionable and oppressive.

But in construing the instrument, if a valid one, the circumstances and surroundings under which it was made, should be taken into consideration. Neither mistake nor fraud is claimed to have been used by the parties, or either of them, at the time it was procured and entered into, and we are asked to treat it as valid and binding, and construe it accordingly; and in this respect so far in the discussion I have complied with counsel's request, and in so doing have been unable to take any view of the case which will sustain the decree made by the learned circuit judge. But an examination of the record, and the character of the transactions out of which the contract grew, and the object intended to be accomplished by it, as I have found them, raise another, and far more important, question, and which it becomes the imperative duty of this court to pass upon, whether raised by counsel or not.

When a contract is brought before us for construction and adjudication, its validity is necessarily involved, and it is usually the first point to which the attention of the court is challenged by counsel; but in this case, when, upon the argument, attention was called to this feature of the case, it was allowed ****1110** to pass by counsel upon both sides without discussion. I have therefore expressed my views of the case as presented by the parties, and will now pass to the question which it is not needful for counsel to present in order to secure the action of this court in disposing of the same.

I think no one can read the contract in question, and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Diamond Match Company. ***657** This object is openly and boldly avowed. Not only does this appear in its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on, but the testimony of Gen. Alger himself avers it, and settles its character beyond question. The organization is a manufacturing company. The business in which it is engaged is making friction matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business, and the manner of carrying it on. The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 of people. The article thus completely under their control for the last 50 years has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes, and in carrying out its object, ***658** that the contract in this case was made between these parties, and which we are now asked to aid in enforcing. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying

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on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution, and is not allowed to exist under express provision in several of our state constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts.

In my judgment, not only is the enterprise in which ***659** the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy. The decree at the circuit should be reversed, and the complainant's bill dismissed, with costs.

CHAMPLIN, J.

I concur with the chief justice in dismissing the bill of complaint, for reasons which render it unnecessary to discuss the merits of the controversy between the parties.

It appears from the testimony that the Diamond Match Company was organized for the purpose of controlling the manufacture and trade in matches in the United States and Canada. The object was to get all the manufacturers of matches in the United States to enter into a combination and agreement, by which the manufacture and output of all the match factories should be controlled by the Diamond Match Company. Those manufacturers who would not enter into the scheme were to be bought out, those who proposed to engage in the business were to be bought off, and a strict watch was to be exercised to discover any person who proposed to engage in such business, that he might be prevented, if possible. All who entered into the combination, and all who were bought off, were required to enter into bonds to the Diamond Match Company that they would not, directly or indirectly, engage in the manufacture or sale of friction matches, nor aid nor assist nor encourage any one else in said business, where, by doing so, it might conflict with the business interests, or diminish the sales, or lessen the profits, of the Diamond Match Company. These restrictions varied in individual cases ****1111** as to the time it was to continue, from 10 to 20 years. Thirty–one manufacturers, being, substantially, all the factories where ***660** matches were made in the United States, either went into the combination, or were purchased by the Diamond Match Company, and out of this number all were closed except about 13. Gen. Alger was a witness in the case, and was asked by his counsel the following question: "*Question.* It appears that during the years 1881 and 1882 large sums of money were expended to keep men out of the match business, remove competition, buy machinery and patents, and in some instances purchase other match factories. I will ask you to state the reasons, if any there are, why those sums should not be treated as an expense of the business, and charge off from this account?" To which he replied: "*Answer.* Because the price of matches was kept up to correspond, so as to pay these expenses, and make large dividends above what could have been made had those factories been in the market to compete with the business." It also appears from the testimony of Gen. Alger that the organization of the Diamond Match Company was in a measure due to his exertions. There is no doubt that all the parties to this suit were active participants in perfecting the combination called "The Diamond Match Company," and that the present dispute grows out of that transaction, and is the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company. Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of ***661** this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434; Coal Co. v. Coal Co., 68 Pa. St. 186; Salt

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Co. v. Guthrie, 35 Ohio St. 672; Craft v. McConoughy, 79 Ill. 346; Hoffman v. Brooks, 11 Week. Cin. Law Bul. 258; Hannah v. Fife, 27 Mich. 172; Alger v. Thacher, 19 Pick. 51. It is also well settled that, if a contract be void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. Foote v. Emerson, 10 Vt. 344; and see Hanson v. Power, 8 Dana, 91; Pratt v. Adams, 7 Paige, 616; Piatt v. Oliver, 1 McLean, 300, 2 McLean, 277; Stanton v. Allen, 5 Denio, 434. It is not necessary that the parties, or either of them, should rely upon the fact that the contract is one which it is against the policy of the law to enforce. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves.

CAMPBELL, J., concurred with CHAMPLIN, J.

LONG, J.

I concur in the result reached by Mr. Justice SHERWOOD in this case. I am not, however, entirely satisfied with many of the reasons he gives for his conclusions.

It clearly appears that the defendants were never members of the Diamond Match Company, and never held a dollar of its stock, except by way of security for the loan of their credit to complainant. In 1879 D. M. Richardson was the head of a corporation, organized under the laws of this state, having a capital of $75,000, consisting of 3,000 shares at $25 each; but such was its financial ***662** condition that for more than 16 months prior to July 3, 1879, its doors were closed, and all operations suspended. In these straits complainant called upon defendant Buhl, and induced him, in conjunction with Gen. Alger, on that date to indorse the commercial paper of the corporation to the amount of $50,000, and to become security on his government bond in the sum of $80,000. In order to be secured, defendants took 1,800 shares of the capital stock of the corporation, with a right to vote it at stockholders' meetings, to receive dividends thereon, paying one–sixth part of such dividends to complainant, and, at the expiration of three years, if all the obligations to defendants were paid, the whole of the stock held by defendants was to be transferred to complainant. Defendants, after this arrangement was made, gave their attention to the business, and it was carried on till December 24, 1880, under that arrangement. During this time, under the management of the defendants from July 3, 1879, to December 24, 1880, a period of a little over 16 months, this corporation, whose doors had been closed for the prior 16 months, had earned nearly $30,000. On November 22, 1880, complainant made a written proposition to the defendants to modify and change, in great measure, the agreement of July 3, 1879, which was agreed to by the defendants, after some additions were made at the instance of Gen. Alger. This proposition, and the amendment thereto, are set out in full in the opinion of Mr. Justice SHERWOOD, and need not be stated here. This new arrangement was not yet signed by the parties, and on December 27, 1880, the parties met, and a contract was formulated, with certain other additions, which the parties finally all assented to and signed. It appears that before this contract was finally agreed ***663** upon and executed, and on December 3, 1880, the Diamond Match Company was organized under the laws of the state of Connecticut, and complainant desired to transfer the property and business of the Richardson Match Company to that, and to take its stock in payment ****1112** therefor. In order to do this complainant was compelled to take one–half as much stock in the new company as his properties and business were placed at in the new company, and to pay cash therefor. The property and business were placed in the new company at $190,000, in shares of the new company's common stock, and complainant took $95,000 of the preferred shares. In order to raise this amount of money complainant again called upon the defendants to indorse notes to that amount, less the net earnings of the Richardson Match Company since July 3, 1879. The defendants agreed to advance to complainant the dividends belonging to them arising from the business of the Richardson Match Company, to be used in taking up the notes indorsed by them, and to take the notes of the complainant therefor, payable March 1, 1883, with interest at 7 per cent., and it was provided that all notes given to defendants by complainant to make up the $95,000 should draw interest at 7 per cent. The Connecticut Mutual Life Insurance Company held a mortgage of $28,200 on the properties of the Richardson Match Company. It was provided in the contract that, upon a transfer of these properties over to the Diamond Match Company, complainant should deposit with it $40,000 of the common stock to secure the payment of this mortgage, and that complainant should take all the balance of the stock, both common and preferred, in his own name, and at once indorse it over to defendant Buhl, to secure the defendants upon their indorsements, and their interest in the profits of the Diamond ***664** Match Company. The contract also provided that, if these notes were not paid by March 1, 1883, defendants might sell these shares of stock at public auction, after 30

days' published notice, to meet such payments, interest, and expenses. The rights and interests of the parties were then fixed by the contract in the following terms: “It is expressly understood that said second parties are to receive one–half, [each one–quarter,] after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one–half the dividends; and in settlement with said first party he is to pay to them in addition the one–half of any surplus or reserved fund which, if divided, would pertain to said stock, and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account; and, if such settlement is made at the end of a half year, the earnings of the whole year shall be averaged, so that the said second parties shall receive the full half of the earnings of said stock for the whole year: provided, that on such settlement the second parties shall estimate such earnings from the trial balance or books of said Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company, and shall take into consideration improvements that have been made out of the earnings thereof.” This contract was executed on December 28, 1880, and the Richardson Match Company's properties and business transferred to the Diamond Match Company, and the stock transferred to Mr. Buhl, as the contract provided. It is conceded that since the making of this contract the notes signed by defendants have been paid from dividends received from the Diamond Match Company. The whole contention, therefore, arises upon the construction of this portion of the contract referring to net profits, and the interest of defendants thereunder. ***665** It appears that in the organization of the Diamond Match Company the various parties put in their plants and good–will of the business at exorbitant prices,–much more than they were actually worth; and also gave a bond not to engage in similar business, for which they were paid large amounts in stock of the company. Upon an inventory of the property the following year, the properties were put in at their actual worth. The accounts of the company were kept upon the ledger under two general heads,–one real estate and machinery accounts, and the other purchase accounts. Under the new inventory large deficits appeared in these two accounts, and, under a resolution of the board of directors, sufficient of the earnings of the company were taken out and applied to make up these balances, and these accounts were charged off. Complainant claims that the balance to be divided among the stockholders after these deductions, and deductions for expenses, represented the net profits; and that defendants, under their contract with hin, must share in this loss.

Defendants claim that they are entitled, under the agreement, to their share of the amounts charged off the same as though these amounts were not so disposed of by the board of directors upon the books. I think the defendants are correct in their interpretation of the contract. The contract is not ambiguous. It was entered into by all the parties understandingly, and no fraud or mistake is charged. The contract expressly provided that “on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account,” etc. Whatever the rights of the parties may be as between the complainant and the Diamond Match Company to ***666** charge these amounts off, and apply the earnings of the company to such purpose, certainly the defendants could in no manner be bound by the action of the board of directors in that regard. They were not members of that company, and held the stock directly from the complainant by way of security for their indorsements, and for the payment of their claims, which were certainly and definitely fixed by the contract. The net earnings of the company, as mentioned in the contract, served only to fix the amount they were to receive. The complainant states in his bill ****1113** that the net earnings of the stock of said company, so held as security by defendants, including these amounts charged off applicable thereto, amounted, in the year 1881, to the sum of $81,099.31, and for the year 1882 amounted to $139,757.93. While these amounts are large, yet complainant gets one–half, and the defendants each one–quarter, by the terms of the contract. As is well stated by Mr. Justice SHERWOOD: “Of course, when the parties entered into the contract, no one could certainly tell that the defendants would ever realize a dollar of profits from the venture, while their liabilities assumed were very large.” It could not be known that the net earnings would ever be sufficient to pay the interest on the notes indorsed, or the mortgage of $28,000 covering the property, and which was to be first paid before the defendants could have any of the earnings applied upon these notes, or share in any balance. The success of the enterprise was not free from doubt, and complainant himself thought he was assuming a great risk in turning the property into the Diamond Match Company. He took this risk, and the defendants shared it with him therein by the indorsement of his notes to nearly $85,000. They were together to get one–half of the net earnings for a certain definite period after the payment ***667** of these notes and mortgage. Complainant was then entitled to the whole stock, freed and unincumbered from any claims of defendants whatever, and the stock was to be assigned to him. The stock had made fabulous earnings, more than complainant or defendants could have ever anticipated or hoped. Complainant, as appears from this record, has reaped the benefits of defendants' financial standing and business abilities. The defendants found him with a plant stocked at $75,000, and his shop closed. They opened the doors,

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and put the machinery in motion, which, according to complainant's statement, has an earning capacity of more than $100,000 annually, and made the complainant the owner and possessor of $190,000 of the common stock and $95,000 of the preferred shares fully paid for. It would seem that one ought to be satisfied with such results, and be willing that those who have carried the burden, and upon whom the loss would fall if disaster overtook the enterprise, should share in the profits when crowned with success, especially when the rights, duties, and obligations of the parties are fixed with so much certainty as appears by this contract. Complainant's bill is entirely devoid of equity, and there is nothing appearing in the record showing that defendants have not treated the complainant in the most honorable manner, and under the true interpretation of the contract.

Whether the organization of the Diamond Match Company is one against public policy, I do not propose to discuss. Defendants are not members of the company, nor have they ever been. The claim the right to sell and dispose of this stock so held by them as security, and to realize therefrom the amount then due under the contract. By the terms of the contract they have the right to pursue this course. ***668** By the decree of the court below they were restrained from making this sale. I agree with Mr. Justice SHERWOOD that the decree of the court below be dismissed, with costs.

MORSE, J., did not sit.

All Citations

77 Mich. 632, 43 N.W. 1102, 6 L.R.A. 457

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778 F.3d 775
United States Court of Appeals, Ninth Circuit.

SAINT ALPHONSUS MEDICAL CENTER–NAMPA INC.; Saint Alphonsus Health System Inc.; Saint Alphonsus Regional Medical Center, Inc.; Treasure Valley Hospital Limited Partnership; Federal Trade Commission; State of Idaho, Plaintiffs–Appellees,
and
Idaho Statesman Publishing, LLC; The Associated Press; Idaho Press Club; Idaho Press–Tribune LLC; Lee Publications Inc., Intervenors,
v.
ST. LUKE'S HEALTH SYSTEM, LTD.; St. Luke's Regional Medical Center, Ltd.; Saltzer Medical Group, Defendants–Appellants.

No. 14–35173
|
Argued and Submitted Nov. 19, 2014.
|
Filed Feb. 10, 2015.

Synopsis
Background: Federal Trade Commission (FTC), State of Idaho, and local hospitals brought action against two health care providers, alleging that providers' merger violated the Clayton Act and state law. The United States District Court for the District of Idaho, B. Lynn Winmill, Chief Judge, 2014 WL 3895205, 2014 WL 407446, entered judgment for plaintiffs and ordered divestiture of affiliation between health care providers. Health care providers appealed.

Holdings: The Court of Appeals, Hurwitz, Circuit Judge, held that:

evidence supported District Court's determination that relevant geographic market for primary care physician services consisted of city;

evidence did not support District Court's finding that provider would raise prices in hospital-based ancillary services market;

evidence supported district court's finding that FTC established prima facie case that merger was anticompetitive;

District Court did not clearly err in concluding that health care provider did not rebut prima facie case; and

District Court did not abuse its discretion in ordering divestiture of affiliation between providers.

Affirmed.

Procedural Posture(s): On Appeal.

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Appeal from the United States District Court for the District of Idaho, B. Lynn Winmill, Chief District Judge, Presiding. D.C. Nos. 1:12–cv–00560–BLW, 1:13–cv–00116–BLW.

Before: RICHARD R. CLIFTON, MILAN D. SMITH, JR., and ANDREW D. HURWITZ, Circuit Judges.

OPINION

HURWITZ, Circuit Judge:

This case arises out of the 2012 merger of two health care providers in Nampa, Idaho. The Federal Trade Commission ("FTC") and the State of Idaho sued, alleging that the merger violated § 7 of the Clayton Act, 15 U.S.C. § 18, and state law; two local hospitals filed a similar complaint. Although the district court believed that the merger was intended to improve patient outcomes and might well do so, the judge nonetheless found that the merger violated § 7 and ordered divestiture.

As the district court recognized, the job before us is not to determine the optimal future shape of the country's health care system, but instead to determine whether this particular merger violates the Clayton Act. In light of the careful factual findings by the able district judge, we affirm the judgment below.

I. Background

A. The Health Care Market in Nampa, Idaho

Nampa, the second-largest city in Idaho, is some twenty miles west of Boise and has a population of approximately 85,000. Before the merger at issue, St. Luke's Health Systems, Ltd. ("St. Luke's"), an Idaho-based, not-for-profit health care system, operated an emergency clinic in the city. Saltzer Medical Group, P.A. ("Saltzer"), the largest independent multi-specialty physician group in Idaho, had thirty-four physicians practicing at its offices in Nampa. The only hospital in Nampa was operated by Saint Alphonsus Health System, Inc. ("Saint Alphonsus"), a part of the multistate Trinity Health system. Saint Alphonsus and Treasure Valley Hospital Limited Partnership ("TVH") jointly operated an outpatient surgery center. [1]

The largest adult primary care physician ("PCP") provider in the Nampa market was Saltzer, which had sixteen PCPs. [2] St. Luke's had eight PCPs and Saint Alphonsus nine. Several other PCPs had solo or small practices.

B. The Challenged Acquisition

Saltzer had long had the goal of moving toward integrated patient care and risk-based reimbursement. After unsuccessfully attempting several informal affiliations, including one with St. Luke's, Saltzer sought a formal partnership with a large health care system.

In 2012, St. Luke's acquired Saltzer's assets and entered into a five-year professional service agreement ("PSA") with the Saltzer physicians (the "merger" or the ***782** "acquisition"). [3] Saltzer received a $9 million payment for goodwill. The initial PSA contained hortatory language about the parties' desire to move away from fee-for-service reimbursement, but included no provisions implementing that goal. An amended PSA, however, contained some quality-based incentives. The merger did not require Saltzer doctors to refer patients to the St. Luke's Boise hospital, nor did it require that Saltzer physicians use St. Luke's facilities for ancillary services.

C. Procedural History

In November 2012, the Private Hospitals filed a complaint in the District of Idaho seeking to enjoin the merger under Clayton Act § 7. [4] The complaint alleged anticompetitive effects in the relevant markets for "primary care physician services," "general acute-care inpatient services," "general pediatric physician services," and "outpatient surgery services." The district court denied

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a preliminary injunction, noting that: (1) the PSA did not require referrals to St. Luke's, minimizing any immediate harm to the Private Hospitals; (2) implementation of the PSA was to take place over time; and (3) the PSA provided a process for unwinding the transaction if it were declared illegal.

In March 2013, the FTC and the State of Idaho filed a complaint in the district court seeking to enjoin the merger pursuant to the Federal Trade Commission Act ("FTC Act"), the Clayton Act, and Idaho law. [5] This complaint alleged anticompetitive effects only in the adult PCP market. The district court consolidated this case with the one filed by the Private Hospitals, and after a nineteen-day bench trial, found the merger prohibited by the Clayton Act and the Idaho Competition Act because of its anticompetitive effects on the Nampa adult PCP market. [6]

The district court expressly noted the troubled state of the U.S. health care system, found that St. Luke's and Saltzer genuinely intended to move toward a better health care system, and expressed its belief that the merger would "improve patient outcomes" if left intact. Nonetheless, the court found that the "huge market share" of the post-merger entity "creates a substantial risk of anticompetitive price increases" in the Nampa adult PCP market. Rejecting an argument by St. Luke's that anticipated post-merger efficiencies excused the potential anticompetitive price effects, the district court ordered divestiture. This appeal followed.

II. Standard of Review

We review the district court's findings of fact for clear error and its conclusions of law de novo. *Husain v. Olympic Airways,* 316 F.3d 829, 835 (9th Cir.2002), *aff'd,* 540 U.S. 644, 124 S.Ct. 1221, 157 L.Ed.2d 1146 (2004). The question is whether a finding of fact is "clearly erroneous," not whether there is a "compelling case" for an alternative finding. *California v. Am. Stores Co.,* 872 F.2d 837, 842 (9th Cir.1989), *rev'd on other grounds,* 495 U.S. 271, 110 S.Ct. 1853, 109 L.Ed.2d 240 (1990). The district ***783** court's choice of remedy is reviewed for abuse of discretion. *Theme Promotions, Inc. v. News Am. Mktg. FSI,* 546 F.3d 991, 1000 (9th Cir.2008) (citing *United States v. Alisal Water Corp.,* 431 F.3d 643, 654 (9th Cir.2005)).

III. The Clayton Act § 7 Analysis

A. Overview of the Clayton Act

The great Yankee catcher Yogi Berra is reputed (likely apocryphally) to have said that it's "tough to make predictions, especially about the future." *The Perils of Prediction,* Economist, June 2, 2007, at 96. [7] Yet that is precisely what this case requires. Because § 7 of the Clayton Act bars mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18, judicial analysis necessarily focuses on "probabilities, not certainties," *Brown Shoe Co. v. United States,* 370 U.S. 294, 323, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). This "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their incipiency." *United States v. Phila. Nat'l Bank,* 374 U.S. 321, 362, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963) (internal quotation marks omitted).

Section 7 claims are typically assessed under a "burden-shifting framework." *Chi. Bridge & Iron Co. v. FTC,* 534 F.3d 410, 423 (5th Cir.2008). The plaintiff must first establish a prima facie case that a merger is anticompetitive. *See Olin Corp. v. FTC,* 986 F.2d 1295, 1305 (9th Cir.1993) (discussing how plaintiff's establishment of a prima facie case on statistical evidence was the first step in the analysis). The burden then shifts to the defendant to rebut the prima facie case. *See id.; Am. Stores,* 872 F.2d at

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842 (citing *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 631, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974)). "[I]f the [defendant] successfully rebuts the *prima facie* case, the burden of production shifts back to the Government and merges with the ultimate burden of persuasion, which is incumbent on the Government at all times." *Chi. Bridge & Iron,* 534 F.3d at 423. [8]

B. The Relevant Market

"Determination of the relevant product and geographic markets is a necessary predicate to deciding whether a merger contravenes the Clayton Act." *Marine Bancorporation,* 418 U.S. at 618, 94 S.Ct. 2856 (internal quotation marks omitted). Definition of the relevant market is a factual question "dependent upon the special characteristics of the industry involved and we will not disturb such findings unless clearly erroneous." ***784** *Twin City Sportservice, Inc. v. Charles O. Finley & Co.,* 676 F.2d 1291, 1299 (9th Cir.1982). Although the parties agree that the relevant product market in this case is adult PCPs, St. Luke's vigorously disputes the district court's determination that Nampa is the relevant geographic market. We find no clear error in that factual finding.

The relevant geographic market is the "area of effective competition where buyers can turn for alternate sources of supply." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.,* 924 F.2d 1484, 1490 (9th Cir.1991) (alteration omitted) (quoting *Oltz v. St. Peter's Cmty. Hosp.,* 861 F.2d 1440, 1446 (9th Cir.1988)) (internal quotation marks omitted). Put differently, "a market is the group of sellers or producers who have the actual or potential ability to deprive each other of significant levels of business." *Rebel Oil Co. v. Atl. Richfield Co.,* 51 F.3d 1421, 1434 (9th Cir.1995) (quoting *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.,* 875 F.2d 1369, 1374 (9th Cir.1989)) (internal quotation marks omitted). The plaintiff has the burden of establishing the relevant geographic market. *See* *United States v. Conn. Nat'l Bank,* 418 U.S. 656, 669–70, 94 S.Ct. 2788, 41 L.Ed.2d 1016 (1974).

A common method to determine the relevant geographic market, and the one used by the district court, is to find whether a hypothetical monopolist could impose a "small but significant nontransitory increase in price" ("SSNIP") in the proposed market. *See* *Theme Promotions,* 546 F.3d at 1002; *see also* *In re Se. Milk Antitrust Litig.,* 739 F.3d 262, 277–78 (6th Cir.2014) (describing the relevant geographic market as one in which "buyers ... respond to a SSNIP by purchasing regardless of the increase"); U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* ("Merger Guidelines") § 4 (2010). [9] If enough consumers would respond to a SSNIP by purchasing the product from outside the proposed geographic market, making the SSNIP unprofitable, the proposed market definition is too narrow. *See* *Theme Promotions,* 546 F.3d at 1002.

Market definition thus perforce focuses on the anticipated behavior of buyers and sellers. *See, e.g.,* *Rebel Oil,* 51 F.3d at 1430, 1434–35. In the health care industry, insurance companies effectively act both as buyers and sellers. *See* *FTC v. Freeman Hosp.,* 69 F.3d 260, 270 n. 14 (8th Cir.1995); Gregory Vistnes, *Hospitals, Mergers, and Two–Stage Competition,* 67 Antitrust L.J. 671, 672 (2000). Noting that "the vast majority of health care consumers are not direct purchasers of health care—the consumers purchase health insurance and the insurance companies negotiate directly with the providers," the district court correctly focused on the "likely response of insurers to a hypothetical demand by all the PCPs in a particular market for a [SSNIP]." [10]

The district court found that a hypothetical Nampa PCP monopolist could profitably impose a SSNIP on insurers. Citing testimony that Nampa residents "strongly prefer access to local PCPs," the ***785** court found that "commercial health plans need to include Nampa PCPs in their networks to offer a competitive product." "Given this dynamic—that health plans must offer Nampa Adult PCP services to Nampa residents to effectively compete—Nampa PCPs could band together and successfully demand a [SSNIP] (or reimbursement increase) from health plans."

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St. Luke's argues that the district court erred by considering only the current behavior of Nampa consumers, not their likely response to a SSNIP. St. Luke's is of course correct that geographic market definition involves prospective analysis—it predicts consumer response to a hypothetical price increase. *See* *FTC v. Tenet Health Care Corp.,* 186 F.3d 1045, 1053–54 (8th Cir.1999). But that is precisely what the district court did. The court not only examined present Nampa consumer behavior, but also concluded that it would not change in the event of a SSNIP.

This determination was supported by the record. Evidence was presented that insurers generally need local PCPs to market a health care plan, and that this is true in particular in the Nampa market. For example, Blue Cross of Idaho has PCPs in every zip code in which it has customers, and the executive director of the Idaho Physicians Network testified that it could not market a health care network in Nampa that did not include Nampa PCPs. Evidence also indicated that consumers would not change their behavior in the event of a SSNIP. Experts testified that because health care consumers only pay a small percentage of health care costs out of pocket, the impact of a SSNIP likely would not register. Similarly, there was testimony that consumers choose physicians on factors other than price. The court was unconvinced by evidence that insurers could defend against a SSNIP by steering consumers to non-Nampa PCPs. [11]

For similar reasons, there also was no clear error in the district court's determination that evidence that one-third of Nampa residents travel to Boise for PCPs did not prove that a significant number of other residents would so travel in the event of a SSNIP. Those who traveled generally went to PCPs near their Boise places of employment. Thus, the court reasonably found this statistic not determinative of whether other Nampa residents would be willing to travel.

C. The Plaintiffs' Case

Once the relevant geographic market is determined, a prima facie case is established if the plaintiff proves that the merger will probably lead to anticompetitive effects in that market. *See Olin,* 986 F.2d at 1305; *see also Chi. Bridge & Iron,* 534 F.3d at 423. A prima facie case can be established simply by showing high market share. *United States v. Syufy Enters.,* 903 F.2d 659, 664 n. 6 (9th Cir.1990); *see also* *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 716 (D.C.Cir.2001). However, "statistics concerning market share and concentration, while of great significance, [a]re not conclusive indicators of anticompetitive effects...." ***786** *United States v. Gen. Dynamics Corp.,* 415 U.S. 486, 498, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974); *see also* *FTC v. Warner Commc'ns Inc.,* 742 F.2d 1156, 1163 n. 1 (9th Cir.1984). Thus, plaintiffs in § 7 cases generally present other evidence as part of the prima facie case. *See* *Gen. Dynamics,* 415 U.S. at 498, 94 S.Ct. 1186 ("[O]nly a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." (quoting *Brown Shoe,* 370 U.S. at 322 n. 38, 82 S.Ct. 1502)); *see also Chi. Bridge & Iron,* 534 F.3d at 431 (noting that market share data was "just one element in the Government's strong *prima facie* case"); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,* 77 Antitrust L.J. 49, 50–60 (2010) (noting the trend in merger enforcement to consider factors in addition to market share).

The district court held that the plaintiffs established a prima facie case because of the post-merger entity's: (1) market share; (2) ability to negotiate higher PCP reimbursement rates with insurers; and (3) ability to "charge more [ancillary] services at the higher hospital billing rates." The court also found that "entry into the market has been very difficult and would not be timely to counteract the anticompetitive effects of the Acquisition." St. Luke's does not challenge the barriers-to-entry finding; we review the others in turn for clear error.

1. Market Share

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A commonly used metric for determining market share is the Herfindahl–Hirschman Index ("HHI"). *See* *ProMedica Health Sys., Inc. v. FTC,* 749 F.3d 559, 568 (6th Cir.2014); *H.J. Heinz,* 246 F.3d at 716. HHI is "calculated by summing the squares of the individual firms' market shares," which "gives proportionately greater weight to the larger market shares." Merger Guidelines § 5.3. The analysis "consider[s] both the post-merger level of the HHI and the increase in the HHI resulting from the merger." *Id.* The Merger Guidelines classify markets as (1) unconcentrated (HHI below 1500); (2) moderately concentrated (HHI between 1500 and 2500); or (3) highly concentrated (HHI above 2500). *Id.* Mergers that increase the HHI more than 200 points and result in highly concentrated markets are "presumed to be likely to enhance market power." *Id.* "Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive." *H.J. Heinz,* 246 F.3d at 716.

The district court calculated the post-merger HHI in the Nampa PCP market as 6,219, and the increase as 1,607. St. Luke's does not challenge these findings. As the district court correctly noted, these HHI numbers "are well above the thresholds for a presumptively anticompetitive merger (more than double and seven times their respective thresholds, respectively)." *See* *ProMedica,* 749 F.3d at 568 (noting that a merger with similar HHI numbers "blew through those barriers in spectacular fashion").

2. PCP Reimbursements

The district court also found that St. Luke's would likely use its post-merger power to negotiate higher reimbursement rates from insurers for PCP services. Recognizing that the § 7 inquiry is based on a prediction of future actions, *see* *Phila. Nat'l Bank,* 374 U.S. at 362, 83 S.Ct. 1715, this finding was not clearly erroneous.

Because St. Luke's and Saltzer had been each other's closest substitutes in Nampa, the district court found the acquisition limited the ability of insurers to negotiate with the merged entity. Pre-acquisition internal correspondence indicated that the merged companies would use this increased bargaining power to raise prices. ***787** An email between St. Luke's executives discussed "pressur[ing] payors for new directed agreements," and an exchange between Saltzer executives stated that "[i]f our negotiations w/ Luke's go to fruition," then "the clout of the entire network" could be used to negotiate favorable terms with insurers. The court also examined a previous acquisition by St. Luke's in Twin Falls, Idaho, and found that St. Luke's used its leverage in that instance to force insurers to "concede to their pricing proposal."

3. Ancillary Services

The district court's finding that St. Luke's would raise prices in the hospital-based ancillary services market [12] is more problematic. The court found that St. Luke's would "exercise its enhanced bargaining leverage from the Acquisition to charge more services at the higher hospital-based billing rates." Because insurers and providers typically negotiate for all services as part of the same contract, the district court found that St. Luke's increased leverage with respect to PCP services would allow it to demand higher fees for ancillary services.

The problem with this conclusion is that the district court made no findings about St. Luke's' market power in the ancillary services market. Absent such a finding, it is difficult to conclude that the merged entity could easily demand anticompetitive prices for such services. Perhaps the court was suggesting that St. Luke's would engage in tying, "a device used by a seller with market power in one product market to extend its market power to a distinct product market." *Cascade Health Solutions v. PeaceHealth,* 515 F.3d 883, 912 (9th Cir.2008). Although various antitrust statutes, including Sherman Act §§ 1 and 2, Clayton Act § 3, and FTC Act § 5, address tying, Clayton Act § 7 does not expressly prohibit the practice. A leading antitrust treatise cautions against condemning a merger for potential tying effects as "superfluous and overdeterrent." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ("Areeda") ¶ 1144a (2010).

Wholly aside from these conceptual difficulties, the factual underpinnings of the district court's conclusion are suspect. The documents cited by the district court merely state that St. Luke's hopes to *increase revenue* from ancillary services, not that it plans to charge higher prices. An increase in revenue could occur in a variety of ways not involving increased prices, such as increased Medicare payments or increased volume from Saltzer referrals. The district court did not find that Saltzer physicians would inappropriately label in-house services as hospital-based, or that they would force patients to travel to the St. Luke's hospital in Boise for services that could be provided in-house in Nampa. And the court did not identify any past actions that would allow it to predict that St. Luke's would act anti-competitively in the future in the ancillary services market. Indeed, in post-merger negotiations with Blue Shield, St. Luke's did not do so. We thus find that the ancillary services finding is not supported by the record.

4. The Prima Facie Case

But absent the ancillary services finding, the district court's conclusion that a prima facie case was established is amply ***788** supported by the record. "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *Hosp. Corp. of Am. v. FTC,* 807 F.2d 1381, 1389 (7th Cir.1986).

The extremely high HHI on its own establishes the prima facie case. *See* *H.J. Heinz,* 246 F.3d at 716; *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 982–83 & n. 3 (D.C.Cir.1990). In addition, the court found that statements and past actions by the merging parties made it likely that St. Luke's would raise reimbursement rates in a highly concentrated market. *See* *Hosp. Corp.,* 807 F.2d at 1388–89 (expressing concern that a history of cooperation among hospitals could lead to collusion when a merger caused the market to become more concentrated). And, the court's uncontested finding of high entry barriers "eliminates the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthens the FTC's case." *H.J. Heinz,* 246 F.3d at 717.

The facts found by the district court are similar to those in other cases in which a prima facie violation of § 7 was established. *See, e.g., Chi. Bridge & Iron,* 534 F.3d at 431–32 (high HHI, limited rivals, high entry barriers, and customer perception); *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.,* 140 F.3d 1228, 1236–37 (9th Cir.1998) (reversing summary judgment for defendant because undisputed facts showed high market share and "insurmountable barriers to entry"); *FTC v. Univ. Health, Inc.,* 938 F.2d 1206, 1219–20 & n. 27 (11th Cir.1991) (high market concentration, high entry barriers, and evidence that defendants intended to eliminate competition with the merger); *Am. Stores,* 872 F.2d at 841–43 (high market share, and insufficient evidence of low entry barriers to rebut the prima facie case). The district court did not clearly err in its factual findings, which adequately support its ultimate conclusion that the plaintiffs established "a prima facie case that the Acquisition is anti-competitive."

D. The Rebuttal Case

Because the plaintiffs established a prima facie case, the burden shifted to St. Luke's to "cast doubt on the accuracy of the Government's evidence as predictive of future anticompetitive effects." *Chi. Bridge & Iron,* 534 F.3d at 423. The rebuttal evidence focused on the alleged procompetitive effects of the merger, particularly the contention that the merger would allow St. Luke's to move toward integrated care and risk-based reimbursement. [13]

1. The Post–Merger Efficiencies Defense

The Supreme Court has never expressly approved an efficiencies defense to a § 7 ***789** claim. *See* *H.J. Heinz,* 246 F.3d at 720. Indeed, *Brown Shoe* cast doubt on the defense:

> Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

370 U.S. at 344, 82 S.Ct. 1502. Similarly, in *FTC v. Procter & Gamble Co.,* the Court stated 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." 386 U.S. 568, 580, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967).

Notwithstanding the Supreme Court's statements, four of our sister circuits (the Sixth, D.C., Eighth, and Eleventh) have suggested that proof of post-merger efficiencies could rebut a Clayton Act § 7 prima facie case. *See* *ProMedica,* 749 F.3d at 571; *H.J. Heinz,* 246 F.3d at 720–22; *Tenet,* 186 F.3d at 1054–55; *Univ. Health,* 938 F.2d at 1222–24. [14] The FTC has also cautiously recognized the defense, noting that although competition ordinarily spurs firms to achieve efficiencies internally, "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." Merger Guidelines § 10; *see also* Oliver E. Williamson, *Economies as an Antitrust Defense Revisited,* 125 U. Pa. L.Rev. 699, 699 (1977) ("Sometimes ... a merger will ... result in real increases in efficiency that reduce the average cost of production of the combined entity below that of the two merging firms."). However, none of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense; thus, even in those circuits that recognize it, the parameters of the defense remain imprecise.

The status of the defense in this circuit remains uncertain. A quarter of a century ago, we rejected an efficiencies defense in *RSR Corp. v. FTC,* 602 F.2d 1317, 1325 (9th Cir.1979). *RSR,* however, involved an argument that the merger would allow the defendant to compete more efficiently *outside* the relevant market. *Id.* More recent cases focus on whether efficiencies in the relevant market negate the anticompetitive effect of the merger in that market. *See* *Univ. Health,* 938 F.2d at 1222. Even after *RSR,* several district courts in this circuit have suggested that there could be such a defense. *See, e.g., United States v. Bazaarvoice, Inc.,* No. 13–cv–00133–WHO, 2014 WL 203966, at *64, *72–73 (N.D.Cal. Jan. 8, 2014); *United States v. Oracle Corp.,* 331 F.Supp.2d 1098, 1174–75 (N.D.Cal.2004); *but see* *California v. Am. Stores Co.,* 697 F.Supp. 1125, 1132–33 (C.D.Cal.1988) (finding that *RSR* barred ***790** an efficiencies defense), *rev'd on other grounds,* 872 F.2d 837, *rev'd on other grounds,* 495 U.S. 271, 110 S.Ct. 1853.

We remain skeptical about the efficiencies defense in general and about its scope in particular. It is difficult enough in § 7 cases to predict whether a merger will have future anticompetitive effects without also adding to the judicial balance a prediction of future efficiencies. Indeed, even then-Professor Bork, a sharp critic of Clayton Act enforcement actions, *see, e.g.,* Robert H. Bork and Wade S. Bowman, Jr., *The Crisis in Antitrust,* 65 Colum. L.Rev. 363, 373 (1965), rejected the efficiencies defense, calling it "spurious" because it "cannot measure the factors relevant to consumer welfare, so that after the economic extravaganza was completed we would know no more than before it began," Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 124 (1978). Judge Richard Posner has regularly expressed similar views. *See* Richard A. Posner, *Antitrust Law* 133 (2d ed.2001) ("I said back then that there should be no general defense of efficiency. I still think this is right. It is rarely feasible to

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determine by the methods of litigation the effect of a merger on the costs of the firm created by the merger."); Richard A. Posner, *Antitrust Law: An Economic Perspective* 112 (1976) ("I would not allow a generalized defense of efficiency."); *cf.* Frank H. Easterbrook, *The Limits of Antitrust,* 63 Tex. L.Rev. 1, 39 (1984) ("[N]either judges nor juries are particularly good at handling complex economic arguments....").

Nonetheless, we assume, as did the district court, that because § 7 of the Clayton Act only prohibits those mergers whose effect "may be substantially to lessen competition," 15 U.S.C. § 18, a defendant can rebut a prima facie case with evidence that the proposed merger will create a more efficient combined entity and thus increase competition. For example, if two small firms were unable to match the prices of a larger competitor, but could do so after a merger because of decreased production costs, a court recognizing the efficiencies defense might reasonably conclude that the transaction likely would not lessen competition. *See* Merger Guidelines § 10 ("Merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets.... [I]ncremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price.").

Because we deal with statutory enforcement, the language of the Clayton Act must be the linchpin of any efficiencies defense. The Act focuses on "competition," so any defense must demonstrate that the prima facie case "portray[s] inaccurately the merger's probable effects on competition." *Am. Stores,* 872 F.2d at 842. In other words, a successful efficiencies defense requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive.

Courts recognizing the defense have made clear that a Clayton Act defendant must "clearly demonstrate" that "the proposed merger enhances rather than hinders competition because of the increased efficiencies." *United States v. Long Island Jewish Med. Ctr.,* 983 F.Supp. 121, 137 (E.D.N.Y.1997). Because § 7 seeks to avert monopolies, proof of "extraordinary efficiencies" is required to offset the anticompetitive concerns in highly concentrated markets. *See* *H.J. Heinz,* 246 F.3d at 720–22; *see also* Merger Guidelines § 10 ("Efficiencies almost never justify a merger to monopoly or near-monopoly."). The defendant must also demonstrate that the claimed efficiencies are "merger-specific," *see* ***791** *United States v. H & R Block, Inc.,* 833 F.Supp.2d 36, 89–90 (D.D.C.2011), which is to say that the efficiencies cannot readily "be achieved without the concomitant loss of a competitor," *H.J. Heinz,* 246 F.3d at 722; *see also* Merger Guidelines § 10 & n. 13. Claimed efficiencies must be verifiable, not merely speculative. *See, e.g.,* *FTC v. CCC Holdings Inc.,* 605 F.Supp.2d 26, 74–75 (D.D.C.2009); *Oracle,* 331 F.Supp.2d at 1175; *see also* Merger Guidelines § 10.

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* *Univ. Health,* 938 F.2d at 1222 (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. [15] 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 ***792** 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 Procter & Gamble,* 386 U.S. at 580, 87 S.Ct. 1224. 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.

IV. Remedy

"The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 326, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961). "[T]he relief must be directed to that which is necessary and appropriate ... to eliminate the effects of the acquisition offensive to the statute ... and assure the public freedom from its continuance." *Ford Motor Co. v. United States,* 405 U.S. 562, 573 n. 8, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972) (internal citation and quotation marks omitted). Section 7 remedies should not be punitive, but "courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *E.I. du Pont,* 366 U.S. at 326, 81 S.Ct. 1243.

The customary form of relief in § 7 cases is divestiture. *See id.* at 330, 81 S.Ct. 1243 (noting that most litigated Clayton Act § 7 cases "decreed divestiture as a matter of course"); *see also ProMedica,* 749 F.3d at 573; *RSR,* 602 F.2d at 1325–26; *Ash Grove Cement Co. v. FTC,* 577 F.2d 1368, 1379–80 (9th Cir.1978). Divestiture is the "most important of antitrust remedies," and "should always be in the forefront of a court's mind when a violation of § 7 has been found." *E.I. du Pont,* 366 U.S. at 330–31, 81 S.Ct. 1243; *see also id.* at 329, 81 S.Ct. 1243 ("The very words of § 7 suggest that an undoing of the acquisition is a natural remedy."). This is especially true when the government is the plaintiff. *See Am. Stores,* 495 U.S. at 280–81, 110 S.Ct. 1853 ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition.").

St. Luke's nonetheless argues that the district court erred in ordering divestiture because (1) divestiture will not actually restore competition; (2) divestiture eliminates the transaction's procompetitive benefits; and (3) a proposed conduct remedy was preferable. We find no abuse of discretion in the district court's choice of remedy.

Although divestiture may generally be the most straightforward way to restore competition, *E.I. du Pont,* 366 U.S. at 331, 81 S.Ct. 1243, a district court must consider whether it will effectively do so under the facts of each case. "A primary concern is whether the offending line of commerce, if disassociated from the merged entities, can survive as a viable, independent entity."

FTC v. PepsiCo, Inc., 477 F.2d 24, 29 n. 8 (2d Cir.1973). St. Luke's argues that Saltzer would no longer be able to compete post-divestiture, and that divestiture therefore would not restore competition in the Nampa PCP market.

The district court had ample basis, however, for rejecting that contention. Indeed, in opposing a preliminary injunction, St. Luke's assured the court that divestiture was feasible. Moreover, Saltzer's employees were assured by management that they would have their jobs no ***793** matter the result of the litigation, and a number of them testified that Saltzer would be viable as an independent entity. The district court also noted that "any financial hardship to Saltzer will be mitigated by St. Luke's payment of $9 million for goodwill and intangibles as part of the Acquisition...."

Nor did the district court abuse its discretion in its consideration of the costs and benefits of divestiture. The court expressly determined that divestiture was appropriate because any benefits of the merger were outweighed by the anticompetitive concerns. *See* *Am. Stores,* 872 F.2d at 843. The Supreme Court has specifically stated that "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *E.I. du Pont,* 366 U.S. at 334, 81 S.Ct. 1243.

Finally, the district court did not abuse its discretion in choosing divestiture over St. Luke's' proposed "conduct remedy"—the establishment of separate bargaining groups to negotiate with insurers. [16] Divestiture is "simple, relatively easy to administer, and sure," *E.I. du Pont,* 366 U.S. at 331, 81 S.Ct. 1243, while conduct remedies risk excessive government entanglement in the market, *see* U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* § II n. 12 (2011) (noting that conduct remedies need to be "tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process"). The district court, moreover, found persuasive the rejection of a similar proposal in *In re ProMedica Health System, Inc.,* No. 9346, 2012 WL 1155392, at *48–50 (F.T.C. March 28, 2012), *adopted as modified,* 2012 WL 2450574 (F.T.C. June 25, 2012). Even assuming that the district court might have been within its discretion in opting for a conduct remedy, we find no abuse of discretion in its declining to do so. *See* *ProMedica,* 749 F.3d at 572–73 (holding that the FTC did not abuse its discretion in choosing divestiture over a proposed conduct remedy).

V. Conclusion

For the reasons stated above, we **AFFIRM** the judgment of the district court.

All Citations

778 F.3d 775, 2015-1 Trade Cases P 79,053, 15 Cal. Daily Op. Serv. 1412, 2015 Daily Journal D.A.R. 1699

Footnotes

1 For simplicity, this opinion sometimes refers to St. Luke's and Saltzer collectively as "St. Luke's," and Saint Alphonsus and TVH collectively as the "Private Hospitals."

2 The district court found that "[a]dult PCP services include physician services provided to commercially insured patients aged 18 and over by physicians practicing internal medicine, family practice, and general practice."

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3 The parties and the district court regarded the PSA as the functional equivalent of an employment agreement, and we assume the same.

4 The Private Hospitals filed an amended complaint in January 2013.

5 The Idaho Competition Act is "construed in harmony" with federal antitrust law, Idaho Code §§ 48–102(3), –106, and the district court held that the antitrust analysis is the same for each. The parties do not contend otherwise.

6 The court therefore did not address the Private Hospitals' contentions with respect to the other product markets.

7 This quotation is not included in the definitive book of Berra quotations, *see* Yogi Berra, *The Yogi Book: "I Really Didn't Say Everything I Said!"* (1998), and its provenance is at best unclear, *see, e.g., The Yale Book of Quotations* 92 (Fred R. Shapiro ed., 2006) (attributing a variant to Niels Bohr, but noting that the exact authorship is disputed).

8 The application of this framework in the Ninth Circuit is not rigid. Thus, in determining whether the prima facie case has been rebutted, a district court may consider evidence submitted by the plaintiff in the casein-chief. *See Olin,* 986 F.2d at 1305 (finding no burden-shifting error because the FTC had determined that the rebuttal evidence was insufficient to overcome the prima facie showing); *see also Chi. Bridge & Iron,* 534 F.3d at 424–25 (stating that *Olin* "allows [a court] to preserve the *prima facie* presumption if the [defendant] ... fails to satisfy the burden of production in light of contrary evidence in the *prima facie* case").

9 Although the Merger Guidelines are "not binding on the courts," *Olin,* 986 F.2d at 1300, they "are often used as persuasive authority," *Chi. Bridge & Iron,* 534 F.3d at 431 n. 11.

10 This "two-stage model" of health care competition is "the accepted model." John J. Miles, 1 *Health Care & Antitrust L.* § 1:5 (2014). In the first stage, providers compete for inclusion in insurance plans. *See* Vistnes, *supra,* at 674. In the second stage, providers seek to attract patients enrolled in the plans. *See id.* at 681–82. Because patients are "largely insensitive" to price, the second stage "takes place primarily over non-price dimensions." *Id.* at 682. Thus, antitrust analysis focuses on the first stage. *Id.* at 692.

11 Extensive evidence was offered about Micron, a Boise employer that created a health care plan including financial incentives for employees to use certain providers; the plan caused a substantial portion of Micron employees residing in Nampa to switch to non-Nampa PCPs. St. Luke's argues that this evidence proved that Nampa consumers would respond to a SSNIP. But the district court did not clearly err in finding the Micron example unpersuasive. Micron's cost differentials were much higher than a SSNIP, Boise PCPs were close to work for Micron's employees, and it was unclear whether other employers would be willing or able to replicate Micron's program.

12 Ancillary services, such as x-rays and diagnostic testing, are sometimes performed by doctors in conjunction with PCP examinations. Before the merger, Saltzer provided many ancillary services at its physicians' offices. Insurance companies and Medicare often offer higher reimbursements for ancillary services performed at a hospital-based outpatient facility.

13 The district court found that a core reason for high health care costs is the prevalent fee-for-service reimbursement model, based on the apparently uncontested opinions of expert witnesses. Experts have recommended moving toward integrated care and risk-based reimbursement. "In an integrated delivery system, [PCPs] and specialty physicians work as a team, with PCPs managing patient care and specialty physicians consulting and providing care as needed." Risk-based reimbursement (also known as capitation) means that "providers receive reimbursement from insurers in the form of a set amount for each patient rather than a payment for each service rendered. The set amount is based on the average expected health care utilization for the patients given such factors as their age and medical history." "Capitation motivates providers to consider the costs of treatment as they will share in the savings if they can keep actual costs below the set amount they receive."

14 Some courts have attempted to explain why the Supreme Court cases do not recognize an efficiencies defense, *see, e.g.,* *H.J. Heinz,* 246 F.3d at 720 n. 18 (arguing that the "possible economies" language in *Procter & Gamble* does not ban an *actual efficiencies* defense), but others have simply stated that the defense exists without addressing the language in *Brown Shoe* and its progeny, *see, e.g.,* *ProMedica,* 749 F.3d at 571.

15 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,* 986 F.2d at 1305 (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.

16 Conduct remedies include "firewall, non-discrimination, mandatory licensing, transparency, and anti-retaliation provisions, as well as prohibitions on certain contracting practices." U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* § II.B (2011); *see also* Areeda ¶ 990d.

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104 S.Ct. 2237
Supreme Court of the United States

SOUTH–CENTRAL TIMBER DEVELOPMENT, INC., Petitioner
v.
Esther WUNNICKE, Commissioner, Department of Natural Resources of Alaska, et al.

No. 82-1608.
|
Argued Feb. 29, 1984.
|
Decided May 22, 1984.

Synopsis
Alaskan timber purchaser and shipper brought action challenging Alaska's requirement that timber taken from state lands be processed within the state prior to export. The United States District Court for the District of Alaska, James A. von der Heydt, Chief Judge, 511 F.Supp. 139, found the requirement violative of the commerce clause, and Alaska appealed. The Court of Appeals, Kennedy, Circuit Judge, 693 F.2d 890, reversed. Certiorari was granted. The Supreme Court, Justice White, held that the requirement was not authorized by Congress' policy with respect to timber taken from federal land where application of that policy to state lands was not expressly stated.

Reversed and remanded.

Justice White delivered opinion with respect to Parts III and IV, in which Justices Brennan, Blackmun, and Stevens joined.

Justice Brennan filed a concurring opinion.

Justice Powell filed an opinion concurring in part and concurring in the judgment in which Chief Justice Berger joined.

Justice Rehnquist filed a dissenting opinion in which Justice O'Connor joined.

Opinion on remand, 746 F.2d 1393.

Procedural Posture(s): On Appeal.

Syllabus [*]

Pursuant to an Alaska statute, the Alaska Department of Natural Resources ****2238** published a notice that it would sell certain timber from state lands under a contract requiring "primary manufacture" (partial processing) of the timber within Alaska before the successful bidder could ship it outside of the State. Petitioner, an Alaska corporation engaged in the business of purchasing timber and shipping the logs into foreign commerce, does not operate a mill in Alaska and customarily sells unprocessed logs. When it learned that the primary-manufacture requirement was to be imposed on the sale of state-owned timber involved here, petitioner filed an action in Federal District Court seeking an injunction on the ground that the requirement violated the negative implications of the Commerce Clause under which States may not enact laws imposing substantial burdens on interstate and foreign commerce unless authorized by Congress. The District Court agreed and issued an injunction, but the Court of Appeals reversed. That court found it unnecessary to reach the question whether, standing alone, the requirement would

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violate the Commerce Clause, because it found implicit congressional authorization in the federal policy of imposing a primary-manufacture requirement on timber taken from federal land in Alaska.

Held: The judgment is reversed, and the case is remanded.

693 F.2d 890 (CA 9 1982), reversed and remanded.

Justice WHITE delivered the opinion of the Court with respect to Parts I and II, concluding that the Court of Appeals erred in holding that Congress has authorized Alaska's primary-manufacture requirement. Although there is a clearly delineated federal policy, endorsed by Congress, imposing primary-manufacture requirements as to timber taken from federal lands in Alaska for export from the United States or for shipment to other States, in order for a state regulation to be removed from the reach of the dormant Commerce Clause as being authorized by Congress, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce ***83** Clause doctrine. The fact that Alaska's policy appears to be consistent with federal policy—or even that state policy furthers the goals that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; it cannot be inferred from that fact that it intended to authorize a similar policy with respect to state lands. Pp. 2240–2243.

Attorneys and Law Firms

LeRoy E. DeVeaux argued the cause for petitioner. With him on the briefs were *Richard L. Crabtree, Donald I. Baker, Karen L. Grimm,* and *Erwin N. Griswold.*

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Ronald W. Lorensen, Deputy Attorney General of Alaska, argued the cause for respondents. On the brief were *Norman C. Gorsuch,* Attorney General, and *Michael J. Frank* and *Michele D. Brown,* Assistant Attorneys General.*

* *James H. Clarke* filed a brief for the Pacific Rim Trade Association et al. as *amici curiae* urging reversal.

C. Dean Little filed a brief for Northwest Independent Forest Manufacturers et al. as *amici curiae* urging affirmance.

Opinion

Justice WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS joined.

***84** We granted certiorari in this case to review a decision of the Court of Appeals for the Ninth Circuit that held that Alaska's requirement that timber taken from state lands be processed within the State prior to export was "implicitly authorized" by Congress and therefore does not violate the Commerce Clause. 464 U.S. 890, 104 S.Ct. 231, 78 L.Ed.2d 224 (1983). We hold that it was not authorized and reverse the judgment of the Court of Appeals.

I

In September 1980, the Alaska Department of Natural Resources published a notice that it would sell approximately 49 million board-feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of sale, the prospectus, and the proposed contract for the sale all provided, pursuant to 11 Alaska Admin.Code § 76.130 (1974), that "[p]rimary manufacture ****2239** within the State of Alaska will be required as a special provision of the contract." [1] App. 35a. Under the primary-manufacture requirement, the successful bidder must partially process the timber prior to shipping it outside of the State. [2] The requirement

is imposed by contract and ***85** does not limit the export of unprocessed timber not owned by the State. The stated purpose of the requirement is to "protect existing industries, provide for the establishment of new industries, derive revenue from all timber resources, and manage the State's forests on a sustained yield basis." Governor's Policy Statement, App. 28a. When it imposes the requirement, the State charges a significantly lower price for the timber than it otherwise would. Brief for Respondents 6–7.

The major method of complying with the primary-manufacture requirement is to convert the logs into cants, which are logs slabbed on at least one side. In order to satisfy the Alaska requirement, cants must be either sawed to a maximum thickness of 12 inches or squared on four sides along their entire length. [3]

Petitioner, South–Central Timber Development, Inc., is an Alaska corporation engaged in the business of purchasing standing timber, logging the timber, and shipping the logs into foreign commerce, almost exclusively to Japan. [4] It ***86** does not operate a mill in Alaska and customarily sells unprocessed logs. When it learned that the primary-manufacture requirement was to be imposed on the Icy Cape sale, it brought an action in Federal District Court seeking an injunction, arguing that the requirement violated the negative implications of the Commerce Clause. [5] The District ****2240** Court ***87** agreed and issued an injunction. South–Central Timber Development, Inc. v. LeResche, 511 F.Supp. 139 (Alaska 1981). The Court of Appeals for the Ninth Circuit reversed, finding it unnecessary to reach the question whether, standing alone, the requirement would violate the Commerce Clause, because it found implicit congressional authorization in the federal policy of imposing a primary-manufacture requirement on timber taken from federal land in Alaska. South–Central Timber Development, Inc. v. LeResche, 693 F.2d 890 (CA 9 1982).

We must first decide whether the court was correct in concluding that Congress has authorized the challenged requirement. If Congress has not, we must respond to respondents' submission that we should affirm the judgment on two grounds not reached by the Court of Appeals: (1) whether in the absence of congressional approval Alaska's requirement is permissible because Alaska is acting as a market participant, rather than as a market regulator; and (2), if not, whether the local-processing requirement is forbidden by the Commerce Clause.

II

Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce. See Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980); Hughes v. Oklahoma, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534–538, 69 S.Ct. 657, 663–665, 93 L.Ed. 865 (1949); Cooley v. Board of Wardens, 12 How. 299, 13 L.Ed. 996 (1852). It is equally clear that Congress may "redefine the distribution of power over interstate commerce" by "permit[ting] the ***88** states to regulate the commerce in a manner which would otherwise not be permissible." Southern Pacific Co. v. Arizona, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945). See also Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958–960, 102 S.Ct. 3456, 3465–3466, 73 L.Ed.2d 1254 (1982); New England Power Co. v. New Hampshire, 455 U.S. 331, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982); Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 652–655, 101 S.Ct. 2070, 2074–2076, 68 L.Ed.2d 514 (1981); Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946). The Court of Appeals held that Congress had done just that by consistently endorsing primary-manufacture ****2241** requirements on timber taken from federal land. 693 F.2d, at 893. Although the court recognized that cases of this Court have spoken in terms of express approval by Congress, it stated: "But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." Ibid.

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We agree that federal policy with respect to federal land is “clearly delineated,” but the Court of Appeals was incorrect in concluding either that there is a clearly delineated federal policy approving Alaska's local-processing requirement or that Alaska's policy with respect to its timber lands is authorized by the existence of a “parallel” federal policy with respect to federal lands.

Since 1928, the Secretary of Agriculture has restricted the export of unprocessed timber cut from National Forest lands in Alaska. The current regulation, upon which the State places heavy reliance, provides:
“Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. This requirement is necessary ***89** to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities.” 36 CFR § 223.10(c) (1983).

From 1969 to 1973, Congress imposed a maximum export limitation of 350 million board-feet of unprocessed timber from federal lands lying west of the 100th meridian (a line running from central North Dakota through central Texas). 16 U.S.C. § 617(a). Beginning in 1973, Congress imposed, by way of a series of annual riders to appropriation Acts, a complete ban on foreign exports of unprocessed logs from western lands except those within Alaska. See, e.g., Pub.L. 96–126, Tit. III, § 301, 93 Stat. 979. These riders limit only foreign exports and do not require in-state processing before the timber may be sold in domestic interstate commerce. The export limitation with respect to federal land in Alaska, rather than being imposed by statute, was imposed by the above-quoted regulation, and applies to exports to other States, as well as to foreign exports.

Alaska argues that federal statutes and regulations demonstrate an affirmative expression of approval of its primary-manufacture requirement for three reasons: (1) federal timber export policy has, since 1928, treated federal timber land in Alaska differently from that in other States; (2) the Federal Government has specifically tailored its policies to ensure development of wood-processing capacity for utilization of timber from the National Forests; and (3) the regulation forbidding without prior approval the export from Alaska of unprocessed timber or its shipment to other States demonstrates that it is the Alaska wood-processing industry in particular, not the domestic wood-processing industry generally, that has been the object of federal concern.

Acceptance of Alaska's three factual propositions does not mandate acceptance of its conclusion. Neither South– ***90** Central nor the United States [6] challenges the existence of a federal policy to restrict the out-of-state shipment of unprocessed Alaska timber from federal lands. They challenge only the derivation from that policy of an affirmative expression of federal approval of a parallel policy with respect to state timber. They argue that our cases dealing with congressional authorization of otherwise impermissible state interference with interstate commerce have required an “express” statement of such authorization, and that no such authorization may be implied.

****2242** It is true that most of our cases have looked for an express statement of congressional policy prior to finding that state regulation is permissible. For example, in Sporhase v. Nebraska ex rel. Douglas, supra, the Court declined to find congressional authorization for state-imposed burdens on interstate commerce in ground water despite 37 federal statutes and a number of interstate compacts that demonstrated Congress' deference to state water law. We noted that on those occasions in which consent has been found, congressional intent and policy to insulate state legislation from Commerce Clause attack have been “expressly stated.” 458 U.S., at 960, 102 S.Ct., at 3466. Similarly, in New England Power Co. v. New Hampshire, 455 U.S. 331, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982), we rejected a claim by the State of New Hampshire that its restriction on the interstate flow of privately owned and produced electricity was authorized by § 201(b) of the Federal Power Act. That section provides that the Act “shall not ... deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.” 16 U.S.C. § 824(b). We found nothing in the statute or legislative history “evinc[ing] a congressional intent ‘to alter the limits of state power otherwise imposed by the Commerce Clause.’ ” 455

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U.S., at 341, 102 S.Ct., at 1101 ***91** (quoting United States v. Public Utilities Comm'n of California, 345 U.S. 295, 304, 73 S.Ct. 706, 712, 97 L.Ed. 1020 (1953)).

Alaska relies in large part on this Court's recent opinion in White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), for its "implicit approval" theory. At issue in White was an executive order issued by the Mayor of Boston requiring all construction projects funded by the city or by funds that the city had authority to administer, to be performed by a work force consisting of at least 50% residents of the city. A number of the projects were funded in part with federal Urban Development Action Grants. The Court held that insofar as the city expended its own funds on the projects, it was a market participant unconstrained by the dormant Commerce Clause; insofar as the city expended federal funds, "the order was affirmatively sanctioned by the pertinent regulations of those programs." Id., at 215, 103 S.Ct., at 1048. Alaska relies on the Court's statements in White that the federal regulations "affirmatively permit" and "affirmatively sanctio[n]" the executive order and that the order "sounds a harmonious note" with the federal regulations, and it finds significance in the fact that the Court did not use the words "expressly stated."

Rather than supporting the position of the State, we believe that White undermines it. If approval of state burdens on commerce could be implied from parallel federal policy, the Court would have had no reason to rely upon the market-participant doctrine to uphold the executive order. Instead, the order could have been upheld as being in harmony with federal policy as expressed in regulations governing the expenditure of federal funds.

There is no talismanic significance to the phrase "expressly stated," however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation ***92** is mandated by the policies underlying dormant Commerce Clause doctrine. It is not, as Alaska asserts, merely a wooden formalism. The Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." Hughes v. Oklahoma, 441 U.S. 322, 325, 99 S.Ct. 1727, 1730, 60 L.Ed.2d 250 (1979). Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. ****2243** Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." South Carolina State Highway Dept. v. Barnwell Brothers, Inc., 303 U.S. 177, 185, n. 2, 58 S.Ct. 510, 514, n. 2, 82 L.Ed. 734 (1938); see also Southern Pacific Co. v. Arizona, 325 U.S., at 767–768, n. 2, 65 S.Ct., at 1519–1520, n. 2. On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce. [7]

The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect ***93** to state lands. [8] Accordingly, we reverse the contrary judgment of the Court of Appeals.

III

We now turn to the issues left unresolved by the Court of Appeals. The first of these issues is whether Alaska's restrictions on export of unprocessed timber from state-owned lands are exempt from Commerce Clause scrutiny under the "market-participant doctrine."

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Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities. See White v. Massachusetts Council of Construction Employers, Inc., 460 U.S., at 206–208, 103 S.Ct., at 1043–1044; Reeves, Inc. v. Stake, 447 U.S. 429, 436–437, 100 S.Ct. 2271–2277, 65 L.Ed.2d 244 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810, 96 S.Ct. 2488, 2498, 49 L.Ed.2d 220 (1976). The precise contours of the market-participant doctrine have yet to be established, however, the doctrine having been applied in only three cases of this Court to date.

The first of the cases, Hughes v. Alexandria Scrap Corp., supra, involved a Maryland program designed to reduce the number of junked automobiles in the State. A "bounty" was established on Maryland-licensed junk cars, and the State imposed more stringent documentation requirements on out- ***94** of-state scrap processors than on in-state ones. The Court rejected a Commerce Clause attack on the program, although it noted that under traditional Commerce Clause analysis the program might well be invalid because it had the effect of reducing the flow of goods in interstate commerce. Id., at 805, 96 S.Ct., at 2495. The Court concluded that Maryland's ****2244** action was not "the kind of action with which the Commerce Clause is concerned," ibid., because "[n] othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Id., at 810, 96 S.Ct., at 2498 (footnote omitted).

In Reeves, Inc. v. Stake, supra, the Court upheld a South Dakota policy of restricting the sale of cement from a state-owned plant to state residents, declaring that "[t]he basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law." Id., at 436, 100 S.Ct., at 2277. The Court relied upon " 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' " Id., at 438–439, 100 S.Ct., at 2278–2279 (quoting United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919)). In essence, the Court recognized the principle that the Commerce Clause places no limitations on a State's refusal to deal with particular parties when it is participating in the interstate market in goods.

The most recent of this Court's cases developing the market-participant doctrine is White v. Massachusetts Council of Construction Employers, Inc., supra, in which the Court sustained against a Commerce Clause challenge an executive order of the Mayor of Boston that required all construction projects funded in whole or in part by city funds or city-administered funds to be performed by a work force of at least 50% city residents. The Court rejected the argument that the city was not entitled to the protection of the doctrine because the order had the effect of regulating employment contracts between public contractors and their employees. ***95** Id., at 211, n. 7, 103 S.Ct., at 1046, n. 7. Recognizing that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," the Court found it unnecessary to define those limits because "[e]veryone affected by the order [[[was], in a substantial if informal sense, 'working for the city.' " Ibid. The fact that the employees were "working for the city" was "crucial" to the market-participant analysis in White. United Building and Construction Trades Council v. Mayor of Camden, 465 U.S. 208, 219, 104 S.Ct. 1020, 1028, 79 L.Ed.2d 249 (1984).

The State of Alaska contends that its primary-manufacture requirement fits squarely within the market-participant doctrine, arguing that "Alaska's entry into the market may be viewed as precisely the same type of subsidy to local interests that the Court found unobjectionable in Alexandria Scrap." Brief for Respondents 24. However, when Maryland became involved in the scrap market it was as a purchaser of scrap; Alaska, on the other hand, participates in the timber market, but imposes conditions downstream in the timber-processing market. Alaska is not merely subsidizing local timber processing in an amount "roughly equal to the difference between the price the timber would fetch in the absence of such a requirement and the amount the state actually receives." Ibid. If the State directly subsidized the timber-processing industry by such an amount, the purchaser would retain the option of taking advantage of the subsidy by processing timber in the State or forgoing the benefits of the subsidy

and exporting unprocessed timber. Under the Alaska requirement, however, the choice is made for him: if he buys timber from the State he is not free to take the timber out of state prior to processing.

The State also would have us find Reeves controlling. It states that "Reeves made it clear that the Commerce Clause imposes no limitation on Alaska's power to choose the terms on which it will sell its timber." Brief for Respondents 25. Such an unrestrained reading of Reeves is unwarranted. Although the Court in Reeves did strongly ****2245** endorse the right of ***96** a State to deal with whomever it chooses when it participates in the market, it did not—and did not purport to—sanction the imposition of any terms that the State might desire. For example, the Court expressly noted in Reeves that "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged," 447 U.S., at 438, n. 9, 100 S.Ct., at 2278, n. 9; that a natural resource "like coal, timber, wild game, or minerals," was not involved, but instead the cement was "the end product of a complex process whereby a costly physical plant and human labor act on raw materials," id., at 443–444, 100 S.Ct., at 2281; and that South Dakota did not bar resale of South Dakota cement to out-of-state purchasers, id., at 444, n. 17, 100 S.Ct., at 2281, n. 17. In this case, all three of the elements that were not present in Reeves—foreign commerce, a natural resource, and restrictions on resale—are present.

Finally, Alaska argues that since the Court in White upheld a requirement that reached beyond "the boundary of formal privity of contract," 460 U.S., at 211, n. 7, 103 S.Ct., at 1046, n. 7, then, a fortiori, the primary-manufacture requirement is permissible, because the State is not regulating contracts for resale of timber or regulating the buying and selling of timber, but is instead "a seller of timber, pure and simple." Brief for Respondents 28. Yet it is clear that the State is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale. [9]

***97** That privity of contract is not always the outer boundary of permissible state activity does not necessarily mean that the Commerce Clause has no application within the boundary of formal privity. The market-participant doctrine permits a State to influence "a discrete, identifiable class of economic activity in which [it] is a major participant." White v. Massachusetts Council of Construction Workers, Inc., 460 U.S., at 211, n. 7, 103 S.Ct., at 1046, n. 7. Contrary to the State's contention, the doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity. See Tr. of Oral Arg. 35.

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. [10] Unless the ***98** "market" ****2246** is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.

At the heart of the dispute in this case is disagreement over the definition of the market. Alaska contends that it is participating in the processed timber market, although it acknowledges that it participates in no way in the actual processing. Id., at Oral Arg. 34. South–Central argues, on the other hand, that although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant. We agree with the latter position.

There are sound reasons for distinguishing between a State's preferring its own residents in the initial disposition of goods when it is a market participant and a State's attachment of restrictions on dispositions subsequent to the goods coming to rest in private hands. First, simply as a matter of intuition a state market participant has a greater interest as a "private trader" in the immediate transaction than it has in what its purchaser does with the goods after the State no longer has an interest in them. The common law recognized such a notion in the doctrine of restraints on alienation. See Dr. Miles Medical Co. v. John D. Park & Sons

Co., 220 U.S. 373, 404, 31 S.Ct. 376, 383, 55 L.Ed. 502 (1911); but cf. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53, n. 21, 97 S.Ct. 2549, 2559, n. 21, 53 L.Ed.2d 568 (1977). Similarly, the antitrust laws place limits on vertical restraints. It is no defense in an action charging vertical trade restraints that the same end could be achieved through vertical integration; if it were, there would be virtually no antitrust scrutiny of vertical arrangements. We reject the contention that a State's action as a market regulator may be upheld against Commerce Clause challenge on the ground that the State could ***99** achieve the same end as a market participant. We therefore find it unimportant for present purposes that the State could support its processing industry by selling only to Alaska processors, by vertical integration, or by direct subsidy. See Tr. of Oral Arg. 34, 37, 45.

Second, downstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity. In contrast to the situation in White, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract. [11] In sum, the State may not avail itself of the market-participant doctrine to immunize its downstream regulation of the timber-processing market in which it is not a participant.

IV

Finally, the State argues that even if we find that Congress did not authorize the processing restriction, and even if we conclude that its actions do not qualify for the market-participant exception, the restriction does not substantially burden interstate ****2247** or foreign commerce under ordinary Commerce Clause principles. We need not labor long over that contention.

Viewed as a naked restraint on export of unprocessed logs, there is little question that the processing requirement cannot survive scrutiny under the precedents of the Court. For ***100** example, in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), we invalidated a requirement of the State of Arizona that all Arizona cantaloupes be packed within the State. The Court noted that the State's purpose was "to protect and enhance the reputation of growers within the State," a purpose we described as "surely legitimate." Id., at 143, 90 S.Ct., at 848. We observed:

"[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal. Foster–Fountain Packing Co. v. Haydel, 278 U.S. 1 [49 S.Ct. 1, 73 L.Ed. 147]; Johnson v. Haydel, 278 U.S. 16 [49 S.Ct. 6, 73 L.Ed. 155]; Toomer v. Witsell, 334 U.S. 385 [68 S.Ct. 1156, 92 L.Ed. 1460]." Id., at 145, 90 S.Ct., at 849.

We held that if the Commerce Clause for bids a State to require work to be done within the State for the purpose of promoting employment, then, a fortiori, it forbids a State to impose such a requirement to enhance the reputation of its producers. Because of the protectionist nature of Alaska's local-processing requirement and the burden on commerce resulting therefrom, we conclude that it falls within the rule of virtual per se invalidity of laws that "bloc[k] the flow of interstate commerce at a State's borders." City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978).

We are buttressed in our conclusion that the restriction is invalid by the fact that foreign commerce is burdened by the restriction. It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that "the Federal Government ... speak with one voice when regulating commercial relations with foreign governments." Michelin Tire Corp. v. Wages, 423 U.S. 276, 285, 96 S.Ct. 535, 540, 46 L.Ed.2d 495 (1976); see also Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d

336 (1979). In light of the substantial attention given by Congress to the subject of ***101** export restrictions on unprocessed timber, it would be peculiarly inappropriate to permit state regulation of the subject. See Prohibit Export of Unprocessed Timber: Hearing on H.R.639 before the Subcommittee on Forests, Family Farms, and Energy of the House Committee on Agriculture, 97th Cong., 1st Sess. (1981).

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with the opinion of this Court.

It is so ordered.

Justice MARSHALL took no part in the decision of this case.

Justice BRENNAN, concurring.

I join Justice WHITE's opinion in full because I believe Alaska's in-state processing requirement constitutes market regulation that is not authorized by Congress. In my view, Justice WHITE's treatment of the market-participant doctrine and the response of Justice REHNQUIST point up the inherent weakness of the doctrine. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 817, 96 S.Ct. 2488, 2501, 49 L.Ed.2d 220 (1976) (BRENNAN, J., dissenting).

Justice POWELL, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

I join Parts I and II of Justice WHITE's opinion. I would remand the case to the ****2248** Court of Appeals to allow that court to consider whether Alaska was acting as a "market participant" and whether Alaska's primary-manufacture requirement substantially burdened interstate commerce under the holding of Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

Justice REHNQUIST, with whom Justice O'CONNOR joins, dissenting.

In my view, the line of distinction drawn in the plurality opinion between the State as market participant and the ***102** State as market regulator is both artificial and unconvincing. The plurality draws this line "simply as a matter of intuition," ante, at 2246, but then seeks to bolster its intuition through a series of remarks more appropriate to antitrust law than to the Commerce Clause.[a1] For example, the plurality complains that the State is using its "leverage" in the timber market to distort consumer choice in the timber-processing market, ibid., a classic example of a tying arrangement. See, e.g., United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 619–621, 97 S.Ct. 861, 867–868, 51 L.Ed.2d 80 (1977). And the plurality cites the common-law doctrine of restraints on alienation and the antitrust limits on vertical restraints in dismissing the State's claim that it could accomplish exactly the same result in other ways. Ante, at 2246.

Perhaps the State's actions do raise antitrust problems. But what the plurality overlooks is that the antitrust laws apply to a State only when it is acting as a market participant. See, e.g., Jefferson County Pharmaceutical Assn., Inc. v. Abbott Laboratories, 460 U.S. 150, 154, 103 S.Ct. 1011, 1015, 74 L.Ed.2d 882 (1983) (state action immunity "does not apply where a State has chosen to compete in the private retail market"). When the State acts as a market regulator, it is immune from antitrust scrutiny. See Parker v. Brown, 317 U.S. 341, 350–352, 63 S.Ct. 307, 313–314, 87 L.Ed. 315 (1943). Of course, the line of distinction in cases under the Commerce Clause need not necessarily parallel the line drawn in antitrust ***103** law. But the plurality can hardly justify placing Alaska in the market-regulator category, in this Commerce Clause case, by relying on antitrust cases that are relevant only if the State is a market participant.

The contractual term at issue here no more transforms Alaska's sale of timber into "regulation" of the processing industry than the resident-hiring preference imposed by the city of Boston in White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), constituted regulation of the construction industry. Alaska is merely

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paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber. Under existing precedent, the State could accomplish that same result in any number of ways. For example, the State could choose to sell its timber only to those companies that maintain active primary-processing plants in Alaska. Reeves, Inc. v. Stake, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980). Or the State could directly subsidize the primary-processing industry within the State. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976). The State could even pay to have the logs processed and then enter the market only to sell processed logs. See ante, at 2246. It seems to me unduly formalistic to conclude **2249 that the one path chosen by the State as best suited to promote its concerns is the path forbidden it by the Commerce Clause.

For these reasons, I would affirm the judgment of the Court of Appeals.

All Citations

467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71, 14 Envtl. L. Rep. 20,548

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The proposed contract, which the successful bidder on the timber sale would have been required to sign, provided:

"Section 68. Primary Manufacture. Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

"Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974."

2 11 Alaska Admin.Code § 76.130 (1974) (repealed 1982), which authorized the contractual provision in question, provided:

"PRIMARY MANUFACTURE

"(a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

"(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

"(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

"(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

"(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles

and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture."

The local-processing requirement is now authorized by Alaska Admin.Code §§ 71.230, 71.910 (1982).

3 Current regulations require that the cants be no thicker than 8 ¾ inches unless slabs are taken from all four sides. 11 Alaska Admin.Code § 71.910 (1982).

4 Apparently, there is virtually no interstate market in Alaska timber because of the high shipping costs associated with shipment between American ports. Consequently, over 90% of Alaska timber is exported to Japan. Brief for Petitioner 14, n. 14.

5 Although it would appear at first blush that it would be economically more efficient to have the primary processing take place within Alaska, that is apparently not the case. Material appearing in the record suggests that the slabs removed from the log in the process of making cants are often quite valuable, but apparently cannot be used and are burned. Record, Exh. 11, p. 63. It appears that because of the wasted wood, cants are actually worth less than the unprocessed logs. An affidavit of a vice president of South–Central states in part:

"5. It is also my observation that within Alaska there is absolutely no market for domestic resawing of 'cant' or 'square' manufactured to State of Alaska specifications. In other words, a cant or square manufactured in Alaska would be virtually unsaleable within local Alaska sawmill markets. The reasons are:

"A. Any sawmill would prefer round logs for its sawmill operations and the small volume of round logs required would be readily available locally.

"B. Round logs are preferable because they can be stored in the water and moved in the water, whereas cants must be transported on land.

"C. Once a log is placed on the sawmill carriage and the costs of getting it there have been incurred, it produces more lumber for the costs involved than does a cant.

"D. Also the round log is much less subject to deterioration from weather and outside conditions.

"6. South–Central had experience with attempting to make a sale of cants inside the State of Alaska. We had some cants at Jakalof Bay which were manufactured to State specifications, but which were not loaded aboard ships during that season. We attempted to market those cants to a sawmill in Anchorage, but found that just costs of transporting the cants from Jakalof Bay to Anchorage exceeded the highest possible sales price of the cants. Accordingly no sale was made.

"7. Based on the above statements and my observations of the Alaska timber industry, it is my firm conclusion that a cant or a square manufactured to State of Alaska primary manufacture specifications is marketable only in foreign commerce and cannot be sold for use within Alaska. It is also my firm conclusion that no sawmill in Alaska will manufacture a cant or square for any domestic Alaska market." App. 121a–122a.

6 The United States appears as amicus curiae in support of the position of South–Central.

7 The need for affirmative approval is heightened by the fact that Alaska's policy has substantial ramifications beyond the Nation's borders. The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government, enhances the necessity that congressional authorization not be lightly implied.

8 It is for that reason that we need not resolve the dispute between the parties about whether Congress' purpose in applying the primary-manufacture requirement to federal lands was for the purpose of encouraging the Alaska wood-processing

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industry or whether it was merely to ensure adequate processing capacity to deal with federal timber. In either event, no congressional intent to permit a primary-manufacture requirement by the State appears.

It is worthy of note, although we do not rely upon it, that Congress has been requested to authorize the imposition by States of in-state processing requirements but has declined to do so. Prohibit Export of Unprocessed Timber: Hearing on H.R.639 before the Subcommittee on Forests, Family Farms, and Energy of the House Committee on Agriculture, 97th Cong., 1st Sess., 18–19 (1981).

9 The facts of the present case resemble closely the facts of Foster–Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), in which the Court struck down a Louisiana law prohibiting export from the State of any shrimp from which the heads and hulls had not been removed. The Court rejected the claim that the fact that the shrimp were owned by the State authorized the State to impose such limitations. Although not directly controlling here, because of the Court's recognition that "the State owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people," id., at 11, 49 S.Ct., at 4, the Court's reasoning is relevant. The Court noted that the State might have retained the shrimp for consumption and use within its borders, but "by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control." Id., at 13, 49 S.Ct., at 4.

10 The view of the market-participant doctrine expressed by Justice REHNQUIST, post, at 2248, would validate under the Commerce Clause any contractual condition that the State had the economic power to impose, without regard to the relationship of the subject matter of the contract and the condition imposed. If that were the law, it would have been irrelevant that the employees in White v. Massachusetts Council of Construction Workers, Inc., 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), were in effect "working for the city." Id., at 211, n. 7, 103 S.Ct., at 1046, n. 7. If the only question were whether the condition is imposed by contract, a residency requirement could have been imposed with respect to the work force on all projects of any employer doing business with the city.

11 This is not to say that the State could evade the reasoning of this opinion by merely including a provision in its contract that title does not pass until the processing is complete. It is the substance of the transaction, rather than the label attached to it, that governs Commerce Clause analysis.

a1 The plurality does offer one other reason for its demarcation of the boundary between these two concepts.

"[D]ownstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that in it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity." Ante, at 2246. But, of course, this is not a "reason" at all, but merely a restatement of the conclusion. The line between participation and regulation is what we are trying to determine. To invoke that very distinction in support of the line drawn is merely to fall back again on intuition.

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65 S.Ct. 716
Supreme Court of the United States

STATE OF GEORGIA
v.
PENNSYLVANIA R. CO. et al.

No. 11, Original.
|
Argued and Submitted on Rules and Returns Jan. 2, 1945.
|
Decided March 26, 1945.
|
Rehearing Denied April 23, 1945.

See 324 U.S. 890, 65 S.Ct. 1018.

Synopsis
Proceeding by the State of Georgia against the Pennsylvania Railroad Company and others, wherein the State of Georgia sought to invoke the original jurisdiction of the Supreme Court by filing a motion for leave to file a bill of complaint charging the defendants with a conspiracy in restraint of trade and commerce.

Motion granted.

Mr. Chief Justice STONE, Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, and Mr. Justice JACKSON, dissenting.

Attorneys and Law Firms

****719 *442** Mr. John Dickinson, of Philadelphia, Pa., for Pennsylvania R. Co. et al.

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Mr. Sidney S. Alderman, of Washington, D.C., for Southern Ry. Co. et al.

Mr. Ellis Arnall, of Atlanta, Ga., for State of Georgia.

Mr. W.R.C. Cocke, of Norfolk, Va., for Seaboard Air Line Ry. Co.

Opinion

***443** Mr. Justice DOUGLAS delivered the opinion of the Court.

The State of Georgia by this motion for leave to file a bill of complaint [1] seeks to invoke the original jurisdiction of this Court under Art. III, Sec. 2 of the Constitution. See Judicial Code s 233, 28 U.S.C. s 341, 28 U.S.C.A. s 341. The defendants are some twenty railroad companies. On November 6, 1944, we issued a rule to show cause why Georgia should not be permitted to filed its bill of complaint. Returns to the rule have been made and oral argument had.

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Georgia sues in four capacities only two of which we need mention: (1) In her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them; and (2) in her capacity as a proprietor to redress wrongs suffered by the State as the owner of a railroad and as the owner and operator of various institutions of the State.

The essence of the complaint is a charge of a conspiracy among the defendants in restraint of trade and commerce among the States. It alleges that they have fixed arbitrary and noncompetitive rates and charges for transportation of freight by railroad to and from Georgia so as to prefer the ports of other States over the ports of Georgia. It charges that some sixty rate bureaus, committees, conferences, associations and other private rate-fixing agencies have been utilized by defendants to fix these rates; that no road can change joint through rates without the approval of these private agencies; that this private rate-fixing machinery which is not sanctioned by the Interstate Commerce Act, 49 U.S.C.A. s 1 et seq., and which is prohibited by the anti-trust Acts has put the effective control of rates to ***444** and from Georgia in the hands of the defendants. The complaint ****720** alleges that these practices in purpose and effect give manufacturers, sellers and other shippers in the North an advantage over manufacturers, shippers and others in Georgia. It alleges that the rates so fixed are approximately 39 per cent higher than the rates and charges for transportation of like commodities for like distances between points in the North. It alleges that the defendants who have lines wholly or principally in the South are generally dominated and coerced by the defendants who have northern roads and therefore that even when the southern defendants desire, they cannot publish joint through rates between Georgia and the North when the northern carriers refuse to join in such rates.

It is alleged that the rates as a result of the conspiracy are so fixed as

‘(a) to deny to many of Georgia's products equal access with those of other States to the national market;

‘(b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;

‘(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and

‘(d) to hold the Georgia economy in a state of arrested development.’

The complaint alleges that the defendants are not citizens of Georgia; that Georgia is without remedy in her own courts, as the defendants are outside her jurisdiction; that she has no administrative remedy, the Interstate Commerce Commission having no power to afford ***445** relief against such a conspiracy; that the issues presented constitute a justiciable question.

The prayer is for damages and for injunctive relief.

We will return later to the cause of action which Georgia seeks to allege. It is sufficient at this point to say that for purposes of this motion for leave to file we construe the allegation that defendants have conspired to fix the rates so as to ‘prefer’ the ports of other States over the ports of Georgia as a charge that defendants have conspired to fix rates so as to discriminate against Georgia. And we construe the allegation that the southern defendants are dominated and coerced by the northern roads and cannot publish joint through rates when the northern roads refuse to join as a charge that the northern roads use coercion on the southern roads in the fixing of joint through rates.

Defendants in their returns pray that the motion for leave to file be denied on three grounds: (1) That the complaint presents no justiciable controversy; (2) that the complaint fails to state a cause of action; and (3) that two of the defendants are citizens of Georgia. Leave to file should of course be denied if it is plain that no relief may be granted in the exercise of the original jurisdiction of this Court. See State of Alabama v. Arizona, 291 U.S. 286, 291, 292, 54 S.Ct. 399, 401, 402, 78 L.Ed. 798; State of Arizona v. California, 298 U.S. 558, 572, 56 S.Ct. 848, 855, 80 L.Ed. 1331.

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Justiciable Controversy. It is said that the bill does not set forth a justiciable controversy within the rule of Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078, and State of Florida v. Mellon, 273 U.S. 12, 47 S.Ct. 265, 71 L.Ed. 511. We take the other view, for we are of the opinion that Georgia as parens patriae and as proprietor of various institutions asserts a claim within judicial cognizance. The complaint of Georgia in those respects is not of a political or governmental character. There is involved no question of distribution of powers between the State and the national government as in Commonwealth of Massachusetts v. Mellon and in State of Florida v. Mellon, supra. And, as we shall develop ***446** more fully when we turn to a consideration of the assertion that no cause of action has been stated, we are not asked to resolve a dispute which has been withdrawn from the judiciary or which by the charter of our government has been reposed in departments other than the judiciary. Cf. Coleman v. Miller, 307 U.S. 433, 456, 460, 59 S.Ct. 972, 983, 985, 83 L.Ed. 1385, 122 A.L.R. 695. The complaint alleges a conspiracy to restrain trade and commerce through the fixing of rates. The history of restraints of trade makes it plain ****721** that these problems present judicial questions with which courts have long dealt. [2]

It is of course true that Georgia does not have a right to invoke the original jurisdiction of the Court merely because there may be involved a judicial question. It is not enough that a State is plaintiff. The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened not to the enforcement of penal statutes of a State. State of Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297-300, 8 S.Ct. 1370, 1377—1379, 32 L.Ed. 239. And though the suit is civil, leave to file will be denied where it appears that the suit brought in the name of the State is in reality for the benefit of particular individuals. State of Oklahoma v. Atchison, T. & S.F.R. Co., 220 U.S. 277, 31 S.Ct. 434, 55 L.Ed. 465; State of Oklahoma v. Cook, 304 U.S. 387, 58 S.Ct. 954, 82 L.Ed. 1416; Jones v. Bowles, 322 U.S. 707, 64 S.Ct. 1043. Moreover, Commonwealth of Massachusetts v. Mellon and State of Florida v. Mellon, supra, make plain that the United States not the State represents the citizens as parens patriae in their relations to the federal government.

The present controversy, however, does not fall within any of those categories. This is a civil not a criminal proceeding. Nor is this a situation where the United States rather than Georgia stands as parens patriae to the citizens of Georgia. This is not a suit like those in Commonwealth of Massachusetts v. Mellon, and State of Florida v. Mellon, supra, where ***447** a State sought to protect her citizens from the operation of federal statutes. Here Georgia asserts rights based on the anti-trust laws. The fact that the United States may bring criminal prosecutions or suits for injunctions under those laws does not mean that Georgia may not maintain the present suit. As we have seen Georgia sues as a proprietor to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions. Georiga, suing for her own injuries, is a 'person' within the meaning of s 16 of the Clayton Act, 15 U.S.C.A. s 26; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. State of Georgia v. Evans, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346. But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. Those rights are of course based on federal laws. The enforcement of the criminal sanctions of these acts has been entrusted exclusively to the federal government. See State of Georgia v. Evans, supra, 316 U.S. at page 162, 62 S.Ct. at page 974, 86 L.Ed. 1346. But when it came to other sanctions Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, parens patriae, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anit-trust acts.

In determining whether a State may invoke our original jurisdiction in a dispute which is justiciable (State of Oklahoma v. Cook, supra, 304 U.S. at page 393, 58 S.Ct. at page 957, 82 L.Ed. 1416) the interests of the State are not confined to those which are proprietary; they embrace the so-called 'quasi-sovereign' interests which in the words of State of Georgia v. Tennessee Copper Co., 206 U.S. 230, 237, 27 S.Ct. 618, 619, 51 L.Ed. 1038, 11 Ann.Cas. 488, ***448** are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.' In that case this Court enjoined manufacturing companies

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from discharging noxious gas from their works in Tennessee over Georgia's territory. It was pointed out that 'It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, by they better or worse, and whatever demestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.' ****722** 206 U.S. at page 238, 27 S.Ct. at page 619, 51 L.Ed. 1038, 11 Ann.Cas. 488. That case followed State of Missouri v. Illinois, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497, where Missouri was granted leave to file a bill seeking to enjoin the discharge of sewage into the Mississippi.[3] The Court observed that 'if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.' 180 U.S. at page 241, 21 S.Ct. at page 344, 45 L.Ed. 497. And see People of State of New York v. New Jersey, 256 U.S. 296, 301, 302, 41 S.Ct. 492, 493, 494, 65 L.Ed. 937. In State of Kansas v. Colorado, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956, Kansas was allowed to sue to restrain the diversion of water from the Arkansas River, an interstate stream. The Court in upholding the right of Kansas to maintain the suit stated: 'It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint.' 206 U.S. at page 99, 27 S.Ct. at page 668, 51 L.Ed. 956. And see State of Colorado v. Kansas, 320 U.S. 383, 64 S.Ct. 176, 88 L.Ed. 116; ***449** State of North Dakota v. Minnesota, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342. In Commonwealth of Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300, Pennsylvania and Ohio were allowed to maintain suits which sought to enjoin West Virginia from interfering with the flow of natural gas from West Virginia to the other states. The Court said:

'The attitude of the complainant states is not that of mere volunteers, attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a twofold interest—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantiala nd both are threatened with serious injury.

'Each state uses large amounts of the gas in her several institutions and schools,—the greater part in the discharge of duties which are relatively imperative. A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more. To substitute another form of fuel will involve very large public expenditures.

'The private consumers in each state not only include most of the inhabitants of many urban communities but constitute a substantial portion of the state's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.' 262 U.S. at pages 591—592, 43 S.Ct. at page 663, 67 L.Ed. 1117, 32 A.L.R. 300.

***450** It seems to us clear that under the authority of these cases Georgia may maintain this suit as parens patriae acting on behalf of her citizens though here, as in State of Georgia v. Tennessee Copper Co., supra, 206 U.S. at page 237, 27 S.Ct. at page 619, 51 L.Ed. 1038, 11 Ann.Cas. 488, we treat the injury to the State as proprietor merely as a 'makeweight.' The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. See State of Missouri v. Illinois, supra, 180 U.S. at pages 219-224, 21 S.Ct. at pages 335—337, 45 L.Ed. 497; Commonwealth of Virginia v. West Virginia, 246 U.S. 565, 599, 38 S.Ct. 400, 405, 59 L.Ed. 1272. Trade barriers, recriminations, intense commercial

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rivalries had **723 plagued the colonies.[4] The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative. State of Missouri v. Illinois, supra, 180 U.S. at page 241, 21 S.Ct. at page 344, 45 L.Ed. 497; State of Georgia v. Tennessee Copper Co., supra, 206 U.S. at page 237, 27 S.Ct. at page 619, 51 L.Ed. 1038, 11 Ann.Cas. 488.

If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. Such a charge at least equals in gravity the one which Pennsylvania and Ohio had with West Virginia over the curtailment of the flow of natural gas from the West Virginia *451 fields. There are substitute fuels to which the economy of a State might be adjusted. But discriminatory rates fastened on a region have a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior ferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as parens patriae the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the statute of minor or conventional controversies. There is no warrant for such a restriction.

State of Oklahoma v. Atchison, T. & S.F.R. Co., supra, is not opposed to this view. In that case, the defendant railroad company had obtained a grant from Congress to locate and maintain a railrway line through the Indian territory out of which the State of Oklahoma was later formed. The federal act provided certain maximum transportation rates which the company might charge. Oklahoma sued to cancel the grant, to have the property granted decreed to be in the State of Oklahoma as cestui que trustent, to enjoin the defendant from operating a railroad in the States, and to enjoin pendente lite the exaction of greater rates than the maximum rates specified. The Court construed the Act of Congress as subjecting the rates to federal control until the territory became a part of a State, at which time the rates became subject to state control. The Court held that our original jurisdiction could not be invoked by a State merely because its citizens were injured. We adhere to that decision. It does not control the present one. This is no attempt to utilize our original *452 jurisdiction in substitution for the established methods of enforcing local law. This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers.

Since the claim which Georgia asserts as parens patriae as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil sanctions of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail.

Cause of Action. It is argued that the complaint fails to state a cause of action. (1) It is pointed out that under the principle of the Abilene case no action for damages on the basis of unjust, unreasonable, or discriminatory railroad rates may be maintained without prior resort to the Interstate Commerce Commission. **724 Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075; Great Northern R. Co. v. Merchants' Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943. (2) It is said that an injunction may not be granted to restrain rates alleged to be unreasonable or discriminatory where there has been no prior determination of the matter by the Commission and that the only way a State or any other person may obtain a judicial determination of the legality of a rate is by review of the Commission's order. Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U.S. 481, 30 S.Ct. 164, 54 L.Ed. 292; State of North Dakota v. Chicago & N.W.R. Co., 257 U.S. 485, 42 S.Ct. 170, 66 L.Ed. 329; State of Texas v. Interstate Commerce Commission, 258 U.S. 158, 42 S.Ct. 261, 66 L.Ed. 531. (3) It is said that damages under the anti-trust laws may not be recovered against

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railroad carriers though the rates approved by the Commission were fixed pursuant to a conspiracy. Keogh v. Chicago & N.W.R. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183. (4) It is said that persons other than the United States are barred from enjoining violations of the anti- ***453** trust laws by virtue of s 16 of the Clayton Act. 38 Stat. 737, 15 U.S.C. s 26, 15 U.S.C.A. s 26. See Central Transfer Co. v. Terminal R. Ass'n, 288 U.S. 469, 473-475, 53 S.Ct. 444, 445, 446, 77 L.Ed. 899; Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500, 513, 56 S.Ct. 546, 551, 80 L.Ed. 827. (5) It is argued that Georgia cannot maintain an action on common law principles based upon a conspiracy among carriers to fix rates.

We think it is clear from the Keogh case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. That was a suit for damages under s 7 of the Sherman Act, 26 Stat. 210, 7 U.S.C.A. s 15 note. The Court recognized that although the rates fixed had been found reasonable and nondiscriminatory by the Commission, the United States was not barred from enforcing the remedies of the Sherman Act. 260 U.S. at pages 161, 162, 43 S.Ct. at page 49, 67 L.Ed. 183. It held, however, that for purposes of a suit for damages a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added: ‘This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.’ 260 U.S. at page 163, 43 S.Ct. at page 49, 67 L.Ed. 183. The reasoning and precedent of that case apply with full force here. But it does not dispose of the main prayer of the bill, stressed at the argument, which asks for relief by way of injunction.

***454** It is clear that a suit could not be maintained here to review, annul, or set aside an order of the Interstate Commerce Commission. Congress has prescribed the method for obtaining that relief. It is exclusive of all other remedies, including a suit by a State in this Court. State of North Dakota v. Chicago & N.W.R. Co., supra; State of Texas v. Interstate Commerce Commission, supra. The same result obtains where the basis for attacking an order of the Commission is a violation of the anti-trust laws, save in the case where the United States is the complainant. For s 16 of the Clayton Act which gives relief by way of injunction against threatened loss or damage through violation of the anti-trust laws provides that no one except the United States shall be entitled to bring such suits against common carriers subject to the Interstate Commerce Act ‘in respect of any matter subject to the regulation, supervision, or other jurisdiction’ of the Commission. Central Transfer Co. v. Terminal R. Ass'n, supra, indicates that if Georgia in the present proceeding sought to set aside the rates of the defendants, leave to file would have to be denied. In that case the Commission had approved certain rate schedules which entailed abandoning certain ‘off-track’ stations and the employment by the carriers of a single transfer company to do inter-station hauling. The carriers proceeded to make an agreement to carry out the program which had been submitted to the Commission and ****725** which was later approved by it. Suit was brought by a private company to enjoin performance of the contract on the ground that it created a monopoly in violation of the anti-trust laws. The Court held that the suit was barred by s 16 of the Clayton Act. The Court pointed out that the purpose of s 16 was ‘to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the government ***455** itself.’ 288 U.S. at page 475, 53 S.Ct. at page 446, 77 L.Ed. 899. It added (288 U.S. at page 476, 53 S.Ct. at page 446, 77 L.Ed. 899); ‘True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission.’ The policy behind these restrictions placed on suitors by the Congress was aptly stated in Terminal Warehouse Co. v. Pennsylvania R. Co., supra, 297 U.S. at page 513, 56 S.Ct. at page 551, 80 L.Ed. 827, as follows: ‘If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory

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commission, the unity of the system of regulation breaks down beyond repair.' We adhere to these decisions. But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia.

The relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled. She merely asks that the alleged rate-fixing combination and conspiracy among the defendant-carriers be enjoined. As we shall see, that is a matter over which the Commission has no jurisdiction. And an injunction designed to put an end to the conspiracy need not enjoin operation under established rates as would have been the case had an injunction issued in Central Transfer Co. v. Terminal R. Ass'n, supra.

***456** These carriers are subject to the anti-trust laws. United States v. Southern Pacific Co., 259 U.S. 214, 42 S.Ct. 496, 66 L.Ed. 907. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; United States v. Joint Traffic Ass'n, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259. Congress by s 11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of its provisions 'where applicable to common carriers' under the Commission's jurisdiction.[5] It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (New York Central Securities Corp. v. United States, 287 U.S. 12, 25, 26, 53 S.Ct. 45, 48, 49, 77 L.Ed. 138) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. McLean Trucking Co. v. United States, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not per se exempt from the Sherman Act. United States v. Borden Co., 308 U.S. 188, 198 et ****726** seq., 60 S.Ct. 182, 188 et seq., 84 L.Ed. 181. It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See Arizona Grocery Co. v. Atchison, T. & S.F.R. Co., 284 U.S. 370, 385, 386, 52 S.Ct. 183, 184, 185, 76 L.Ed. 348. But it is elementary that repeals by implication are not ***457** favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy. United States v. Borden Co., supra, 308 U.S. at pages 198, 199, 60 S.Ct. at pages 188, 189, 84 L.Ed. 181. None of the powers acquired by the Commission since the enactment of the Sherman Act relates to the regulation of rate-fixing combinations. Twice Congress has been tendered proposals to legalize rate-fixing combinations.[6] But it has not adopted them. In view of this history we can only conclude that they have no immunity from the anti-trust laws.

It is pointed out, however, that under s 1[4] of the Interstate Commerce Act, 54 Stat. 900, 49 U.S.C. s 1(4), 49 U.S.C.A. s 1(4) it is 'the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto.' And it is noted that agreement among carriers is provided in the establishment of joint rates. s 6. That is true. But it would be a perversion of those sections to hold that they legalize a ratefixing combination of the character alleged to exist here. The collaboration contemplated in the fixing of through and joint rates is of a restrictive nature. We do not stop at this stage of the proceedings to delineate the legitimate area in which that collaboration may operate. In the Keogh case, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183, the suit was one for damages under the Sherman Act. The charge was that the defendant carriers ***458** had formed a rate bureau or committee to secure agreement in respect to freight rates among the constituent railroad companies which would otherwise be competing carriers. As we have seen, the Court held that damages could not be recovered. But Mr. Justice Brandeis speaking for a unanimous Court stated that a conspiracy to fix rates might be illegal though the rates fixed were reasonable and non-discriminatory. He said (260 U.S. at pages 161, 162, 43 S.Ct. at page 49, 67 L.Ed. 183): 'All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceedings before the Commission. * * * But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be

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illegal; and, if so, the Government may have redress by criminal proceedings under section 3 * * *, by injunction under section 4 * * *, and by forfeiture under section 6 * * *. That was settled by United States v. Trans-Missouri Freight Association, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007, and United States v. Joint Traffic Association, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the government.'

The Trans-Missouri Freight Ass'n case and the Joint Traffic Ass'n case have been followed in other fields. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, and the cases which preceded it indicate the extent of the ban on price-fixing under the Sherman Act. But we need not at this juncture determine the full extent to which that principle is applicable in the fixing of joint through rates. It is sufficient here to note that we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate ***459** making. ****727** 1 Sharfman, The Interstate Commerce Commission (1931), p. 81. The Act was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates. Arizona Grocery Co. v. Atchison, T. & S.F.R. Co., supra. If a combination of the character described in this bill of complaint is immune from suit that freedom of action disappears. The coercive and collusive influences of group action take its place. [7] A monopoly power is created under the aegis of private parties without Congressional sanction and without governmental supervision or control.

These considerations emphasize the irrelevancy to the present problem of the fact that the Commission has authority to remove discriminatory rates of the character alleged to exist here. Under s 3(1) of the Act rates are declared unlawful which give 'any undue or unreasonable preference or advantage' to any port, region, district, territory and the like. And the Commission has taken some action in that regard. See State of Alabama v. New York C.R. Co., 235 I.C.C. 255; Id., 237 I.C.C. 515; Live Stock to and from the South, 253 I.C.C. 241. The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influences of a combination which exceed the limits of the collaboration authorized for the fixing of joint through ***460** rates. It seeks to put an end to discriminatory and coercive practices. The aim is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the combination. That is not to undercut or impair the primary jurisdiction of the Commission over rates. It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted.

What we have said disposes for the most part of the argument that recognized principles of equity prevent us from granting the relief which is asked. Sec. 16 of the Clayton Act provides for relief by injunction 'when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.' Those requirements are sufficiently satisfied to justify a filing of this bill. It must be remembered that this is a suit to dissolve an illegal combination or to confine it to the legitimate area of collaboration. That relief cannot be obtained from the Commission for it has no supervisory authority over the combination. It is true that the injury to Georgia is not in the existence of the combination per se but in the rates which are fixed by the combination. The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us. The Keogh case indicates that even a combination to fix reasonable and non-discriminatory rates may be illegal. 260 U.S. at page 161, 43 S.Ct. at page 49, 67 L.Ed. 183. The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws. Thus a 'zone of reasonableness exists between maxima and ***461** minima within which a carrier is ordinarily free to adjust its charges for itself.' United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 506, 55 S.Ct. 462, 465, 79 L.Ed. 1023. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers ****728** who employ unlawful tactics. If the ratemaking function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner

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envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone.

Moreover, the relief sought from this Court is not an uprooting of established rates. We are not asked for a decree which would be an idle gesture. We are not asked to enjoin what the Commission might later approve or condone. We are not asked to trench on the domain of the Commission; nor need any decree which may be ultimately entered in this cause have that effect. Georgia alleges, 'no administrative proceeding directed against a particular schedule of rates would afford relief to the State of Georgia so long as the defendants remained free to promulgate rates by collusive agreement. Until the conspiracy is ended, the corrosion of new schedules, established by the collusive power of the defendant carriers acting in concert, would frustrate any action sought to be taken by administrative process to redress the grievances from which the State of Georgia suffers.' Rate-making is a continuous process. Georgia is seeking a decree which will prevent in the future the kind of harmful conduct which has occurred in the past. Take the case of coercion. If it is shown that the alleged combination exists and uses coercion in the fixing of joint through rates, only an injunction aimed at future conduct of that character can give adequate relief. Indeed, so long as the collaboration which exists exceeds lawful limits and continues in operation, the only effective remedy lies in dissolving the ***462** combination or in confining it within legitimate boundaries. Any decree which is entered would look to the future and would free tomorrow's rate-making from the coercive and collusive influences alleged to exist. It cannot of course be determined in advance what rates may be lawfully established. But coercion can be enjoined. And so can a combination which has as its purpose an invidious discrimination against a region or locality. Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here. If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. It will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the anti-trust laws condemn and which are not sanctioned by the Interstate Commerce Act. It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination. The threatened injury is clear. The damage alleged is sufficient to satisfy the preliminary requirements of this motion to file. There is no administrative control over the combination. And no adequate or effective remedy other than this suit is suggested which Georgia can employ to eliminate from rate-making the influences of the unlawful conspiracy alleged to exist here.

As we have said, we construe the bill to charge a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed. We hold that under that construction of the bill a cause of action under the anti-trust laws is alleged.[8] We intimate no opinion whether the bill might ***463** be construed to charge more than that or whether a rate-fixing combination would be legal under the Interstate Commerce Act and the Sherman Act but for the features of discrimination and coercion charged here. We are dealing with the case only in a preliminary manner. Cf. State of Missouri v. Illinois, 200 U.S. 496, 517, 518, 26 S.Ct. 268, 269, 50 L.Ed. 572. The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed. We construe it with that liberality accorded the complaint of a sovereign State as presenting a substantial question with sufficient clarity and specificity as to require a joinder of issues.

****729** Alleged Misjoinder of Parties Defendant. Two of the defendant-corporations claim to be citizens of Georgia. Georgia asserts they are not. That issue is an involved one. Georgia may not of course invoke the original jurisdiction of the Court in a suit against one of her citizens. If either of the defendants who assert this defense is a citizen of Georgia and is a necessary party, leave to file would have to be denied. Commonwealth of Pennsylvania v. Quicksilver Mining Co., 10 Wall. 553, 19 L.Ed. 998; State of California v. Southern Pac. Co., 157 U.S. 229, 15 S.Ct. 591, 39 L.Ed. 683; State of Minnesota v. Northern Securities Co., 184 U.S. 199, 22 S.Ct. 308, 46 L.Ed. 499; State of Louisiana v. Cummins, 314 U.S. 577, 62 S.Ct. 121, 86 L.Ed. 467. We do not, however, have to decide at this stage of the proceedings whether the corporations in question are citizens of Georgia within the meaning of Art. III, Sec. 2 of the Constitution. They are not indispensable parties. In a suit to enjoin a conspiracy not all the conspirators are necessary parties defendant.[9] It is averred and not challenged ***464** that the other defendants are citizens of other States. The citizenship of the two defendants in question may be challenged by a motion to strike. State of

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Louisiana v. Cummins, 314 U.S. 580, 62 S.Ct. 132, 86 L.Ed. 469. But if they are stricken, the Court would not lose original jurisdiction over the controversy between Georgia and the other defendants.

Exercise of Original Jurisdiction. It does not necessarily follow that this Court must exercise its original jurisdiction. It has at times been held that this Court is not the appropriate tribunal in which to maintain suits brought by a State.

By Clause 1 of s 2 of Article III of the Constitution, the judicial power of the United States extends 'to all Cases, in Law and Equity, arising under * * * the Laws of the United States' and 'to Controversies * * * between a State and Citizens of another State.' [10] Clause 2 of s 2 of Article III confers on this Court jurisdiction of those cases 'in which a State shall be Party.' But Clause 2 of s 2 merely distributes the jurisdiction conferred by Clause 1 of s 2. State of Louisiana v. Texas, 176 U.S. 1, 16, 20 S.Ct. 251, 256, 44 L.Ed. 347; Commonwealth of Massachusetts v. Missouri, 308 U.S. 1, 19, 60 S.Ct. 39, 44, 84 L.Ed. 3. Clause 2 does not grant exclusive jurisdiction to this Court in the cases enumerated by it. Ames v. Kansas, 111 U.S. 449, 469, 4 S.Ct. 437, 446, 28 L.Ed. 482; Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 18 S.Ct. 685, 42 L.Ed. 1126. And it has been held that the exercise of that jurisdiction is not mandatory in every case. State of North Dakota v. Chicago & Northwestern R. Co., supra; State of Georgia v. Chattanooga, 264 U.S. 472, 473, 483, 44 S.Ct. 369, 371, 68 L.Ed. 796; State of Oklahoma v. Cook, supra, 304 U.S. at page 396, 58 S.Ct. at page 958, 82 L.Ed. 1416; Commonwealth of Massachusetts v. Missouri, supra. The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice. ***465** State of Georgia v. Chattanooga, supra; Commonwealth of Massachusetts v. Missouri, supra.

There is some suggestion that the issues tendered by the bill of complaint present questions which a district court is quite competent to decide. It is pointed out that the remedy is one normally pursued in the district courts whose facilities and prescribed judicial duties are better adapted to the extended trial of issues of fact than are those of this Court. And it is said that no reason appears why the present suit may not conveniently proceed in the district court of the proper venue or why the convenience of the parties and witnesses, as well as of the courts, would be better served by a trial before a master appointed by this ****730** Court than by a trial in a district court with the customary appellate review. [11] The suggestion is that we deny the motion for leave to file, without prejudice to the maintenance of the suit in an appropriate district court. See Commonwealth of Massachusetts v. Missouri, supra, 308 U.S. at pages 17, 18, 60 S.Ct. at pages 42, 43, 84 L.Ed. 3.

There is, however, a reason why we should not follow that procedure here though in other respects we assume it would be wholly appropriate. Sec. 16 of the Clayton Act, 15 U.S.C. s 26, 15 U.S.C.A. s 26, with the exception already noted, provides that 'any person * * * shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws.' Sec. 12 of the Clayton Act, 15 U.S.C. s 22, 15 U.S.C.A. s 22, provides that 'Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the ***466** district of which it is an inhabitant, or wherever it may be found.'

From these provisions it is apparent that Georgia might sue the defendants only in the judicial district where they are inhabitants or where they may be found or transact business. The bill of complaint, however, alleges and (with the exception of the two defendants already mentioned) it is not denied that 'the parties defendant are not citizens of Georgia, or within the jurisdiction of its courts.' If that allegation is taken as true, it is apparent that Georgia could not find all of the defendants in one of the judicial districts of Georgia so as to maintain a suit of this character against all of them in a district court in Georgia. Certainly we have no basis for assuming that all of the so-called northern roads, incorporated in such States as Pennsylvania, Maryland, Indiana, Ohio, New York and Illinois, are doing business in Georgia. It is said that most of the defendants can be found in Georgia, in the District of Columbia, or in other districts. But no such facts appear in the record before us. And we cannot take judicial notice of the district or districts wherein all of the defendants are 'found' or 'transact business'. We would not be warranted in depriving Georgia of the original jurisdiction of this Court merely because each of the defendants could be found in some

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judicial district. Unless it were clear that all of them could be found in some convenient forum we could not say that Georgia had a 'proper and adequate remedy' apart from the original jurisdiction of this Court. Commonwealth of Massachusetts v. Missouri, supra, 308 U.S. at page 19, 60 S.Ct. at page 44, 84 L.Ed. 3. No such showing has been made. Once a state makes out a case which comes within our original jurisdiction, its right to come here is established. There is no requirement in the Constitution that it go further and show that no other forum is available to it.

It is true that s 5 of the Sherman Act empowers the court before whom proceedings under s 4 are pending to ***467** bring in parties who reside outside the district in which the court is held.[12] That procedure is available in civil suits brought by the ****731** United States. Standard Oil Co. v. United States, 221 U.S. 1, 46, 31 S.Ct. 502, 510, 54 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734. But since s 4 is limited to suits brought by the United States, s 5 is similarly confined. See Greer, Mills & Co. v. Stoller, C.C., 77 F. 1; Hansen Packing Co. v. Armour & Co., D.C., 16 F.Supp. 784, 787. Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial. As stated in Robertson v. Railroad Labor Board, 268 U.S. 619, 622, 623, 45 S.Ct. 621, 622, 623, 69 L.Ed. 1119:

'In a civil suit in personam, jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. Under the general provisions of law, a United States District Court ***468** cannot issue process beyond the limits of the district, Harkness v. Hyde, 98 U.S. 476, 25 L.Ed. 237; Ex parte Graham (Fed.Cas. No. 5,657), 3 Wash. (C.C.) 456. And a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district. Toland v. Sprague, 12 Pet. 300, 330, 9 L.Ed. 1093. Such was the general rule established by Judiciary Act Sept. 24, 1789, c. 20, s 11, 1 Stat. 73, 79, in accordance with the practice at the common law. Picquet v. Swan, Fed.Cas. No. 11,134, 5 Mason 35, 39 et seq. And such has been the general rule ever since. Munter v. Weil Corset Co., 261 U.S. 276, 279, 43 S.Ct. 347 (349), 67 L.Ed. 652.'

It follows that we should not in the exercise of our discretion remit Georgia to the federal district courts for relief against the injuries of which she complains.

The motion for leave to file the amended bill of complaint is granted.

It is so ordered.

Motion for leave to file bill of complaint granted.

Mr. Chief Justice STONE, dissenting.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, Mr. Justice JACKSON, and I think that the application of the State of Georgia for leave to file its amended bill of complaint in this Court should be denied (1) because in its judicial discretion, this Court should, without deciding the merits, leave the State to its remedy, if any, in the district court; (2) because the State lacks standing to present the only substantial issue in the case; and (3) because in the present posture of the case, the bill of complaint, for several reasons, fails to state a cause of action for which a court of equity can give effective relief.

As the Court concedes and for reasons which will presently be more fully considered, the State, under the rule laid down in Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183, cannot maintain its suit for damages resulting from the alleged conspiracy to fix unlawful interstate railroad freight rates. But the Court grants Georgia's application to file on the ground that its bill of complaint, ***469** as now amended, states a cause of action under s 16 of the Clayton Act, c. 323, 38 Stat. 737, 15 U.S.C. s 26, 15 U.S.C.A. s 26, for an injunction against a conspiracy in violation of the antitrust laws. The Court holds that such a suit is within the original jurisdiction of this Court, conferred by Article III, s 2, Cls. 1 and 2 of the Constitution. Clause 1 provides that the judicial power of the United States extends 'to all Cases, in Law and Equity, arising

under * * * the Laws of the United States' and 'to Controversies * * * between a State and Citizens of another State * * *.' Clause 2 confers on this Court original jurisdiction of those cases or controversies 'in which a State shall be Party.'

The Court disregards the fainthearted and unconvincing assertion of the State that it has a 'common law' cause of action entitling it, independently of the Clayton Act and the federal antitrust laws, to maintain the present suit to restrain the alleged conspiracy to fix and maintain rates or charges for the interstate transportation of freight. We do not stop to consider **732 this contention, for we are of the opinion that the objections to the maintenance of the present suit are essentially the same, whether it be regarded as a suit upon a cause of action arising under the Clayton Act or as one maintainable upon the equitable principles generally applicable in the federal courts independently of the Clayton Act.

I.

If it be assumed that the State may maintain this action, either as parens patriae or for the injury to itself as a shipper and consignee of interstate freight, the right sought to be established is in point of substance like that of a private corporation, and the remedy asked is one normally pursued in district courts whose facilities and prescribed judicial duties are better adapted to the trial *470 of issues of fact than are those of this Court. In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time consuming process which seriously interferes with the discharge of our ever increasing appellate duties. No reason appears why the present suit may not be as conveniently proceeded with in the district court of the proper venue as in this Court, or why the convenience of the parties and witnesses, as well as of the courts concerned, would be better served by a trial before a master appointed by this Court than by a trial in the appropriate district court with the customary appellate review. The case seems preeminently one where this Court may and should, in the exercise of its discretion and in the interest of a more efficient administration of justice, decline to exercise its jurisdiction, and remit the parties to the appropriate district court for the proper disposition of the case there. State of North Dakota v. Chicago & Northwestern R. Co., 257 U.S. 485, 42 S.Ct. 170, 66 L.Ed. 329; State of Georgia v. Chattanooga, 264 U.S. 472, 483, 44 S.Ct. 369, 371, 68 L.Ed. 796; State of Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 396, 58 S.Ct. 954, 958, 82 L.Ed. 1416; Commonwealth of Massachusetts v. Missouri, 308 U.S. 1, 17—20, 60 S.Ct. 39, 42—44, 84 L.Ed. 3.

It is said that Georgia should not be deprived of the jurisdiction of this Court unless it can bring suit against all the defendants in one convenient district; and that there is no reason for assuming that all the defendants are amendable to suit in any one judicial district. But this puts the shoe on the wrong foot. It is Georgia which seeks to invoke our equity jurisdiction to hear this case, and when the question of our discretionary power to remit the parties to an adequate remedy in some other court is raised, it is incumbent upon it to show that it will be unable to reach all the defendants in a convenient district. And Georgia, although invited on the argument of this motion to do so, has made no showing that the suit cannot be proceeded with in a district court as readily as in this *471 Court. It made no such allegation in the amended bill of complaint which it tenders.[1] Hence we can only conclude that there is no such obstacle.

Further, it may be readily determined from standard works of reference, such as The Official Guide of the Railways, Moody's Steam Railroads, railroad time-tables, and telephone directories, that the supposed difficulty is not a real one. Under s 12 of the Clayton Act, 15 U.S.C. s 22, 15 U.S.C.A. s 22, these defendants may be sued in any district in which they are 'found' or 'transact business.' A corporation both is 'found' and 'transacts business' in a district in which it operates a railroad or in which it maintains an office for the solicitation of freight or passenger traffic. See Eastman Kodak Co. v. Southern Photo Material Co., 273 U.S. 359, 370—374, 47 S.Ct. 400, 402—404, 71 L.Ed. 684; United States v. Univis Lens Co., 316 U.S. 241, 246, 62 S.Ct. 1088, 1091, 86 L.Ed. 1408. These facts may be ascertained readily from the sources we have mentioned. It appears from them that there are several districts which would be as convenient for a trial as Washington, D.C., where proceedings before this Court would be had, and in which **733 Georgia may obtain service of process upon at least as many of the defendants named in the complaint, as it may sue in this Court. For Georgia, itself, as well as this Court, seems reconciled to the suit's continuing here with but eighteen of the twenty defendants, since two may be required to be dismissed from the suit as citizens of Georgia.[2]

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***472** Of the twenty defendants, at least 18, not including the New York, Chicago & St. Louis R.R. Co., and the Richmond, Fredericksburg and Potomac R.R. Co., (R.F. & P.) are within the jurisdiction of the Northern District of Georgia. Of these defendants, at least 19, all but the R.F. & P., transact business in the Northern District of Illinois and in the Southern District of New York. At least 18, not including the R.F. & P., and the Nashville, Chattanooga & St. Louis Ry., are amendable to suit in the Western District of Pennsylvania and in the Eastern District of Michigan. At least 18, all but the R.F. & P., and the Carolina, Clinchfield and Ohio Railway,[3] are suable in the Eastern District of Missouri. Thus, there is no want of a suitable forum in which Georgia can reach at least the same number of defendants as she may sue in this Court. And it may be that service can be had on the other defendants in the districts named.

II.

If leave to file were denied, as we think it should be, without prejudice to a suit in a district court, it would be unnecessary at this stage of the proceedings to pass upon the question whether the suit is one which a court of equity could entertain. But in assuming jurisdiction of the case, the Court passes on that question. Hence it becomes necessary to state the reasons why, in the present posture of the case, the State does not state a case for relief within our original jurisdiction.

The gist of the cause of action asserted by the amended complaint is the injury visited upon the inhabitants of the State of Georgia by the alleged conspiracy among the defendant railroads to fix and maintain unlawfully excessive and discriminatory rates upon freight moving ***473** by interstate rail transportation to and from Georgia. It is further alleged that the conspiracy violates the Sherman Act, and that its effect is to retard the economic growth of the State. To this is added what the Court concedes is a mere 'makeweight' allegation of injury to the State in its capacity as an owner of a railroad, and as a shipper and consignee of freight.

But the inhabitants of the State who have suffered injury or who are threatened with injury by the unlawful practices alleged in the amended complaint are alone entitled to seek a legal remedy for their injury, and are the proper parties plaintiff in any suit to enforce their rights which are alleged to have been infringed. It has long been settled by the decisions of this Court that a State is without standing to maintain suit for injuries sustained by its citizens and inhabitants for which they may sue in their own behalf. State of New Hampshire v. Louisiana, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656; State of Louisiana v. Texas, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347; State of Oklahoma v. Atchison, T. & S.F.R. Co., 220 U.S. 277, 289, 31 S.Ct. 434, 437, 55 L.Ed. 465; State of Oklahoma ex rel. Johnson v. Cook, supra, 304 U.S. 395, 396, 58 S.Ct. 958, 959, 82 L.Ed. 1416; Jones ex rel. Louisiana v. Bowles, 322 U.S. 707, 64 S.Ct. 1043. And many years ago it was established by decisions of this Court, whose authority has remained unimpaired until discarded by the opinion of the Court just announced, that a State does not stand in such relation to its citizens and inhabitants as to enable it to maintain an original suit in this Court to protect them by injunction from injuries to the State's economy resulting from the maintenance of unlawful interstate freight rates. State of Oklahoma v. Atchison, T. & S.F.R. Co., supra; cf. State of Oklahoma v. Gulf, C. & S.F. Ry. Co., 220 U.S. 290, 301, 31 S.Ct. 437, 441, 55 L.Ed. 469, Ann.Cas.1912C, 524.

In the Atchison Railway case the plaintiff State alleged as the basis for its capacity to sue for relief, see ****734** 220 U.S. at pages 283, 284, 31 S.Ct. at pages 434, 435, 55 L.Ed. 469, Ann.Cas.1912C, 524, as does Georgia here, that the maintenance of the unlawful structure of freight rates on commodities widely used by inhabitants of the State, was "a menace ***474** to the future of said state.' * * * (and) a hindrance to the growth of the state.' This Court nevertheless held that the wrong was to the individuals of the State, and that the State was therefore not in a position to bring the suit as parens patriae.

The federal government is parens patriae with respect of the cause of action here alleged, and not the State. The federal government alone stands in such relationship to the citizens and inhabitants of the United States, as to permit the bringing of suit in their behalf, to protect them from the violation of federal laws relating to interstate commerce. See Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 485, 486, 43 S.Ct. 597, 600, 601, 67 L.Ed. 1078; State of Florida v. Mellon, 273

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U.S. 12, 18, 47 S.Ct. 265, 267, 71 L.Ed. 511; Jones ex rel. Louisiana v. Bowles, supra. The Sherman Act, ss 1-4, 15 U.S.C. ss 1-4, 15 U.S.C.A. ss 1—4, recognized that it is the United States which is parens patriae, when it authorized the United States, not the individual States, to bring criminal prosecutions or suits for injunctions under the Act.

When the United States brings such a suit it is acting on behalf of the people of the United States, and in the national interest. The authority to bring such suits includes the discretionary authority not to bring them, if the responsible officers of the government are of the opinion that a suit is not warranted or would be of disservice to the national interest. To permit a State to bring a Sherman Act suit in behalf of the public is to fly in the face of the national policy established by Congress that the federal government should determine when such a suit is to be brought and how it should be prosecuted.

Thus the Sherman Act entrusted to the national government the duty to represent the people in the vindication of their rights under the anti-trust laws. And this is confirmed by s 16 of the Clayton Act, which permits injunction suits by the United States against common carriers in respect of matters within the province of the Interstate Commerce Commission, while prohibiting such suits to all others, including a State.

***475** III.

But even if, as the Court decides, Georgia has standing to maintain this suit, either in its own right or as parens patriae, and this Court has jurisdiction of the suit and should, in the exercise of its discretion, entertain it rather than remit the parties to the district court, the more important question remains whether the present suit is one in which a court of equity can give any effective relief.

The suit, so far as the Court allows its prosecution, is in equity to restrain an alleged conspiracy by the defendant rail carriers to fix and maintain unjust, unlawful, excessive, and discriminatory freight rates in violation of the antitrust laws. Section 16 of the Clayton Act, 15 U.S.C. s 26, 15 U.S.C.A. s 26, authorizes 'any person' to maintain a suit to restrain violations of the antitrust laws, and the State of Georgia, suing for its own injuries, is a person within the meaning of that section. State of Georgia v. Evans, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346. The section provides that the relief to be given is an injunction 'against threatened loss or damage by a violation of the antitrust laws * * *, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings * * *.' And even though, as asserted, the suit be maintainable in the federal courts independently of the Clayton Act, the controlling principles governing the maintenance of the suit are the same in either case. The plaintiff must show threatened injury, Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65, 82, 22 S.Ct. 585, 594, 46 L.Ed. 808; Paine Lumber Co. v. Neal, 244 U.S. 459, 471, 37 S.Ct. 718, 720, 61 L.Ed. 1256; Duplex Printing Press Co. v. Deering, 254 U.S. 443, 464, 465, 41 S.Ct. 172, 175, 176, 65 L.Ed. 349, 16 A.L.R. 196; compare State of Texas v. Florida, 306 U.S. 398, 406-412, 59 S.Ct. 563, 567—571, 830, 83 L.Ed. 817, 121 A.L.R. 1179, with Commonwealth of Massachusetts v. Missouri, supra, 308 U.S. 15, 16, 60 S.Ct. 42, 84 L.Ed. 3, for which he is without other adequate remedy, Matthews v. Rodgers, 284 U.S. 521, 525, 526, 52 S.Ct. 217, 219, 220, 76 L.Ed. 447, and cases cited; ****735** Schoenthal v. Irving Trust Co., 287 U.S. 92, 94, 53 S.Ct. 50, 51, 77 L.Ed. 185; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50—52, 58 S.Ct. 459, 463—465, 82 L.Ed. 638, and ***476** cases cited, and for which a court of equity is able to provide a remedy.

Georgia is threatened with injury only as the alleged conspiracy will result in the defendants' charging freight rates other than those which would exist in the absence of the conspiracy. That is, Georgia is not injured unless other rates than those now in force would be charged if the alleged conspiracy were to cease. While threatened damage in that sense could be assumed in a free competitive market, freight rates are not, under the Interstate Commerce Act, arrived at by the processes of free competition. The requirements of the Act are, as we will see, that the rates be just and reasonable and that they accord with the national transportation policy; the determination, in the first instance, whether the rates conform to those standards is left by Congress to the Interstate Commerce Commission, not to the courts. And unless Georgia can show that the present rates are unlawful, or

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that some other rate structure, which could be substituted for that now in force, would be just and reasonable, which Georgia cannot do without prior resort to the Commission, it can not show that any other structure could lawfully exist or that any injury to it is threatened by the conspiracy.

It follows from this that the prerequisites to the maintenance of the present suit are lacking for the following reasons: First, the State has not availed itself of or exhausted the administrative remedies provided by the Interstate Commerce Act, which may afford an adequate remedy and which must in any case precede the institution of the present suit in equity. Second, the suit as now framed falls within the proviso of s 16 of the Clayton Act denying to any 'person', except the United States, authority 'to bring suit in equity for injunctive relief against any common carrier subject to the provisions of' the Interstate Commerce Act, 'in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.' And ***477** third, in the absence of a determination by the Commission of the unlawfulness of the interstate freight tariffs filed or proposed to be filed by the several defendant carriers, no court of equity could, within the scope of its authority, frame a decree effectively enjoining an agreement or 'conspiracy' to file tariffs establishing interstate freight rates.

First. The fact that a State may constitutionally invoke the jurisdiction of this Court in a suit brought by it against citizens of another State, does not dispense with the further requisite that if equitable relief is sought, the bill of complaint must state a cause of action cognizable in equity, of such a nature that the Court can give relief. State of Texas v. Florida, supra, 306 U.S. 405, 59 S.Ct. 567, 83 L.Ed. 817, 121 A.L.R. 1179. It is, as we have said, a familiar principle governing the exercise of equity jurisdiction of federal courts that equitable relief may be invoked only when the plaintiff is without other adequate remedy. And it is a corollary of this that a suitor may not seek such relief until he has exhausted his available administrative remedies. Myers v. Bethlehem Shipbuilding Corp., supra, 303 U.S. 51, 58 S.Ct. 463, 82 L.Ed. 638, note 9, and cases cited; Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 310, 311, 58 S.Ct. 199, 204, 205, 82 L.Ed. 276.

Here, by the terms of s 16 of the Clayton Act, as well as the principles generally governing equitable relief in the federal courts, the State, in order to secure the aid of equity, must show injury caused or threatened by the alleged unlawful acts of which it complains. Since the wrongful acts relied upon are a conspiracy to adopt and maintain unjust, unlawful, excessive or discriminatory freight rates, the only threatened injury to the State or its inhabitants, resulting from the conspiracy, is that which is or may be caused by such unlawful rates.

But the Interstate Commerce Act requires all interstate rail carriers, before putting into effect rates or charges for interstate transportation to adopt and file with the Commission just and reasonable rates. Section 1(4)(5)(6), 6(1) (3), 49 U.S.C. s 1(4)(5)(6), 6(1)(3), 49 U.S.C.A. s 1(4—6), (6)(1, 3). In confers on ***478** the Commission exclusive jurisdiction to determine the lawfulness of all rates appearing in the filed tariffs, and authority to suspend rates, and to order the railroad to cease and desist from charging other ****736** than the lawful rates. Section 15(1)(7), 49 U.S.C. s 15(1)(7), 49 U.S.C.A. s 15(1, 7). The Commission's determination is to be in accordance with the 'national transportation policy', to develop and preserve a national transportation system, see Railroad Commission of State of Wisconsin v. Chicago, B. & Q.R. Co., 257 U.S. 563, 585, 42 S.Ct. 232, 236, 66 L.Ed. 371, 22 A.L.R. 1086; New England Divisions Case (Akron, C. & Y.R. Co. v. United States), 261 U.S. 184, 189, 190, 43 S.Ct. 270, 273, 67 L.Ed. 605; Railroad Commission v. Southern Pacific Co., 264 U.S. 331, 341, 342, 44 S.Ct. 376, 377, 378, 68 L.Ed. 713, and to establish and maintain 'reasonable charges * * *, without * * * unfair or destructive competitive practices * * *.' Transportation Act of 1940, c. 722, 54 Stat. 899, s 1, 49 U.S.C.A. note preceding s 1.

The Commission is directed to consider the effect of rates on the movement of traffic, and the need of adequate and efficient railway transportation service at low cost, as well as the carriers' need of revenues sufficient to enable them to provide that service. Interstate Commerce Act, as amended, s 15a, 49 U.S.C. s 15a, 49 U.S.C.A. s 15a. In fixing rates or divisions, the Commission's determination may take account of the financial needs of the weaker carriers, by giving them a larger share of divisions, or by a general rate increase.[4] ***479** New England Divisions Case, supra, 261 U.S. 189—195, 43 S.Ct. 273—275, 67 L.Ed. 605; Beaumont, S.L. & W.R. Co. v. United States, 282 U.S. 74, 51 S.Ct. 1, 75 L.Ed. 221; cf. Ann Arbor R.

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Co. v. United States, 281 U.S. 658, 50 S.Ct. 444, 74 L.Ed. 1098. It may fix minimum as well as maximum rates, s 15, 49 U.S.C. s 15, 49 U.S.C.A. s 15, thus permitting it to prevent cut-throat competition and to protect weaker competitors. It may consider the effect of competing means of transportation, or other relevant circumstances and conditions attending the transportation service. See Barringer & Co. v. United States, 319 U.S. 1, 729, 63 S.Ct. 967, 87 L.Ed. 1171, and authorities cited; and on the considerations upon which the Commission fixes rates, see Sharfman, The Interstate Commerce Commission, Volume III-B. These and many other controlling factors, which enter the Commission's determination of rates, may be irrelevant to decision in an ordinary Sherman Act case, but are inextricably interwoven with the present suit, in which the State must establish that injury to it is threatened by the conspiracy to fix freight rates.

The Commission's orders are enforceable by injunctions in the district courts. Section 16(12), 49 U.S.C. s 16(12), 49 U.S.C.A. s 16(12). And the administrative remedy is exclusive of any which may be afforded by courts, at least until the Commission has passed upon the validity of the rates and classifications involved. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075; Robinson v. Baltimore & Ohio R.R. Co., 222 U.S. 506, 32 S.Ct. 114, 56 L.Ed. 288; Northern Pacific Ry. Co. v. Solum, 247 U.S. 477, 38 S.Ct. 550, 62 L.Ed. 1221; Director General of Railroads v. Viscose Company, 254 U.S. 498, 41 S.Ct. 151, 65 L.Ed. 372; Midland Valley R. Co. v. Barkley, 276 U.S. 482, 48 S.Ct. 342, 72 L.Ed. 664. Until the Commission acts, no court can say that the rates are not lawful and reasonable or that they are not within the lowest range of the zone of reasonableness. Nor can either be assumed, the burden being upon Georgia to show that it is injured by the acts of which it complains. And if the present rates are at the lowest point of reasonableness, as they well may be, Georgia is not injured, for in that event no lower rates ***480** could be lawfully enforced by the Commission or the courts.

It is not without pertinence to the present ****737** application that the State of Georgia and seven other southern States are parties to proceedings now pending before the Interstate Commerce Commission, Docket No. 28300, Class Rate Investigation, and Docket No. 28310, Consolidated Freight Classification, in which the Chairman of the Georgia Public Service Commission has appeared as the principal witness on behalf of the State. In these proceedings the witness urged uniformity of rates in southern and official classification territories, in conformity to the official territory system of rates. The witness relied on s 3(1) of the Act, 49 U.S.C. s 3(1), 49 U.S.C.A. s 3(1), making it unlawful for any rail carrier to make or give undue or unreasonable preferences or advantage to any particular person, locality or particular description of traffic; on s 1(4)(5)(6), 49 U.S.C. s 1(4)(5)(6), 49 U.S.C.A. s 1(4—6), requiring common carriers by rail to establish just and reasonable rates, fares, charges and classifications; and on s 5(b) of the Transportation Act of 1940, 49 U.S.C.A. s 3 note, which requires the Commission to investigate the lawfulness of rates between points in different classification territories and to enter such orders as may be appropriate for the removal 'of any unlawfulness which may be found to exist.'

It is plain that the Commission has jurisdiction in these proceedings to set aside such unlawful rates as may have resulted from the conspiracies alleged in the State's amended complaint. If the Commission orders them set aside, nothing further remains for any court to do, for reasons which will presently more fully appear, save only as it may be asked to review or enforce the Commission's order. Without prior resort to the Commission, Georgia does not and cannot establish in a court proceeding, that it is threatened with injury by the conspiracy or that it ***481** is necessary for it to resort to the courts to secure the relief which it seeks in the present suit.

The State seeks to avoid these plain provisions of the Clayton and Interstate Commerce Acts by its insistence that by its amended complaint it asks relief not from the unlawful rates which have been or will be established as a result of the alleged conspiracy, but from the conspiracy itself, over which the Interstate Commerce Commission is said to have no jurisdiction, and from which it can give no relief. In the State's bill of complaint, as originally presented, it sought an injunction setting aside the unlawful rates. Evidently realizing that all courts are precluded from taking such action before the Commission has determined the validity of the rates, the State sought to overcome the difficulty by an amendment to its bill of complaint, purporting to withdraw its attack on the rates and assailing the conspiracy alone. But, as the Court seems to recognize, even the amended complaint contains allegations and raises issues as to whether the rates charged by the defendants are discriminatory. The complaint therefore raises questions as to interference with the primary jurisdiction of the Interstate Commerce Commission which are essentially the same as those presented by the original bill.

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This verbal maneuver, as a means of conferring jurisdiction on this Court, is futile, for the reason, as we have said, that the State cannot maintain its suit in equity either under s 16 of the Clayton Act or upon general equity principles, without establishing a threatened injury to it or those whom it represents. And this is equally true whether it sues as parens patriae or as owner of a railroad, and a shipper and consignee of freight. The threatened injury can ensue only from the maintenance of the unlawful rates and practices, which are specially charged to be discriminatory. But 'a rate is not necessarily illegal because ***482** it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce' and not by the antitrust laws. Keogh v. Chicago & Northwestern R. Co., supra, 260 U.S. 162, 43 S.Ct. 49, 67 L.Ed. 183. Hence it follows in this case that the suit can be maintained only by showing that the alleged conspiracy has resulted or will result in unlawful rates, or that without the conspiracy, lawful rates, other than those now in force, would prevail, determinations which can be made only by the Interstate Commerce Commission, and which must be made by it, before this Court can take any judicial action based upon such determinations.

We assume for present purposes that a conspiracy to fix lawful rates may be a violation of the antitrust laws, as was intimated in the Keogh case. But as this ****738** Court there pointed out, 260 U.S. pages 161, 162, 43 S.Ct. at page 49, 67 L.Ed. 183, the remedy is not to be had by the suit of a private individual; 'the government may have redress by criminal proceedings under section 3 * * *, by injunction under section 4 * * *, and by forfeiture under section 6 * * *.' The State cannot, more than a private individual, bring a suit under the Clayton Act to restrain the conspiracy unless it be a conspiracy to do something injurious to the plaintiff. The only such injury alleged in a great variety of ways is that caused by unlawful and discriminatory freight rates established by the conspiracy. No such injury can be presumed from a conspiracy to fix lawful rates or to fix any rate unless it can be known with what new rates those now in force will be replaced by Commission action.

For this and like reasons, this Court has uniformly refused to permit a party under guise of suing under the antitrust laws, to seek in the courts by indirection, determinations which are reserved for the Commission in the first instance. Keogh v. Chicago & Northwestern R. Co., supra; Central Transfer Co. v. Terminal Railroad Ass'n, 288 U.S. 469, 476, 53 S.Ct. 444, 446, 77 L.Ed. 899; ***483** Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500, 56 S.Ct. 546, 80 L.Ed. 827; and compare United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408; Armour & Co. v. Alton R. Co., 312 U.S. 195, 61 S.Ct. 498, 85 L.Ed. 771. As these cases show, the State cannot make its assault on a matter said not to be within the jurisdiction of the Commission, when adjudication must turn upon matters which are within its jurisdiction. Here the Court cannot ascertain and enjoin threatened injury resulting from a conspiracy to fix unlawful freight rates without considering their lawfulness and reasonableness, and thus encroaching upon the authority which Congress has given to the Commission alone. The case is therefore peculiarly one for the application of the rule that equity will not undertake to give relief until the plaintiff has exhausted his administrative remedies, for until that has occurred, it cannot be known that the plaintiff is without adequate relief or, in the event that it is not, what relief equity may appropriately give.

Second. Independent of, but supplementing the considerations which indicate the unmistakable intention of Congress that a suit like the present should not be made the means of breaking down the regulatory powers of the Commission, are the provisions of s 16 of the Clayton Act. As already noted, a proviso to the section withholds from 'any person' other than the United States the right 'to bring suit in equity for injunctive relief against any common carrier subject to the provisions of' the Interstate Commerce Act 'in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.'

When the Clayton Act was adopted in 1914, the Commission had already been given broad powers to fix and regulate rates by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584 and the Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 539, 49 U.S.C.A. s 1 et seq. Congress realized the danger that indiscriminate suits for injunctions under the ***484** antitrust laws, in many cases affecting interstate rail carriers, would substitute the many district courts for the Commission, the single rate making authority, a retrogression from the consistent Congressional policy to avoid confusion and conflict in this field. Hence, when Congress, by s 16 of the Clayton Act, for the first time authorized private suitors to seek relief by injunction under the antitrust laws, it was at pains to bar such suits against carriers with respect to any matters within the province of the Commission. Thus

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it was the purpose of s 16 to preclude the breakdown of the unified rate structure established for the nation by the Commission, as would inevitably result from the maintenance under the Sherman Act of numerous individual suits, like the present one, affecting rates which Congress had left within the Commission's exclusive control in the first instance.

The statutory command can no more be evaded than may the exclusive jurisdiction of the Commission to regulate rates, by saying that the 'relief' which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Section 16 does not foreclose a suit merely where the 'relief' is a matter subject to the jurisdiction of the Commission. Its words are much broader. They deny the remedy, except to the United States, 'in respect of ****739** any matter subject to * * * jurisdiction' of the Commission. As we have said, Georgia cannot show damage save by showing that the Commission would approve some rate structure other than that presently existing. That is certainly a 'matter subject to the * * * jurisdiction' of the Commission, sufficient to preclude a suit under s 16.

The inseparability of equitable relief against a rate making conspiracy from that against the unlawfulness of the rates which are or may be its fruits, has already been pointed out. Suffice it to say here that precisely the argument now made for disregarding the prohibition of s 16 was rejected by this Court in a suit brought by an injured ***485** private party to restrain agreements or conspiracies to do acts within the jurisdiction of the Commission. Central Transfer Co. v. Terminal Railroad Ass'n, supra. And compare United States Navigation Co. v. Cunard S.S. Co., supra, where this Court gave the like construction to s 16 of the Clayton Act, in its comparable relation to the authority of the Shipping Board to fix rates under the Shipping Act of 1916, c. 451, 39 Stat. 728, as amended by the Merchant Marine Act of 1920, c. 250, 41 Stat. 988, 46 U.S.C ss 801—842, 46 U.S.C.A. ss 801—842.

In the Central Transfer Co. case it was urged that s 16 of the Clayton Act did not preclude the relief sought, since the Commission did not have jurisdiction over the agreements or contracts complained of, but only over the acts involved in their performance. This Court gave the conclusive answer which we think should be given now, that no injunction could be effectively given against the agreement or conspiracy without in some manner relating it to the lawfulness of the acts done or to be done in execution of the agreement or contract, and that the determination of the lawfulness of those acts and their regulation were within the exclusive jurisdiction of the administrative agency. In that case, as well as in the United States Navigation Co. case, it was pointed out that any other construction would defeat the plain purpose of s 16 to preclude, except in suits by the Government, judicial interference with or prejudgment of the lawfulness of matters which Congress has indubitably placed within the jurisdiction of the administrative agency.

Equitable relief under s 16 in the present case must be denied upon the principle identical with that upon which the Court has relied in denying the right of the State to recover damages in the suit which it proposes here. The fact that in this branch of the case, as in Keogh v. Chicago & Northwestern R. Co., supra, and Terminal Warehouse Co. v. Pennsylvania R. Co., supra, the suit is for damages ***486** resulting from unlawful rates, instead of an injunction restraining threatened damage or injury, is without significance. For in either case, damage cannot ensue unless the agreement or conspiracy results in an unlawful rate or practice of whose lawfulness the Commission is the sole arbiter. And in both, this Court has held that the suit cannot be maintained without first resorting to the Commission.

Congress did not see fit by its extensive revision of the Interstate Commerce Act in the Transportation Act of 1940, to alter the application of the Clayton Act to the jurisdiction of the Interstate Commerce Commission. For us to alter it now to meet the exigencies of a particular case, which presents no plausible relevant differences from those which we have heretofore decided, is an assumption of power which only Congress could rightly exercise, and a power which it has plainly declined to exercise.

Third. Even assuming, as the State does, and as the Court is persuaded, that a court of equity could be called upon to enjoin a conspiracy to establish rates in anticipation of a determination of their unlawfulness, it would plainly be impossible to frame a decree for relief in advance of a determination by the Commission that the present rates are unlawful, or that those resulting from the decree would be lawful. Courts cannot enjoin, in general terms, violations of the Sherman Act, without specifying what acts are to be enjoined as violations, or as aiding or inducing violations. Swift & Co. v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518; Swift & Co. v. United States, 276 U.S. 311, 328, 48 S.Ct. 311, 315, 72 L.Ed. 587; cf.

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New York, New Haven & H.R. Co. v. Interstate Commerce Comm., 200 U.S. 361, 404, 26 S.Ct. 272, 282, 50 L.Ed. 515; **740 National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 61 S.Ct. 693, 85 L.Ed. 930. Nor can it determine in advance what rates may be lawfully established since the jurisdiction to make that determination is reserved exclusively to the Commission.

*487 Hence the suggestion, which the Court has been persuaded to accept, that this Court can find a way to enjoin the alleged conspiracy to fix rates, without regard to what rates are or may be agreed upon and whether the Commission finds them to be lawful or unlawful, is an invitation to a course of the veriest futility. Any injunction which this Court could properly frame must not be an idle gesture. It must be one to prevent the threatened injury. An injunction to prevent a conspiracy without relation to its injurious consequences, could not have that effect, and the injunction could be related to those consequences in this case only by defining rates and practices which the Commission has not declared, and may or may not declare, to be unlawful.

It is futile to attempt to enjoin a conspiracy to fix rates because of their injurious effect on the plaintiff, unless it is known that they are unlawful or will be and unless the Court is free to determine the point. And it is futile for this Court to attempt to prescribe what rates will be lawful since its determination will not be binding upon the Commission, and may be ignored by it. Indeed, even after the Commission has made such a determination this Court, in the first instance, is without power to set it aside, State of North Dakota v. Chicago & Northwestern R. Co., supra; State of Texas v. Interstate Commerce Comm., 258 U.S. 158, 164, 165, 42 S.Ct. 261, 263, 264, 66 L.Ed. 531, for exclusive jurisdiction to set aside an order of the Commission is vested in a district court of three judges under the Urgent Deficiencies Act, c. 32, 38 Stat. 219, as amended, 28 U.S.C. ss 41(28), 43, 28 U.S.C.A. ss 41(28), 43.

It is the duty of this Court to dismiss an original suit in which it cannot make an effective decree. See State of Arizona v. California, 298 U.S. 558, 572, 56 S.Ct. 848, 855, 80 L.Ed. 1331, and cases cited. A fortiori, it is its duty not to entertain such a suit.

The soundness and the compelling necessity for the construction which the Court has hitherto given to s 16 of the Clayton Act could not be better illustrated and emphasized *488 than by reference to the situation exhibited by the case which is now before us. Any decree, effective to prevent the injury of which the State complains, would necessarily result in further inequalities in rates, such as are now alleged to exist. The Court cannot enjoin as unlawful the alleged conspiracy to establish rates without undertaking to say what rates and practices are to be deemed lawful and what unlawful. But by this determination the Interstate Commerce Commission would not be bound, nor would the United States or any railroad other than those which are parties defendant.

Only Georgia would secure relief approximating that sought by the bill. If relief enjoining the conspiracy complained of were effective to relieve the State of the injury from unlawful rates to which it objects, and without which it could not maintain the suit under s 16, the decree must result in a new rate structure applicable to the railroads which are parties defendant. Prejudice and discrimination would be created as to every other State in southern territory and as to shippers and consignees of freight in those States who would still be governed by the published tariff rates, against which only Georgia and its citizens would have secured some measure of relief. There would be two sets of rates between the south and the north, one, effected as a result of this Court's decree, applicable to shippers in Georgia over the railroads which are defendants here, and another governed by published tariffs approved by the Commission and applicable to all other shippers and railroads in the south. Since illegality in existing rates is averred because of disparity in the level of rates in two rate making areas, with no allegation that southern carriers receive more than a fair charge for their transportation service, the Court would be required to determine whether the discrimination should be removed by increasing rates in official territory or establishing an intermediate level of new rates, *489 Interstate Commerce Commission v. United States, 289 U.S. 385, 392, 53 S.Ct. 607, 610, 77 L.Ed. 1273—a determination which could be arrived at only by the performance by this Court of the legislative function of rate making which has hitherto been reserved to the Commission.

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****741** If all this is to be avoided by the injunction against the alleged conspiracy, but without enjoining any of its asserted evil consequences in rate making, the issue originally tendered would, by the amendment to the bill of complaint, seem to amount to little if any thing more than a political issue. The amended complaint alleges that 'The wrong done transcends that experienced by individuals. For as men, firms, and corporations have come and gone, the conspiracy has continued over the decades.' While trial upon the original complaint might have reduced this grievance to the dimensions of a cause of action to enjoin illegal freight rates injurious to the State, it now appears as the grievance of a section of the country against an existing federal system of rate making which should be addressed to Congress rather than to this Court.

The support which the Department of Justice lends to Georgia's contentions by the brief amicus, filed in this Court in behalf of the United States, removes any evident need for entertaining this suit. The Government is charged with the enforcement of the antitrust laws, and is authorized by s 4 of the Sherman Act and s 16 of the Clayton Act to maintain suits for that purpose, which others cannot bring. If it believes that the alleged conspiracy exists and should be stopped by the remedial action of courts, without resort to the Commission, there would seem to be no reason why, avoiding the many technical obstacles to the present suit, it should not proceed to remedy in the usual manner the grievances of the citizens of the United States including citizens of Georgia.

***490** Other objections aside, it seems obvious that this Court cannot give any effective relief removing the threat of injury to the State resulting from a railroad rate conspiracy without breaking down the system of rate regulation by the Commission —a system which Congress has painstakingly built up since the decisions, more than forty-five years ago, in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007, and United States v. Joint Traffic Ass'n, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259, when the Commission was without power to prescribe rates. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co., supra; Terminal Warehouse Co. v. Pennsylvania R. Co., supra, 297 U.S. 513, 56 S.Ct. 551, 80 L.Ed. 827.

The reasoning of the Court is not and cannot be restricted to this case. If Georgia may prosecute the present suit, every shipper or consignee of freight who asserts injury by a conspiracy respecting railroad rates in violation of the antitrust laws, may maintain a like suit in a district court. The prosecution of such suits cannot fail to bring chaos into the field of interstate rate making. The entry of decrees for the plaintiffs could only mean the breakdown of the unified system of fixing rates by Commission action, which Congress has ordained by the Interstate Commerce Act. It was the purpose of s 16 of the Clayton Act to preclude such a breakdown. Its purpose can and should be effected by the refusal of this Court to entertain the proposed suit.

All Citations

324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051, 59 P.U.R.(NS) 132

Footnotes

1 The original bill of complaint dated June 12, 1944 was followed by an amended bill of complaint dated September 15, 1944. Our references throughout are to the amended bill.

2 See McLaughlin, Cases on the Federal Anti-Trust Laws (1933), pp. 7—42; Thornton, Combinations in Restraint of Trade (1928), chs. II, III.

3 And see Missouri v. Illinois, 200 U.S. 496, 26 S.Ct. 268, 50 L.Ed. 572; State of Wisconsin v. Illinois, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426.

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4 See 1 Beveridge, The Life of John Marshall (1916), pp. 310—311; Bancroft, History of the Formation of the Constitution (1885), pp. 27, 130, 183, 187, 454.

5 These provisions are those relating to discriminations in price, services, or facilities (s 2); certain sales of goods, wares, merchandise and the like (s 3); acquisition by one corporation of the stock of another (s 7); interlocking directorates and officers (s 8). See 15 U.S.C. ss 13, 14, 18, and 19, 15 U.S.C.A. ss 13, 14, 18, 19. The enforcement machinery is composed of cease and desist orders enforceable in the courts. 15 U.S.C. s 21, 15 U.S.C.A. s 21.

6 See (1) 51 Cong.Record, 63rd Cong., 2d Sess., pp. 9582, 9583; (2) S. 942, 78th Cong., 1st Sess.; H.R. 2720, 78th Cong., 1st Sess. These latter proposals were designed (1) to make lawful the fixing of rates by carriers through rate bureaus, conferences, or associations; and (2) to put those group activities under the control of the Commission. The history and activities of rate bureaus are extensively reviewed in Hearings, Senate Committee on Interstate Commerce on S. 942, Regulation of Rate Bureaus, 78th Cong., 1st Sess.

7 We have considered the argument that Certificate No. 44, issued March 20, 1943 under s 12 of the Act of June 11, 1942, 56 Stat. 357, 50 U.S.C.A. Appendix, s 1112, by the Chairman of the War Production Board (8 Fed.Reg. 3804) protects this alleged combination from the charges contained in the bill. That certificate approves joint action by common carriers through rate bureaus and the like in the initiation and establishment of rates. We do not stop to analyze it beyond observing that in no respect would it be a bar to the present action. It does not purport to be retroactive. It does not sanction the use of coercion. It does not authorize any combination to discriminate against a region in the establishment of rates. Moreover, legal means may be employed for an illegal end.

8 We therefore do not reach the question whether an action based on common law principles could be maintained.

9 See Waterman v. Canal-Louisiana Bank Co., 215 U.S. 33, 49, 30 S.Ct. 10, 14, 54 L.Ed. 80; United Shoe Mach. Co. v. United States, 258 U.S. 451, 456, 42 S.Ct. 363, 365, 66 L.Ed. 708; Hopkins v. Oxley Stave Co., 8 Cir., 83 F. 912, 915, 916; Rocky Mountain Bell Tel. Co. v. Montana , Federation of Labor, C.C., 156 F. 809, 811, 812. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 247, 60 S.Ct. 811, 855, 84 L.Ed. 1129.

10 By reason of the Eleventh Amendment the judicial power of the United States does not extend to suits brought against a state by a citizen of another state.

11 In a proper case appellate review may be had directly in this Court by certiorari before judgment in the Circuit Court of Appeals. Judicial Code s 240(a), 28 U.S.C. s 347(a), 28 U.S.C.A. s 347(a).

12 Sec. 4 reads:

'The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1—7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duty notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.'

Sec. 5 reads:

'Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned,

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whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.'

1 Some reliance is placed on an allegation of the proposed amended complaint, which, in its context, is that the matters of which complaint is made are not within the jurisdiction of the state courts of Georgia; but that has no bearing on the question whether they are within the competence of a federal district court in Georgia or in any other State.

2 These two defendants are the Seaboard Air Line Railway Co., and the Nashville, Chattanooga & St. Louis Ry., two of the largest of the southern defendants.

3 This defendant has been operating since 1924 as the Clinchfield Railroad Company, under lease to the Atlantic Coast Line R.R. Co., and the Louisville & Nashville R.R. Co.

4 Under the recapture clause of the Transportation Act of 1920, c. 91, 41 Stat. 488, s 422, adding s 15a to the Interstate Commerce Act, profits of carriers in excess of a fair return were held in trust for purposes of improving railroad services. Dayton-Goose Creek R. Co. v. United States, 263 U.S. 456, 44 S.Ct. 169, 68 L.Ed. 388, 33 A.L.R. 472. The recapture clause was repealed by the Act of June 16, 1933, c. 91, 48 Stat. 220, s 205, 49 U.S.C.A. s 15a. But its underlying purpose to permit rates sufficient to provide an adequate and efficient transportation system was reaffirmed by the declaration of a 'National Transportation Policy' which the Commission is commanded to observe, by the Transportation Act of 1940, c. 722, 54 Stat. 899, s 1.

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240 F.Supp.3d 1
United States District Court, District of Columbia.

UNITED STATES of America, et al., Plaintiffs,
v.
AETNA INC., et al., Defendants.

Civil Action No. 16–1494 (JDB)
|
Filed 01/23/2017

Synopsis
Background: Department of Justice, eight states, and District of Columbia brought antitrust action against two health insurance companies, claiming that the proposed merger of the two companies might substantially lessen competition, in violation of the Clayton Act, in the areas of individual Medicare Advantage plans and individual commercial health insurance plans offered on public exchanges, and seeking an injunction permanently enjoining the merger. Bench trial was held.

Holdings: The District Court, John D. Bates, J., held that:

the relevant product market for antitrust claims based on Medicare Advantage was the market for Medicare Advantage plans alone;

government established a prima facie case that the proposed merger would substantially lessen competition in the market for individual Medicare Advantage;

Center for Medicare and Medicaid Services' (CMS) regulation of Medicare Advantage plans did not rebut presumption that the proposed merger would substantially lessen competition in the market for individual Medicare Advantage plans;

entry of new health insurance companies into market did not rebut presumption that the proposed merger would substantially lessen competition in the market for individual Medicare Advantage plans;

divestiture of certain Medicare Advantage plans to a third-party did not rebut presumption that the proposed merger would substantially lessen competition in the market for individual medicare advantage plans;

government established a prima facie case that the proposed merger would substantially lessen competition in the public exchange market; and

procompetitive efficiencies generated by the merger did not rebut presumption that the proposed merger would substantially lessen competition.

So ordered.

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MEMORANDUM OPINION

JOHN D. BATES, United States District Judge

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INTRODUCTION

Before the Court is an antitrust challenge to the merger of Aetna Inc. and Humana Inc., two of the largest health insurance companies in the country. Aetna and Humana entered into a merger agreement on July 2, 2015. They subsequently provided notification of their planned merger to the Department of Justice as required by the Hart–Scott–Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a. Following an investigation, the Department of Justice, eight states, and the District of Columbia (collectively, the government) filed this action asserting that the merger "may ... substantially ... lessen competition" in violation of section 7 of the Clayton Act, 15 U.S.C. § 18, in two distinct product lines: individual Medicare Advantage plans and individual commercial health insurance plans offered on the public exchanges. The government identified 364 counties across 21 states where it argues that concentration in the Medicare Advantage market would rise above the presumptively unlawful level if the merger proceeds, and 17 counties across 3 states where that would be true in the public exchange markets. Moreover, the government argues, additional evidence indicates that the companies compete head-to-head in both markets—competition that would be lost following the merger, to the significant detriment of consumers.

Unsurprisingly, Aetna and Humana disagree. For Medicare Advantage, they argue that the relevant product market must include both Original Medicare (Medicare benefits offered directly by the government) as well as Medicare Advantage (Medicare benefits offered by private insurance entities). In this market, properly defined, Aetna and Humana argue that post-merger concentration would not be high enough to be presumptively unlawful. Furthermore, they offer three reasons why, even in a market limited to Medicare Advantage, the proposed merger would not substantially lessen competition. According to defendants, the government's regulatory authority over Medicare Advantage, the threat of entry by new competitors, and defendants' proposed divestiture of a portion of their Medicare Advantage business to another insurance company, Molina Healthcare, Inc., would combine to render any competitive harm unlikely.

***9** In response to the government's public exchange allegations, Aetna and Humana argue that there is no current competition between the two companies in the 17 complaint counties, because Aetna has decided not to compete in those counties in 2017. If there is no current competition between them, they argue, there can be no substantial lessening of that competition post-merger. Alternatively, they argue that even if the Court looks back to the competition between Aetna and Humana in 2016 and predicts future competition on that basis, it is likely that Humana's market share in the public exchanges will be so reduced in 2017 and later years that a merger would not increase market concentration to a presumptively unlawful level.

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Additionally, Aetna and Humana argue that the efficiencies created by the merger and then passed on to consumers would counteract any anticompetitive effects in both the Medicare Advantage and public exchange markets.

The government responds that the relevant product market is indeed Medicare Advantage only, and that none of these arguments is sufficient to rebut the presumption of unlawfulness based on the levels of market concentration and the evidence that Aetna and Humana compete head-to-head in both markets. In the public exchange context, the government contends that Aetna decided not to compete in the 17 complaint counties in 2017 in response to this litigation in an effort to evade judicial review of the merger. Thus, the government argues, the Court should ignore this manipulation and instead analyze the competitive effects of the proposed merger as if Aetna planned to continue competing in the public exchanges in all of the 17 complaint counties as it did in 2016.

The Court concludes that the proposed merger is likely to substantially lessen competition in Medicare Advantage in all 364 complaint counties and in the public exchanges in the three complaint counties in Florida. Aetna and Humana compete in a Medicare Advantage product market that does not include Original Medicare, as both contemporary business documents and econometric evidence confirm. In that market, which is the primary focus of this case, the merger is presumptively unlawful—a conclusion that is strongly supported by direct evidence of head-to-head competition as well. The companies' rebuttal arguments are not persuasive.

In the public exchanges, the Court finds that Aetna withdrew from competing in the 17 complaint counties for 2017 specifically to evade judicial scrutiny of the merger. Although the Court does not adopt the government's view that this means the Court should assume that Aetna will continue to compete everywhere it competed in 2016, the Court will give Aetna's withdrawal decision for 2017 little weight in predicting where Aetna will compete in later years. The Court finds that Aetna is likely to offer plans on the exchanges only in the three complaint counties in Florida in 2018 and beyond, and that the merger is likely to substantially lessen competition in those counties. And as in the Medicare Advantage market, the Court concludes that defendants' proffered efficiencies do not offset the anticompetitive effects of the merger.

BACKGROUND

I. The Parties and Proposed Merger

Aetna and Humana are large health insurance companies with national footprints. Both offer a range of health insurance products, including the two products at issue in this litigation: individual Medicare Advantage plans and individual insurance sold on the public exchanges. Both ***10** are also regarded by industry participants as members of the "Big 5" health insurers, along with competitors UnitedHealth, Anthem, and Cigna.

Humana is "viewed as a leader in Medicare Advantage." Tr. 1837:22–23 (Broussard). [1] In 2016, Humana was one of the two largest Medicare Advantage insurers, boasting more than 2.5 million individual Medicare Advantage members. [2] PX0551 (Nevo Report) ¶ 40. Humana's Medicare Advantage offerings are available to 91% of Medicare beneficiaries nationally. Tr. 253:6–7 (Cocozza). Humana's position atop the Medicare Advantage market has been obtained through impressive recent growth. Between 2013 and 2016, Humana added more seniors to its individual Medicare Advantage plans than any of its rivals. PX0551 (Nevo Report) ¶ 40.

Aetna, although historically oriented more toward the sale of commercial health insurance, has also been growing rapidly in Medicare Advantage. In the last four years, Aetna has expanded its Medicare Advantage plans into 640 new counties; the next most aggressive entrant entered into less than half that many. PX0551 (Nevo Report) ¶ 218 & Ex. 18. Some of Aetna's momentum was derived from its 2013 acquisition of Coventry Health Care, itself a significant player in Medicare Advantage. Tr. 1330:20–1331:1 (Bertolini). Now the fourth-largest seller of individual Medicare Advantage in the country, Aetna has plans for continued rapid growth. Today, Aetna plans are available to approximately 50% of Medicare beneficiaries; within five years, through continued geographic expansion, Aetna hopes to increase that figure to 70%. Tr. 1331:2–22 (Bertolini).

Aetna and Humana are also two of the largest insurers in the individual commercial insurance market on the public exchanges. The exchanges, created by the Affordable Care Act, create a marketplace where individuals who do not receive health insurance through their employer or through a government program can purchase individual insurance plans. At the time the complaint was filed, Aetna sold insurance on the public exchanges in 15 states and had described itself as being "highly successful" in enrollment. See Tr. 1360:14–17 (Bertolini); PX0285 at 4. Humana also offered plans in 15 states in 2016, and planned to continue offering insurance on the exchanges in 11 states for 2017. See Humana Ans. [ECF No. 63] ¶ 42. The two companies competed on the public exchanges in more than 100 counties.

On July 2, 2015, Aetna and Humana announced their merger agreement, under which Aetna would acquire Humana for $37 billion. The firms' respective CEOs, ***11** Mark Bertolini and Bruce Broussard, both expressed excitement about the merger's potential. They believe that the merger will combine two philosophically compatible firms—both focused on providing individualized, value-based care in local communities—into one that can more effectively implement their shared vision for the future of healthcare. See Tr. 1399:17–1401:19 (Bertolini); Tr. 1838:5–1840:19 (Broussard). Although the companies are enthusiastic about their merger, they have also planned for the possibility that it will not occur. If it is not consummated by a specified date—now February 15, 2017—then Aetna must pay Humana a $1 billion break-up fee.

The government imputes a different rationale to the Aetna–Humana transaction, seeing it as part of "an industry-wide rush to consolidate." Pls.' Proposed Findings & Conclusions [ECF No. 275] at 7. Industry participants, including Bertolini, have indeed referred to a "merger frenzy" among health insurers in recent years. Tr. 1319:24–1320:3 (Bertolini). The "frenzy" culminated with the announcements of this merger and another between Anthem and Cigna. That would combine four of the five largest health insurers into two companies. But in the run-up to those announcements, the Big 5 insurers had explored a number of different merger possibilities: on at least two occasions, UnitedHealth had approached Aetna about a potential acquisition, and on other occasions Aetna had made indirect inquiries about acquiring Cigna. See Tr. 1321:8–1322:17 (Bertolini). This degree of merger-related activity, the government contends, tends to undercut the notion that there is something particularly valuable about the Aetna–Humana transaction.

Ultimately, of course, the outcome of this case does not hinge on these competing characterizations of the merger. Instead, as the parties recognize, the outcome here must depend on a detailed analysis of the likely effects of the merger in the challenged markets. The best place to begin that analysis is with a summary of the government programs central to this case: Original Medicare, Medicare Advantage, and the public exchanges created by the ACA.

II. Original Medicare and Medicare Advantage

Individuals aged 65 or over are eligible for Medicare, through which the federal government provides certain health insurance benefits to seniors. The core of the program is Medicare Parts A and B. Part A covers inpatient hospital services; Part B covers doctors' services and outpatient care. See PX0553 (Frank Report) ¶¶ 17, 18. Together, Medicare Parts A and B are often called "Original Medicare." Under Original Medicare, healthcare providers are paid on a fee-for-service basis. When a healthcare provider performs a particular service, it is paid by the government according to a fee schedule determined by the Center for Medicare and Medicaid Services (CMS), an office within the Department of Health and Human Services (HHS). Original Medicare enrollees may obtain care from any healthcare provider that accepts Original Medicare rates. Because the overwhelming majority of providers do so, seniors who enroll in Original Medicare can effectively obtain care from any provider, anywhere in the country.

But Original Medicare does not cover the full cost of seniors' medical care. For example, in 2016 Part A included a $1,288 per year inpatient hospital deductible. PX0553 (Frank Report) ¶ 17. Part B likewise comes with some out-of-pocket costs. Last year, Original Medicare enrollees paid monthly Part B premiums of about $105. PX0553 (Frank Report) ¶ 19. They ***12** also paid a deductible of $166 per benefit period, and a 20% coinsurance rate for most covered services. PX0553 (Frank Report) ¶ 18. Moreover, Original Medicare does not cover the cost of the outpatient prescription drugs prescribed by many providers and taken by many seniors. Tr. 110:4–9 (Frank). Collectively, these premiums, deductibles, coinsurance payments, and drug

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prescription payments may impose significant medical costs on an Original Medicare enrollee—but Original Medicare places no cap on such out-of-pocket expenses. PX0553 (Frank Report) ¶ 19.

To contain those possibly significant out-of-pocket costs, many seniors purchase a Medicare Supplement (known as "MedSupp" or "Medigap") plan from a private insurer.[3] These plans are regulated by state departments of insurance and sold by private insurers in a number of standardized varieties, each denoted by a letter. Tr. 728:4–8 (Wooldridge); DX0130–83. One of the most popular varieties, called a MedSupp Plan F, covers 100% of an Original Medicare enrollee's deductibles and copayments, with no out-of-pocket limit, in exchange for a monthly premium of about $150. See DX0130–83; Tr. 671:8–10 (Wooldridge). But MedSupp plans do not offer coverage for prescription drugs. Tr. 105:23–106:1 (Frank). To obtain prescription drug coverage, an Original Medicare enrollee must purchase a Medicare Part D plan from a private insurer. PX0553 (Frank Report) ¶ 22. The average Part D premium is $39 per month. PX0553 (Frank Report) ¶ 22.

Rather than enrolling in Original Medicare (with or without a MedSupp or Part D plan), a senior may choose to enroll in a Medicare Advantage plan sold by a private insurer. Under the Medicare Advantage program, which was created in approximately its current form by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108–173, 117 Stat. 2066, private insurers are paid by the government to provide health insurance to Medicare-eligible seniors. Participating insurers enter into contracts with CMS; then, pursuant to each contract, the insurers can offer a number of Medicare Advantage plans to seniors. The Medicare Advantage program was intended to "[e]nrich the range of benefit choices available to enrollees" and to "increase[e] efficiency in the overall health care system." Final Rule, Establishment of the Medicare Advantage Program, 70 Fed. Reg. 4,588 (Jan. 28, 2005). To achieve those goals, Medicare Advantage harnesses "open season competition" between Medicare Advantage plans. Id.

This competition occurs within parameters set by the federal government. By statute, all Medicare Advantage plans must provide coverage for Medicare Parts A and B. Additionally, unlike Original Medicare, Medicare Advantage plans must cap an enrollee's out-of-pocket spending at $6,700 per year. Tr. 107:12–17 (Frank). The federal government, through CMS, also oversees the annual Medicare Advantage bid process, which is used to determine how much a Medicare Advantage organization (MAO) will be paid by the ***13** government. The starting point for that calculation is the CMS "benchmark." Each April, CMS publishes a "benchmark" for every county in the United States, based on the cost to Original Medicare of providing Part A and B benefits to an average enrollee in that county in the prior year. PX0553 (Frank Report) ¶ 27. The benchmark represents the maximum amount that the government will pay an MAO to provide Original Medicare benefits to an enrollee in a particular county. MAOs are thus paid on a capitated basis, not on a fee-for-service basis: CMS will not pay the MAO more for seniors who consume more healthcare services. Accordingly, the capitation payment provides MAOs with an incentive to control their enrollees' healthcare costs.

For each Medicare Advantage plan, the MAO submits a "bid" against the benchmark. If an MAO bids above the benchmark, it will be paid the benchmark rate for each enrollee. Those seniors who enroll in that plan must pay a premium equal to the difference between the bid and the benchmark. PX0553 (Frank Report) ¶ 28. But if an MAO is confident about its ability to control costs, and to thereby provide Part A and B benefits to its enrollees for less than Original Medicare, it might submit a bid below the benchmark. In that case, the MAO will be paid its bid, plus an additional amount sometimes called the "rebate." PX0553 (Frank Report) ¶ 29. The rebate is calculated as a percentage of the difference between the bid and the benchmark. The remainder of the difference is retained by CMS as a benefit for taxpayers. PX0553 (Frank Report) ¶ 29. Any rebates earned by the MAO must be used to lower out-of-pocket costs or increase benefits for the plan's enrollees. PX0553 (Frank Report) ¶ 30. Many MAOs use rebates to lower enrollees' Part B premiums, to reduce the plan's cost sharing requirements (that is, copays, coinsurance, or deductibles), or to add benefits that are not available through Original Medicare, such as vision, dental, hearing, or fitness benefits (known as "silver sneakers" benefits).

The amount of an MAO's capitation payment also depends in part on "star ratings." Ranging in half-star increments between one and five, star ratings are intended to be a comprehensive measure of plan quality, reflecting factors like clinical outcomes, patient satisfaction, and access to care. See PX0553 (Frank Report) ¶ 31; PX0551 (Nevo Report) ¶ 68 & n.97. CMS assigns

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star-ratings at the contract level; thus, all the plans under a particular contract between CMS and an MAO will have the same star rating. Tr. 618:6–13 (Wheatley). Star ratings directly affect the amount of an MAO's capitation payment in two ways. First, plans with higher star ratings bid against a higher benchmark. Plans rated with four or more stars can bid against an amount that is 105% of the normal county benchmark. PX0553 (Frank Report) ¶ 32. Second, higher-rated plans earn higher rebates in percentage terms. For example, a plan with 3 stars or below receives as a rebate 50% of the difference between the bid and the benchmark; a plan with 4.5 stars receives 70% of that difference. PX0553 (Frank Report) ¶ 32. Star ratings, therefore, attempt to reinforce the relationship between plan quality and competitive success—high quality plans achieve high star ratings; high star ratings increase benchmarks and rebates; increased benchmarks and increased rebates are used to make plans more attractive; and more attractive plans translate into higher enrollment.

The Medicare Advantage plans that emerge from the CMS bidding system tend to share a number of characteristics. The most fundamental of these is that, unlike Original Medicare, Medicare Advantage ***14** plans tend to be managed care plans with limited provider networks. Faced with the need to bid below the CMS benchmark, Medicare Advantage organizations, including Aetna and Humana, strive to build networks of providers who will work with them to coordinate patient care and control healthcare costs. [4] See Tr. 421:21–422:3 (Cocozza); Tr. 543:21–25 (Wheatley). In some cases, these relationships are rooted in value-based contracts, which pay providers based on various measures of care quality and patient outcomes rather than on the amount of care that they provide. Tr. 435:1–6 (Cocozza); Tr. 549:6–15 (Wheatley).

When these cost-control efforts are successful, MAOs funnel the savings back into their plans in the form of reduced out-of-pocket costs or additional benefits. For example, in 2016, 61% of Medicare Advantage plans included annual limits on an enrollee's out-of-pocket spending that were less than the statutory cap of $6,700. PX0551 (Nevo Report) ¶ 54. That same year, about half of Medicare Advantage enrollees were in zero-premium plans, meaning that they paid no premium other than the standard Part B premium. PX0348 at 7. On the benefits side, 89% of Medicare Advantage plans included prescription drug benefits, which must be purchased separately by enrollees in Original Medicare. PX 551 (Nevo Report) ¶ 55. Many Medicare Advantage plans also offer vision, dental, hearing, or fitness benefits that are unavailable through Original Medicare. Tr. 107:21–25 (Frank). Together, these features—limited networks, coordinated care, out-of-pocket maximums, and supplemental benefits—drive the Medicare Advantage value proposition.

But Medicare Advantage plans do not appeal to everyone. In fact, for as long as Medicare Advantage has existed, a majority of seniors have selected Original Medicare (often with a MedSupp and Part D plan) instead. Most seniors first choose during a seven-month initial election period surrounding their 65th birthday. Those who fail to make a timely choice between the two default into Original Medicare. Tr. 408:2–7 (Cocozza). Each year, seniors may re-evaluate their choice during an annual enrollment period running from October 15 to December 7. During that period, "any [Medicare] beneficiary can make a different election for the upcoming year." Tr. 418:3–5 (Cocozza). Seniors are thus free to switch from Original Medicare to Medicare Advantage or vice-versa, or from one Medicare Advantage plan to another. Seniors may also switch from Medicare Advantage to Original Medicare during another annual window, running from January 1 to February 14. During that period, however, seniors may not switch out of Original Medicare or between Medicare Advantage plans. DX0130–077.

Medicare Advantage plans are subject to CMS regulation applied primarily in connection with the bid process. Each insurer must submit a bid for every Medicare Advantage plan it intends to offer the following year. In April, along with the county benchmarks, CMS publishes two documents: a "call letter" describing the terms of the Medicare Advantage program, and a ***15** set of instructions about bid submission. See DX0014 (call letter); DX0349 (bid instructions). These documents impose a number of requirements on MAOs. Some, like the limit on increases in "total beneficiary cost," relate directly to plan pricing. CMS will deny bids when "it determines the bid proposes too significant an increase in cost sharing or decrease in benefits from one plan year to the next." DX0014–163. For plan year 2017, CMS maintained the total beneficiary cost threshold at $32 per member per month. DX0014–165. Bids proposing increases in amounts greater than the threshold were subject to denial. But even bids complying with the threshold were not necessarily free from scrutiny, because "CMS reserves the right to further examine and request changes to a plan bid even if a plan's [total beneficiary cost] is within the required amount." DX0014–164. Sean Cavanaugh, the Director of the Center for Medicare, the office within CMS that regulates Medicare Advantage,

was not aware of any bids being rejected for violation of the rules on total beneficiary costs during his tenure. Tr. 1144:12–25 (Cavanaugh); see also Tr. 453:9–10 (Cocozza). Instead, CMS typically informs the MAO of the violation, and the MAO revises the bid into compliance. Tr. 1146:12–20 (Cavanaugh). Even then, however, the MAO may still be the subject of a CMS compliance notice. Tr. 1942:8–17 (Paprocki).

Some provisions of the bid instructions relate to MAO margins. The MAO must forecast the margin that it expects to earn on each of its plans. At the individual bid level, CMS seeks to guarantee that bids "provide benefit value in relation to the[ir] margin level[s]." DX0349–027. But most margin restrictions are "Aggregate–Level Requirements" that apply above the bid level. DX0349–028. Each bid is made at the plan level; each plan is part of a contract between CMS and the legal entity offering the plan; and most contracts cover multiple plans—perhaps as many as fifty. See Tr. 2008:12–21 (Paprocki). Some legal entities also have multiple contracts. Tr. 2572:10–15 (Coleman). Above all these bids, contracts, and legal entities sit parent organizations, like Aetna and Humana, which might have multiple contracts with CMS through multiple affiliated legal entities. See Tr. 1948:2–12, 2008:10–11 (Paprocki). CMS regulation allows MAOs to decide whether to apply the aggregate-level margin requirements at the level of the contract, the legal entity, or the parent organization. DX0349–028; see also Tr. 2004:16–20 (Paprocki).

The bid instructions require that the aggregate margins forecasted for the coming plan year are consistent with the actual ones from previous years. DX0349–029. And the aggregate margins that an MAO forecasts for its Medicare Advantage business must be within 1.5% of the margins on its overall business. DX0349–029. Aetna applies this requirement at the parent organization level, the highest level of aggregation permitted by CMS rules. Tr. 2004:16–2005:5 (Paprocki).

Finally, outside of the bid process, CMS imposes limits on an MAO's "medical loss ratio." By statute, MAOs must spend at least 85% of the revenue obtained through a particular contract with CMS on medical services. See 42 U.S.C. § 1395w–27(e)(4); Tr. 1147:2–6 (Cavanaugh). Like the margin rules, the medical loss ratio regulations are applied above the level of individual bids—here, at the contract level. But unlike the margin rules, they apply retroactively to actual results rather than prospectively to forecasts. If CMS determines that, pursuant to a particular contract in a particular year, an MAO spent less than 85% of its revenue on medical costs (meaning that it kept more than 15% of its revenue as profit or to cover administrative costs), ***16** CMS can require the MAO to refund the excess amount to beneficiaries. An MAO that remains out of compliance for three consecutive years may be barred from enrolling new members. Tr. 1148:6–13 (Cavanaugh). So far, however, no such penalties have been imposed. The medical loss ratio rules were introduced to Medicare Advantage by the Affordable Care Act, and CMS is only now preparing to release the first year of medical loss data. Tr. 1148:14–17 (Cavanaugh).

III. The Public Exchanges

The ACA created the public exchanges as online marketplaces where consumers could purchase health insurance. Tr. 2638:24–2639:14 (Counihan); PX0553 (Frank Report) ¶ 73. (The exchanges are sometimes referred to as "Health Insurance Exchanges," or "HIX" in the record. Tr. 1486:11–12 (Lynch)). Their basic structure is uncontested. The exchanges first opened in 2013 for consumers to purchase plans for the 2014 year. See Tr. 138:21–139:25 (Frank). Individuals who do not receive health insurance through some other means—such as through their employer or through a government program like Medicare, Medicaid, or Tricare—are required to purchase health insurance or pay a tax, sometimes referred to as a penalty. PX0553 (Frank Report) ¶ 73. These individuals may purchase health insurance through the public exchanges (on-exchange) or directly from an insurer or a broker (off-exchange). PX0551 (Nevo Report) ¶ 271. Health insurers who offer plans on-exchange in a given state must offer the same plans off-exchange in that state. Tr. 1532:15–1533:3 (Mayhew). However, health insurers may offer products off-exchange that they do not offer on-exchange. Tr. 1533:4–10 (Mayhew). CMS, along with each state, has oversight responsibility for the exchanges. Tr. 2587:22–2588:2 (Counihan).

The ACA also created certain obligations for insurers who offer plans on the exchanges. For example, insurers may not deny coverage based on preexisting conditions, or charge a different premium based on an individual's perceived health status. Tr. 141:6–8 (Frank); PX0553 (Frank Report) ¶ 73. On-exchange plans are grouped into five tiers based on the level of coverage

they provide: there are four "metal" tiers (bronze, silver, gold, and platinum) and there is one catastrophic tier. Tr. 1674:14–19 (Nevo). The "metal" tiers are based on the percentage of total expected healthcare spending the plan covers. Bronze plans cover 60% of expected healthcare spending, silver plans cover 70%, gold plans 80%, and platinum plans 90%. Tr. 142:8–13 (Frank).

Individuals who purchase insurance on-exchange and who earn less than 400% of the federal poverty level are generally eligible to receive subsidies. Tr. 143:10–18 (Frank); PX0553 (Frank Report) ¶¶ 82–83; 26 C.F.R. § 601.105, IRS Revenue Procedure 2016–24, § 2.01. These subsidies vary by location and income level, and can take the form of both premium subsidies and reductions in cost-sharing payments (that is, deductibles, copayments, and coinsurance). Tr. 143:10–18 (Frank); PX0553 (Frank Report) ¶¶ 82–83. The subsidies are provided as tax credits, and are tied to the cost of the second lowest-cost silver plan in the individual's geographic region. Tr. 143:5–9 (Frank). Because the silver plans are the most cost-effective—given the subsidy—approximately 70% of individuals choose silver plans. Tr. 2631:20–2632:7 (Counihan); Tr. 142:14–21 (Frank). Approximately 85% of all individuals who purchase insurance on the exchanges receive a subsidy. Tr. 144:6–8 (Frank); Tr. 1546:24–1547:4 (Mayhew). And because the amount of the subsidy is tied to the price of on-exchange plans, ***17** higher premiums increase the cost both to the consumer and the taxpayer. See Tr. 140:23–141:1 (Frank).

IV. Procedural History

On July 21, 2016, the United States, along with Delaware, the District of Columbia, Florida, Georgia, Illinois, Iowa, Ohio, Pennsylvania, and Virginia, filed a complaint seeking to permanently enjoin the Aetna–Humana merger.[5] See Compl. [ECF No. 1] ¶ 69. The government alleged that the transaction violates Section 7 of the Clayton Act, 15 U.S.C. § 18, because its effect "may be to substantially lessen competition" in a number of markets: (1) the market for individual Medicare Advantage plans in 364 counties across 21 states; and (2) the market for individual insurance sold on the public exchanges in 17 counties across three states (Florida, Georgia, and Missouri). In the government's estimation, the merger would adversely affect 1.6 million people in Medicare Advantage and 700,000 more in the public exchanges. See Compl. ¶¶ 10, 12.

In the weeks following the government's complaint, the companies took steps that introduced additional issues into the case. First, on August 2, 2016, Aetna and Humana each entered into a separate Asset Purchase Agreement with Molina Healthcare, under which they have agreed to sell Molina some of their Medicare Advantage plans if their merger is consummated and if the Court believes that a divestiture is necessary to counteract the merger's anticompetitive effects. The proposed divestiture would transfer responsibility for approximately 290,000 seniors from Aetna or Humana to Molina, and would include seniors in all 364 complaint counties. Second, on August 15, 2016, Aetna announced that it no longer planned to offer plans on the public exchanges in 11 states where it had offered plans in 2016, including those that cover all 17 counties in the complaint. See Tr. 1360:14–16 (Bertolini); PX0133; DX0031. The motivation for—and legal consequence of—Aetna's decision to withdraw have been sharply disputed by the parties.

In the months preceding the trial, the parties exchanged millions of documents, conducted dozens of depositions, and generally worked together in a collaborative and professional manner. They were greatly aided in those efforts by the court–appointed Special Master, retired Judge Richard A. Levie, who facilitated a smooth discovery process and helped make the compressed timeline in this case feasible. In late October and early November, the parties submitted their expert reports—sixteen in all, totaling more than a thousand pages—for the Court's review. They also submitted helpful pretrial briefs previewing the evidence and arguments at trial. During the final week before trial, the Court, Judge Levie, and the parties worked to resolve any outstanding evidentiary or confidentiality issues. A final pretrial conference was held on December 2, with trial set to begin on December 5, 2016.

***18** The trial began on schedule and lasted for 13 trial days. The Court received hundreds of exhibits addressing the businesses of Aetna, Humana, and Molina; their plans for the merger and divestiture; their dealings with CMS; and several other topics. The Court also heard testimony from more than thirty helpful and knowledgeable witnesses, including executives and employees from Aetna, Humana, and Molina; officials from CMS; and independent brokers. The parties also put forward a number of distinguished experts to testify on a variety of subjects. Dr. Richard Frank, formerly the Assistant Secretary for Planning and

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Evaluation at HHS, provided testimony on the role of competition in both Medicare Advantage and the public exchanges. Dr. Gary Ford testified about survey design and, in particular, the value of an internal survey conducted by Humana regarding which insurance options seniors leaving Humana Medicare Advantage plans choose. Dr. Lawton Burns testified about the Molina divestiture. Two experts, Rajiv Gohkale and Christine Hammer, provided testimony on the efficiencies that might result from the Aetna–Humana merger. And finally, economists Dr. Aviv Nevo and Jonathan Orszag provided compelling, detailed, and—most importantly—comprehensible testimony on the probable economic effects of the merger. The Court is appreciative of all these witnesses, and of the attorneys who elicited their testimony.

On December 29, 2016, the parties submitted their proposed findings of fact and conclusions of law. The following day, on December 30, the Court heard final argument over several hours. Now, having carefully considered all of the evidence and the parties' arguments, the Court has reached the following conclusions.

LEGAL STANDARD

Section 7 of the Clayton Act prohibits mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Two aspects of the statutory text are worth highlighting. First, by using the word "may," Congress indicated that its "concern was with probabilities, not certainties." Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Hence, mergers with "probable anticompetitive effect[s]" are prohibited by the Clayton Act. Id. The government need not prove the alleged anticompetitive effects "with 'certainty.' " FTC v. H.J. Heinz Co., 246 F.3d 708, 719 (D.C. Cir. 2001). Second, the Clayton Act protects "competition," rather than any particular competitor. United States v. Baker Hughes Inc., 908 F.2d 981, 991 n.12 (D.C. Cir. 1990). To assess a merger's probable effect on competition, the Court must undertake a "comprehensive inquiry" into the "future competitive conditions in a given market." Id. at 988.

D.C. Circuit precedent creates a burden-shifting framework to guide that inquiry, which generally begins with defining a relevant antitrust market. Id. at 982–83; see, e.g., FTC v. Sysco Corp., 113 F.Supp.3d 1, 24 (D.D.C. 2015); United States v. H & R Block, Inc., 833 F.Supp.2d 36, 50 (D.D.C. 2011). If the government can "show that the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market," that creates "a presumption that the merger will substantially lessen competition." Heinz, 246 F.3d at 715 (internal quotation marks and alterations omitted). By making such a showing, the government "establish[es] a prima facie case of anticompetitive ***19** effect." Baker Hughes, 908 F.2d at 983.

To rebut this presumption, "defendants must produce evidence that shows that the market-share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market." Heinz, 246 F.3d at 715 (internal quotation marks and alterations omitted). "[E]vidence on a variety of factors can rebut a prima facie case." Baker Hughes, 908 F.2d at 984. For example, defendants may produce evidence concerning the "ease of entry into the market, the trend of the market either toward or away from concentration," the "continuation of active price competition," or "unique economic circumstances that undermine the predictive value of the government's statistics." Heinz, 246 F.3d at 715 n.7 (internal quotation marks omitted); see also Baker Hughes, 908 F.2d at 985–86 (listing additional factors that can rebut the government's prima facie case). But the "more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." Baker Hughes, 908 F.2d at 991.

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"If the defendant successfully rebuts the presumption of illegality, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." Heinz, 246 F.3d at 715 (internal quotation marks and alterations omitted). The government "has the ultimate burden of proving a Section 7 violation by a preponderance of the evidence." H & R Block, 833 F.Supp.2d at 49 (internal quotation marks omitted).

ANALYSIS

I. Medicare Advantage

A. Market Definition

Only an "examination of [a] particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of [a] merger." United States v. Gen. Dynamics Corp., 415 U.S. 486, 498, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974) (internal quotation marks omitted). The first question in this case is about the proper boundaries of that "particular market." Antitrust markets have two dimensions: product and geographic area. FTC v. Arch Coal, Inc., 329 F.Supp.2d 109, 119 (D.D.C. 2004). The parties here agree that the relevant geographic market is the county. [6] But they sharply dispute the boundaries of the relevant product market. Is the market properly limited to individual Medicare Advantage plans, as the government contends? Or are defendants correct that Original Medicare options—meaning Original Medicare paired with a MedSupp and/or a prescription drug plan—should also be included in the market?

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe, 370 U.S. at 325, 82 S.Ct. 1502. Both aspects of the Brown Shoe test "look to the availability of substitute commodities, i.e. whether there are other products offered to consumers which are similar in character or use," and "how far buyers will go to substitute one commodity for another." ***20** FTC v. Staples, Inc., 970 F.Supp. 1066, 1074 (D.D.C. 1997). "[T]he mere fact that a [product] may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." Id. at 1075. Markets "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." Times–Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). That general rule applies even to "functionally interchangeable" products, meaning those that can be used for the same purpose as the product at issue. See, e.g., H & R Block, 833 F.Supp.2d at 54–60 (excluding assisted tax preparation and do-it-yourself tax preparation from the market for digital do-it-yourself tax preparation software, even though all provide ways to complete a tax return); Staples, 970 F.Supp. at 1074–81 (excluding consumable office supplies sold outside office supply superstores from the market, even though those supplies were functionally interchangeable with office supplies sold inside the superstores).

This analytical approach guides antitrust courts in attempting to answer one "key question": whether particular products "are sufficiently close substitutes" such that substitution to one could "constrain any anticompetitive ... pricing" in the other. See H & R Block, 833 F.Supp.2d at 54. Products that meet that threshold generally belong in the product market. Once those products are grouped together, the " 'market can be seen as the array of producers of substitute products that could control price if united in a hypothetical cartel or as a hypothetical monopoly.' " FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1052 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting 2B Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 530a, at 226 (3d ed. 2007)). That vision of the proper product market is incorporated into the "hypothetical monopolist test" as set out in the Horizontal Merger Guidelines and applied by the courts in a number of cases. See Fed. Trade Comm'n & U.S. Dep't

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of Justice Horizontal Merger Guidelines § 4.1.1 (2010)[7]; see also Sysco, 113 F.Supp.3d at 33–34; H & R Block, 833 F.Supp.2d at 51–52.

To determine whether a group of products could be an antitrust market, the hypothetical monopolist test asks whether a hypothetical monopolist of all the products within a proposed market would likely impose a "small but significant and non-transitory increase in price" (SSNIP)—typically of five or ten percent—on at least one product in the market, including one sold by the merging firms. See Guidelines §§ 4.1.1, 4.1.2. Whether the hypothetical monopolist can profitably impose the price increase depends, in part, on the amount of substitution outside the proposed market. "If enough consumers are able to substitute away from the hypothetical monopolist's product to another product and thereby make a price increase unprofitable, then the relevant market cannot include only the monopolist's product and must also include the substitute goods." Sysco, 113 F.Supp.3d at 33. But if substitution outside the proposed market is relatively low, then the hypothetical monopolist would likely impose the price increase without sacrificing a large number of sales. In that case, the price increase might be profitable, and the hypothetical monopolist's products would constitute the proper ***21** antitrust market. See id. at 33; Whole Foods, 548 F.3d at 1052 (Kavanaugh, J., dissenting).

The central market definition question in this case is about the nature and extent of any competition between Original Medicare options and Medicare Advantage. Phrased in terms of the hypothetical monopolist test, the question is whether a hypothetical monopolist of all the Medicare Advantage plans in a particular county could profitably impose a small but significant non-transitory increase in price on those plans—or whether substitution by seniors to Original Medicare options would make any attempted price increase unprofitable.

In answering that question, the Court has a number of analytical tools at its disposal. The first is provided by the Supreme Court's decision in Brown Shoe. There, the Court explained that the boundaries of a product market "may be determined by examining such practical indicia as industry or public recognition of the [relevant market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Brown Shoe, 370 U.S. at 325, 82 S.Ct. 1502. These "practical indicia" can be useful "evidentiary proxies for direct proof of substitutability." Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986); see also H & R Block, 833 F.Supp.2d at 51. This makes intuitive sense: if two products have distinct characteristics, uses, customers, and prices, it is unlikely that a large number of customers would switch to one in response to a price increase in the other.

When applying the Brown Shoe factors here, the Court pays "close attention to the defendants' ordinary course of business documents." H & R Block, 833 F.Supp.2d at 52. All market definition "must take into account the realities of competition." Whole Foods, 548 F.3d at 1039 (Brown, J.). Ordinary course of business documents reveal the contours of competition from the perspective of the parties, who have been quite successful in the sale of individual Medicare Advantage plans and may be presumed to " 'have accurate perceptions of economic realities.' " Whole Foods, 548 F.3d at 1045 (Tatel, J.) (quoting Rothery Storage, 792 F.2d at 218 n.4).

Finally, in addition to the practical indicia and the ordinary course of business documents, the Court will rely on testimony from experts in the field of economics. See Sysco, 113 F.Supp.3d at 27. As is customary in merger cases, the parties have introduced a wealth of economic evidence through their economists, Dr. Aviv Nevo and Jonathan Orszag. Together, Nevo and Orszag have provided testimony on subjects relevant to market definition, including the extent of substitution between Original Medicare and Medicare Advantage, the proper methods for applying the hypothetical monopolist test, and the relationship between market concentration and prices in Medicare Advantage. All of this evidence will be evaluated in turn.

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1. Competition Between Original Medicare and Medicare Advantage

The Court will begin where seniors do: with the choice between Original Medicare and Medicare Advantage. By statute, Congress has provided that seniors can obtain Medicare benefits either "through the original medicare fee-for-service program," or "through enrollment in a [Medicare Advantage] plan." ***22** 42 U.S.C. § 1395w–21(a)(1). [8] Because Medicare Advantage plans are required to provide coverage for Medicare Parts A and B, the government agrees that "Medicare Advantage and Original Medicare are both ways for seniors to get their Medicare benefits." Tr. 15:13–15 (opening statement). It is up to the individual senior to choose—and that same basic choice is presented no matter where seniors look. Every year, CMS sends a handbook called "Medicare & You" to each Medicare beneficiary. Tr. 1225:20–22 (Cavanaugh). The 2017 version explains that there "are [two] main choices" for how seniors get Medicare coverage, then proposes a number of steps to help seniors select between them. See DX0130–017. Step one provides a binary choice between Original Medicare and Medicare Advantage. DX0130–017. The handbook also refers seniors to an online tool called the "Medicare Plan Finder," which can be used to "sort plans by type" and "compare the coverage, benefits, and estimated costs" associated with each. DX0130–016. Plan Finder can be used to search for Medicare Advantage plans and compare them to Original Medicare. Tr. 412:13–15 (Cocozza).

Some seniors turn to independent brokers or to corporate sales agents for advice about their healthcare options. Here, too, they are presented with the choice between Original Medicare options and Medicare Advantage. See, e.g., Tr. 1089:5–1090:1 (Fitzgerald) (independent broker); Tr. 2036:7–2040:5 (Kauffmann) (Humana sales manager); see also Brown Shoe, 370 U.S. at 325, 82 S.Ct. 1502 (products sold by the same "vendors" may be in the same product market). Ultimately, a majority of seniors choose Original Medicare (either with or without supplements). According to the government's economist, in 2016 only 44% of those seniors who were ineligible for eligibility-restricted Medicare options decided to enroll in Medicare Advantage. [9] PX0551 (Nevo Report) ¶ 38 & Exs. 1, 2. The rest selected an Original Medicare option.

Original Medicare also serves as a starting point for Medicare Advantage plan design. Alan Wheatley, Humana's Retail Segment President with responsibility for Medicare Advantage, explained the general plan design process. When entering a new county with a Medicare Advantage plan, Humana knows that CMS is "going to pay [to the company] Original Medicare's cost," in the form of the county-level benchmark. Tr. 561:10–13 (Wheatley). For Humana to beat that benchmark and introduce a viable plan, it must find a way to "improve health and lower costs." Tr. 561:20–21 (Wheatley). Those savings can then be used "to add some additional benefits to make [the Humana plan] attractive relative to the big competitors in that market." Tr. 561:23–25 (Wheatley). If the resulting plan has a better value than Original Medicare, Humana is willing to offer it in the market. Tr. 562:11–16 (Wheatley). In internal documents, Aetna and Humana reference the imperative to maintain a ***23** Medicare Advantage value proposition that is superior to the one offered by Original Medicare. See DX0479–002 ("[O]ur value proposition must stay competitive with Original Medicare."); DX0484–002 (citing an "[a]spiration" to "[a]ggressively grow membership by delivering superior value proposition vs. [Original Medicare]"); DX0514–021 (listing the drivers of Medicare Advantage "Value Beyond Traditional Medicare").

Together, these dynamics create a degree of competition between Medicare Advantage and Original Medicare. Because both offer Medicare Parts A and B, the two programs are, at least to some extent, functionally interchangeable. Every senior is given an option between the two and, historically, a majority of seniors have selected Original Medicare. Some degree of competition is also inherent in the CMS bid process. To be viable products, Medicare Advantage plans must control their costs—relative to Original Medicare—enough to offer beneficiaries more benefits or lower out-of-pocket expenses than Original Medicare does. For all these reasons, then, any assessment of the competitive conditions facing Medicare Advantage plans must take the role of Original Medicare into account.

None of this, however, means that Original Medicare must be included in the relevant product market. Not every competitor —not even every competitor with a functionally interchangeable product—must be included in the product market. See, e.g., H & R Block, 833 F.Supp.2d at 54 (excluding two methods of tax preparation from the product market even though it

was "beyond debate" that "all methods of tax preparation are, to some degree, in competition"). What matters is the extent to which competition from Original Medicare options would constrain the exercise of market power in Medicare Advantage. In a memorandum cited by the companies, Dr. Frank, the former Assistant Secretary for Planning and Evaluation at HHS, wrote that "in principle" Original Medicare is "in a position to 'discipline' competition" in Medicare Advantage. DX0087–010. To see whether that occurs in practice, the Court looks first to Brown Shoe and defendants' ordinary course of business documents.

2. Brown Shoe Factors & Ordinary Course of Business Documents

Compared to basic Original Medicare, the average Medicare Advantage plan has some distinct "characteristics and uses." Brown Shoe, 370 U.S. at 325, 82 S.Ct. 1502. Unlike Original Medicare, which allows seniors to receive care from almost any provider, Medicare Advantage plans typically are HMOs or PPOs that come with limited provider networks. In exchange for accepting the network limitations, enrollees receive benefits that Original Medicare does not offer, such as a cap on out-of-pocket expenses and, usually, a prescription drug benefit. They might also receive vision, dental, hearing, or fitness benefits that would have to be purchased separately under Original Medicare. Some seniors may decide that Original Medicare and Medicare Advantage are not reasonable substitutes. Those who want a limit on out-of-pocket expenses, or place a high value on supplemental benefits, would be unlikely to select Original Medicare. Those who value network flexibility, on the other hand, might not select Medicare Advantage.

Seniors can narrow the divide between Original Medicare and Medicare Advantage by purchasing supplemental coverage. By purchasing a MedSupp plan, for instance, a senior can limit out-of-pocket expenses in exchange for a monthly premium. Seniors may also purchase stand-alone ***24** coverage for prescription drugs, or for another supplemental benefit often offered by Medicare Advantage plans. One might expect, therefore, that a purely marginal senior, trying to decide between Original Medicare and Medicare Advantage, would routinely compare particular Medicare Advantage plans to particular MedSupp plans within the context of a larger Medicare market. And if there were large numbers of such seniors, one might further expect Aetna's and Humana's businesses to be organized around efforts to cater to them.

But that is not what the record reveals. The weight of the evidence presented at trial indicates "industry [and] public recognition" of a distinct market for Medicare Advantage. See Brown Shoe, 370 U.S. at 325, 82 S.Ct. 1502. Competition within that market, between Medicare Advantage plans, is far more intense than competition with the products outside of it, like MedSupp plans. This evidence tends to show that substitution between Medicare Advantage and Original Medicare options is not nearly as substantial as defendants now suggest.

Both Aetna and Humana report individual Medicare Advantage results separately in their annual financial reports. PX0303 at 13 (Humana reporting Medicare Advantage revenue); PX0503 at 16 (Aetna reporting Medicare Advantage membership). According to Alan Wheatley, this separate reporting facilitates analysis by investors, who often compare one Medicare Advantage company against another. Tr. 482:8–19 (Wheatley). As defendants argue, this method of reporting is not determinative: just because "automakers track car sales by model does not suggest each model belongs in a separate market." Defs.' Proposed Findings & Conclusions [ECF No. 274] at 122. But neither is it irrelevant, because in this case the separate reporting reflects deeper divisions. At Aetna, more than three thousand employees work on Medicare Advantage and Part D, while about four hundred different employees are "dedicated to the Med Supp business." Tr. 261:9–14, 256:20–1 (Cocozza). Aetna also hosts the two businesses on separate IT platforms. Tr. 255:10–14 (Cocozza). Similar distinctions can be seen at Humana, which maintains "separate business units" for Medicare Advantage and MedSupp. Tr. 475:19–476:13 (Wheatley). However, executives at both companies cautioned against over-interpreting the extent to which the Medicare Advantage and MedSupp businesses are segregated. Aetna's dedicated MedSupp employees do not "work in a vacuum" fully divorced from Medicare Advantage. Tr. 256:20–257:1 (Cocozza). And various internal Humana functions, such as its service operations, might support both businesses. Tr. 475:16–19 (Wheatley).

Fair enough. But in one important respect—pricing—defendants' Medicare Advantage and MedSupp businesses seem to run on very different tracks. According to the government's economist, if "there were significant movement of seniors between

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Medicare Advantage plans and [MedSupp] plans, then firms would consider the pricing of one plan when setting pricing for the other plan." PX0551 (Nevo Report) ¶ 128. There is little indication that Aetna and Humana do so. Quite the opposite is true. Aetna maintains separate teams of actuaries for pricing its Medicare Advantage and MedSupp plans. Tr. 680:13–16 (Wooldridge) (MedSupp actuaries do not work on Medicare Advantage pricing); Tr. 1995:6–18 (Paprocki) (Medicare Advantage actuaries do not work with MedSupp actuaries). And when pricing particular MedSupp plans, Aetna does not assess the prices of Medicare Advantage plans in the locations where the MedSupp plan will be offered. Tr. 257:23–1 (Cocozza). This evidence is inconsistent with the claims of ***25** close competition between Medicare Advantage and Original Medicare with MedSupp.

On the other hand, evidence of intense competition within Medicare Advantage is abundant. When Aetna and Humana refer to their "competitors," they are almost always referring to other Medicare Advantage organizations—and usually to other members of the Big 5. See Staples, 970 F.Supp. at 1079 ("In document after document, the parties refer to, discuss, and make business decisions based upon the assumption that 'competition' refers to other office superstores only."). For example, in a March 2015 email, Cocozza compares Aetna's Medicare Advantage business to its "peers." PX0007. Humana, she says, is Aetna's "most formidable competitor," before addressing UnitedHealth, Cigna, and Anthem in turn. PX0007–847. There is no mention of Original Medicare or MedSupp, which is typical. See, e.g., DX0283–003 (listing Aetna's "top competitors" as Humana, UnitedHealth, Cigna, and Anthem); PX0063–446 (email to Humana CEO comparing the enrollment growth of UnitedHealth, Cigna, Aetna, Anthem, and WellCare).

To compare themselves to these competitors, defendants calculate market shares of a Medicare Advantage market—on the national, state, and county levels. See PX0036–429 (Aetna document calculating national "market share growth" of UnitedHealth, Humana, Aetna, Cigna, and Anthem); PX0583–210 (Humana document dividing national "individual [Medicare Advantage] enrollment market share" between Humana, UnitedHealth, Aetna, Cigna, Anthem, and "Other"); PX0155–454 (Humana document dividing North Carolina Medicare Advantage market share between "Major Competitor[s]" Humana, BlueCross BlueShield of North Carolina, UnitedHealth, Aetna, Cigna, and "Other"); PX0022–603 (Humana document collecting county-level membership data of Humana, Aetna, UnitedHealth, BlueCross BlueShield of Kansas City, and "Others" in the Kansas City area). [10]

Aetna and Humana prepare exceptionally detailed assessments of the competition between various Medicare Advantage plans. These documents were ubiquitous at trial. For example, a 2015 email to Aetna general managers solicited specific information about the cost-sharing and benefit structures of the plans being offered by their "true competition." PX0057–717. A proposed template included columns for UnitedHealth, Humana, Cigna, and "Etc." PX0057–718–19. Two Humana documents reflect a similar exercise. In one—a July 2015 "Competitor Analysis" of Aetna and Cigna—Humana conducted "Market Comparisons" in 17 local markets across the country. PX0012–355. Within each local market, it calculated Medicare Advantage market shares, then compared the various Humana, Aetna, and Cigna plans by type, monthly premium, limit on out-of-pocket costs, primary care physician and specialist copays, and prescription drug plans. See, e.g., PX0012–357 (San Antonio/Corpus Christi Market Analysis). A second 2015 Humana document contains a similar market-by-market, plan-by-plan analysis addressing 24 markets where Humana "deteriorated" and UnitedHealth or Aetna "will likely grow" and another 15 markets where Humana "held stable" but UnitedHealth or Aetna "were aggressive." PX0023–628–29. Within each market, Humana compared its competitors' individual plans on a variety of metrics, including whether the plan had increased its premium. See, e.g., ***26** PX0023–632. Such documents reflect clearly the scope and intensity of the competition within Medicare Advantage—and, more specifically, between members of the Big 5. None of these documents focus on competition with Original Medicare.

Defendants have identified a limited number of documents that do refer to competition between Medicare Advantage and Original Medicare with MedSupp. Some refer to competition only in a very general manner. A 2015 Humana presentation, for instance, observes that "[o]ur main competitor is the traditional Medicare program. Beat them and we win big!" DX0501–003. An Aetna strategic planning document noted as a "Key Market Trend" the "[g]rowing role of Medicare Supplement" as an alternative to Medicare Advantage. DX0290–114. But a few documents give off a glimmer of more concrete, localized competition between Medicare Advantage and MedSupp. [11] A draft Medicare Advantage strategy within Humana proposes that

the firm "increasingly migrate existing members" from MedSupp to Medicare Advantage. DX0484–002. An Aetna document about Washington state observes that increasing MedSupp premiums might offer a "wedge opportunity" for one of Aetna's Medicare Advantage plans. DX0313–091. Another market-specific Humana document about Southern Ohio graphs "Market Membership by Product" and includes both Medicare Advantage products and MedSupp. DX0510–005. But see PX0155–454 (Humana document dividing "MAPD" market shares "By Product Type" but not including MedSupp). Perhaps the most concrete evidence regarding competition between Medicare Advantage and MedSupp relates to the "Med Supp killer," a Medicare Advantage plan designed by Aetna to compete directly for MedSupp customers. DX0035–002; Tr. 2094:9–2095:5 (Follmer). Because the plan has been unsuccessful, Aetna now incentivizes brokers not to sell it. See Tr. 2096:18–2098:1 (Follmer).

But these documents are too few and too general to carry much weight. It is evident from the clear majority of the documents reviewed here that Aetna and Humana spend an enormous amount of time, money, and manpower assessing the offerings of competing Medicare Advantage plans. They make those assessments on a market-by-market, plan-by-plan basis, focusing on details concerning premiums, out-of-pocket costs, networks, and benefits. The passing references in the record to competition with Original Medicare or with MedSupp do not suffice to undercut the strong inference that must be drawn from the ordinary course of business documents—that Aetna and Humana focus most of their competitive efforts within the market for Medicare Advantage rather than on products outside of it, like MedSupp.

That focus makes sense, the government contends, if Medicare Advantage plans generally attract a set of "distinct customers." See Brown Shoe, 370 U.S. at 325, 82 S.Ct. 1502. The government has indeed introduced a good deal of evidence showing that at least some seniors have a "durable preference" for Medicare Advantage relative to Original Medicare options. See Pls.' Proposed Findings & Conclusions at ***27** 38. The most persuasive of this evidence is switching data—that is, data about how often seniors leave Medicare Advantage plans and where they go when they do. The switching data presents a clear picture: Medicare Advantage enrollees rarely switch plans, but when they do, they overwhelming stay within Medicare Advantage.

The switching data evidence comes from a variety of sources. Using data from 2013 and 2014, the Kaiser Family Foundation concluded that 78% of Medicare Advantage enrollees remained with their plan during that period. Tr. 113:16–114:1 (Frank). In that same period, 11% of Medicare Advantage enrollees voluntarily left their plan in favor of a different Medicare Advantage plan; only 2% of enrollees voluntarily left Medicare Advantage for an Original Medicare option. Tr. 114:1–8 (Frank). Of the voluntary switchers from Medicare Advantage, therefore, more than 80% switched to a different Medicare Advantage plan. According to Frank, this proportion has remained relatively stable, between 80 and 85%, in recent years. Tr. 115:9–16 (Frank); see also PX0554 (Frank Reply Report) Ex. 5 (presenting data for 2007 to 2014).

The pattern holds for seniors who voluntarily left their Medicare Advantage plan in response to a premium increase. Again using 2013 and 2014 data, the Kaiser Family Foundation concluded that 25 to 33% of Medicare Advantage enrollees left their existing plan in response to a premium increase of $20 per month—but no more than 13% of them switched to an Original Medicare option. PX0554 (Frank Reply Report) ¶ 32. A 2014 study commissioned by Humana reached similar results. [12] Out of a sample of 250 seniors who disenrolled from a Humana Medicare Advantage plan, 85% switched to a different Medicare Advantage plan. PX0015–879. Because many seniors cited costs, including high premiums, co-pays, or deductibles, as a reason for switching, the survey concluded that "[c]osts play a huge rule in [Medicare Advantage] members defecting." PX0015–853. Both Cocozza and Wheatley acknowledged that most seniors who leave an Aetna or Humana Medicare Advantage plan switch to a different Medicare Advantage plan, not to Original Medicare. Tr. 288:13–16 (Cocozza); Tr. 524:16–21 (Wheatley).

Switching within Medicare Advantage also dominates among seniors who must involuntarily switch from their Medicare Advantage plans, perhaps because their existing plan was cancelled. These seniors "overwhelmingly" return to Medicare Advantage. Tr. 116:2–6 (Frank); see also PX0554 (Frank Reply Report) ¶ 31 (citing a paper finding that between 83 and 95% of seniors whose Medicare Advantage plans were terminated switched to another Medicare Advantage plan). After Humana discontinued one of its Medicare Advantage plans in the San Antonio area, Raul Gonzalez, a local broker, helped about 200 clients obtain new coverage. Only about 12 to 14 switched to Original Medicare plus MedSupp. Tr. 1034:24–1035:8 (Gonzalez). "For the most part," the others switched to an Aetna Medicare Advantage plan. Tr. 1033:1–1035:10 (Gonzalez); see also Tr.

1077:17–1080:14 (Fitzgerald). If seniors do not select a new plan when their existing plan is cancelled, they are defaulted back to Original Medicare. One 2015 paper cited by Frank finds that 89% of the seniors involuntarily moved to Original Medicare by default later chose to return to Medicare Advantage. PX0554 (Frank Reply Report) ¶ 32.

***28** Nevo analyzed switching data from several sources and arrived at similar conclusions. First, he analyzed 2015 CMS data from the annual open-enrollment period, when any senior can switch between any Medicare options, including between Medicare Advantage and Original Medicare. Second, he analyzed a subset of that data, which focused only on those seniors who had their plan cancelled in 2015. And finally, he analyzed three years' worth of data from Aetna and Humana—unlike the CMS open-enrollment data, this data includes information concerning the annual "disenrollment period," when seniors can switch from Medicare Advantage to Original Medicare but not between Medicare Advantage plans. All else equal, including seniors who switched from Medicare Advantage during the disenrollment period might be expected to increase the overall share switching into Original Medicare options. But in all three instances, more than 85% of seniors who left one Medicare Advantage plan switched to another instead of to an Original Medicare option. See Tr. 1587:20–1592:18 (Nevo); see also PX0552 (Nevo Reply Report) Ex. 7.

The switching data makes clear that there is a group of seniors with a distinct preference for Medicare Advantage relative to Original Medicare. Testimony by the government's broker witnesses generally supports the same conclusion. See, e.g., Tr. 1071:11–17 (Fitzgerald) (after receiving an overview of Original Medicare and Medicare Advantage, seniors begin "asking more questions about one side or the other"). A preference for Medicare Advantage may be based on a number of factors, including a senior's comfort with managed care plans or desire to receive all of his or her benefits from one source. See Pls.' Proposed Findings & Conclusions at 37 (collecting support for those propositions). But one important factor is cost. See Tr. 1023:24–1024:8 (Gonzalez) (questions about cost can "quickly determine" whether a senior chooses Medicare Advantage or MedSupp). The weight of the evidence suggests that, on average, Medicare Advantage plans have much lower out-of-pocket costs than Original Medicare plus MedSupp and prescription drug plans. See Brown Shoe, 370 U.S. at 325, 82 S.Ct. 1502 (noting that "distinct prices" may be considered in assessing the boundaries of a market).

All Medicare Advantage plans come with a statutory limit on annual out-of-pocket expenses and most include coverage for prescription drugs. To recreate those benefits on the Original Medicare side, a senior would have to purchase MedSupp and prescription drug plans from a private insurer—and would likely end up paying significantly more in monthly premiums. The average Medicare Advantage enrollee pays $142 in monthly premiums, while the average senior enrolled in Original Medicare plus MedSupp and a prescription drug plan pays double that amount. PX0554 (Frank Reply Report) ¶ 26 & Ex. 4. But as the companies are correct to observe, monthly premiums are only part of the story. A senior with MedSupp coverage will likely not incur monthly out-of-pocket expenses in addition to his or her monthly premium. A senior in Medicare Advantage, on the other hand, may still have to pay various cost-sharing requirements in exchange for receiving medical care. His or her monthly out-of-pocket expenses, then, will depend on the amount of care received, in addition to the monthly premium. Even so, Medicare Advantage enrollees are still likely to enjoy lower out-of-pocket costs. Using national 2010 data, a paper cited by Frank concluded that out-of-pocket costs for Original Medicare exceed those for Medicare Advantage by between $130 and $167 per month. PX0553 ***29** (Frank Report) ¶ 42; see also PX0554 (Frank Reply Report) ¶ 27.

The government does not have to prove that preferences for Medicare Advantage overlap with any demographic indicators. But here, there is evidence suggesting that Medicare Advantage plans tend to attract seniors with lower incomes. That trend has been observed by academics; by defendants' executives, competitors, and Molina; and by independent brokers. See Tr. 112:14–18 (Frank) ("[T]here's been quite a bit of research on this, and that research generally shows that people with lower incomes, lower levels of education, tend to join Medicare Advantage plans disproportionately to the rest of the population"); Tr. 1341:9–16 (Bertolini) (agreeing that the senior who chooses Medicare Advantage "tends on the average to be somewhat lower income than the population as a whole" because of Medicare Advantage's "total out-of-pocket costs"); PX0011–895 (Anthem executive noting that Medicare Advantage "attracts the lower/lower-middle income beneficiaries that can't afford Med Supp"); Tr. 2345:5–7 (Dr. Molina) (Molina CEO asserting that "the majority of people" in "Medicare Advantage are actually of lower income"); Tr. 1024:20–1025:1 (Gonzalez) (broker explaining that "it's much more difficult" for lower income people

"to go with the Medicare Supplement and pay the higher costs"). But see DX0034–006; Tr. 715:3–7 (Wooldridge) (60% of Aetna's MedSupp customers make less than $35,000 a year). That lower-income seniors tend to select Medicare Advantage is circumstantial evidence that its out-of-pocket costs tend to be lower than comparable Original Medicare options.

Based on the Brown Shoe factors and the parties' ordinary course of business documents, the government has made a strong evidentiary showing in support of the Medicare Advantage product market. The switching data shows that there are some seniors with durable preferences for Medicare Advantage. These seniors would be less likely than average to switch to a (often more costly) Original Medicare option in the event of a small but significant non-transitory increase in Medicare Advantage prices, and perhaps much less likely if they are low-income. Given the average cost differential between Medicare Advantage and comparable Original Medicare options, there may be room for a hypothetical monopolist of all Medicare Advantage plans in a particular county to profitably impose such a price increase without driving large numbers of seniors to Original Medicare. That will depend in part on the number of seniors who sit on the margin between Medicare Advantage and Original Medicare.

But the parties' ordinary course of business documents, viewed through the lens of Brown Shoe, suggest that there are not as many of these seniors as one might imagine. Evidence abounds of intense, local competition between Medicare Advantage plans. Evidence of similar competition between Medicare Advantage plans and MedSupp is much scarcer. Collectively, the evidence tends to establish the existence of a market for the sale of individual Medicare Advantage plans.

3. Defendants' Counter Arguments

Aetna and Humana raise several counter arguments. They argue that the government has oversimplified the health-insurance market and the choices that seniors make. Medicare Advantage plans, they point out, can vary on a number of metrics, including the breadth of provider networks, benefits provided, total out-of-pocket costs; some plans, they continue, actually have higher estimated out-of-pocket costs or fewer benefits than a competing Original Medicare option. See Defs.' Proposed Findings & Conclusions at 18–19. As ***30** a result of this overlap, defendants believe that "a Medicare Advantage plan's closest cousins are often one or more Original Medicare options instead of other Medicare Advantage plans. Excluding all Original Medicare options in order to create an MA-only market would ignore the ample overlap between the two types of plans." Id. at 115–16 (internal citation omitted).

What's more, defendants contend, the government has mischaracterized the manner in which seniors make healthcare choices. Each chooses among the available Medicare Advantage and Original Medicare options based on highly individualized preferences that are based on factors such as cost, medical condition, comfort with limited provider networks, and convenience. Preferences may change over time, and are not predetermined by demographic factors like income. See id. at 22–28. Defendants conclude "it is [too] difficult to generalize about the kinds or types of beneficiaries who will select one product over the other." Id. at 123.

Taking the second contention first, the Court agrees that seniors make individualized healthcare decisions. That does not mean, however, that all generalization is futile. Indeed Aetna and Humana, who have a vested financial interest in accurately assessing the competitive landscape, have not always so scrupulously avoided generalizing about seniors' healthcare decisions. For example, a draft presentation prepared for a Humana board retreat includes a slide addressing "Why Consumers Select Products," which differentiates between Medicare Advantage and MedSupp customers. Because Original Medicare plus MedSupp is "the most expensive plan combo," seniors who select it are "[w]illing to pay more for a flexible network of physicians and comprehensive coverage." DX0514–023. Medicare Advantage, on the other hand, attracts those seniors who want "additional health coverage, but [are] willing to sacrifice having a flexible network to keep costs low." DX0514–023; see also PX0045–196 (Humana sales director opining that low Medicare Advantage penetration levels likely means that "there are higher income eligibles in the area who are more inclined to have [MedSupp] policies versus MA plans"); PX0025–920 (2016 Aetna presentation describing the "Typical Med Supp Customer" based on income and geography); PX0021–017 (Aetna executive explaining that Medicare Advantage and Med Supp are "apples and oranges," that "the nature of MA and Med Supp focuses on different areas," and that "an area cannot be both a good Med Supp and a good MA area.").

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Aetna and Humana have also historically been willing to generalize about the costs and benefits of Medicare Advantage compared to Original Medicare options. Internal documents claim that Medicare Advantage provides "[b]etter benefits [and] lower cost" than Original Medicare, either with or without supplemental coverage. See DX0480–006; see also DX0514–021 (Humana document noting that Medicare Advantage offers "[m]ore benefits & less out of pocket payments than Original Medicare"). Humana makes similar claims. In its 2016 Presentation on Medicare Advantage and Prescription Drug Plans, Humana notes that Medicare Advantage plans generally "have lower out-of-pocket costs" than Original Medicare and may come with "[e]xtra benefits." DX0111–023; see also Tr. 2061:6–16 (Kauffman) (Humana sales manager confirming that she shares this information during meetings with seniors).

Nor is the Court convinced that an Original Medicare option is the "closest cousin" for many Medicare Advantage plans. If that is indeed the case, it is not reflected in the record. CMS's Medicare & You Handbook ***31** advises seniors to make a threshold choice between Medicare Advantage and Original Medicare, not to choose from a continuum of intermingled Medicare Advantage and Original Medicare options. PX0519–017. A "Decision Tree" created by Humana presents a senior's decision in a similar fashion. Before assessing a plan's network, costs, or supplemental benefits, the senior is asked to decide whether she is willing to "accept network restrictions"; if so, she is deemed a good fit for Medicare Advantage, but if not, she is deemed a good fit for MedSupp. DX0490–045. If Medicare Advantage plans were routinely competing with a "closest cousin" from the Original Medicare side of the family, one would expect to find evidence of that competition in the ordinary course of business documents. But for the most part, it is not there. Aetna and Humana frequently compare their Medicare Advantage offerings to other Medicare Advantage plans, but they rarely, if ever, compare them to particular MedSupp plans. Seniors, it seems, do not make that comparison either. In eight years selling Medicare products, broker Robert Fitzgerald has never compared a particular Medicare Advantage plan to a particular MedSupp plan—at a senior's request or otherwise. Tr. 1073:18–1074:1 (Fitzgerald).

Aetna and Humana contend that any differences that do exist between Medicare Advantage and Original Medicare have been and will be narrowed by various legislative and regulatory changes. They cite two of note. First, the Affordable Care Act linked Medicare Advantage reimbursement rates to Original Medicare provider costs, resulting in a substantial reduction in county-level benchmarks phased in over a period of six years. See Tr. 1127:13–1128:20 (Cavanaugh). These reductions, defendants contend, have reduced "the reimbursements MAOs receive from CMS, decreasing their revenues, and increasing competition between Original Medicare and Medicare Advantage plans." Defs.' Proposed Findings & Conclusions at 20.

The companies also believe that Accountable Care Organizations, or ACOs, will bring Original Medicare and Medicare Advantage closer. ACOs, which were created by the Affordable Care Act, are groups of providers who join together in an attempt to coordinate care, control costs, and improve health outcomes; those that succeed in holding down costs may be paid a financial bonus by CMS. PX0554 (Frank Reply Report) ¶ 42. By responding to these incentives and providing value-based care within Original Medicare, defendants argue, ACOs will help convert Original Medicare from a fee-for-service model into one more like Medicare Advantage. In fact, defendants say, this conversion is already underway. See Tr. 1174:16–1175:2 (Cavanaugh) (discussing efforts to move Original Medicare away from fee-for-service payment model).

But these policy changes have little impact on the market definition analysis in this case. The Court does not doubt that the benchmark reductions made the basic Medicare Advantage value proposition of lower costs and additional benefits somewhat more difficult to deliver. See DX0508–033 (slide deck for Humana Board of Directors Meeting observing that "Benchmark Reductions are reducing MA Value Add" and that "MA Value Add drives Penetration Rate"). But because these reductions will be fully phased in by the end of 2017, see Tr. 1128:21–24 (Cavanaugh), their impact has largely already been felt. Moreover, MAOs have largely succeeded in maintaining the Medicare Advantage value proposition by controlling costs, bidding below the benchmarks, and offering supplemental benefits not provided by Original Medicare. See PX0551 (Nevo Report) ¶ 67; Tr. 1130:3–12 (Cavanaugh). ***32** Thus, the differences between Medicare Advantage and Original Medicare options have been preserved.

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The argument concerning ACOs is also unpersuasive. The market definition analysis "focuses solely on demand substitution factors," Heinz, 246 F.3d at 718 (internal quotation marks omitted)—i.e., "customers' ability and willingness to substitute away from one product to another in response to a price increase" or "reduction in product quality or service," Guidelines § 4. It is not clear what impact the advent of ACOs would have on the extent of this substitution. As an initial matter, it is the provider, not the senior, who decides whether to participate in an ACO; seniors are often "passively attributed" to them, sometimes even without their knowledge. PX0554 (Frank Reply Report) ¶ 46. Hence, there is no choice by the senior customer to use an ACO. And for the most part, ACOs do not diminish the essential differences between Medicare Advantage and Original Medicare. Perhaps a senior who has been attributed to an ACO would receive some of the care coordination ordinarily associated with Medicare Advantage. But unlike Medicare Advantage enrollees, Original Medicare enrollees assigned to ACOs are not penalized for seeking care outside the network. Tr. 133:22–134:5 (Frank). Nor would they receive additional coverage or cost reductions for participating in the ACO. PX0554 (Frank Reply Report) ¶ 44. Ultimately, then, ACOs have almost "nothing to do with a comparison of the benefits of traditional Medicare or Medicare Advantage." Tr. 1132:3–6 (Cavanaugh). And as a result, they also have little to do with defining the product market in this case.

The companies' third argument, though, fares better. Aetna and Humana argue that an exclusive focus on the behavior of switch-outs—those seniors who have already enrolled in a Medicare Advantage plan—is "misguided." Every day, approximately 10,000 seniors "age in" and become eligible for Medicare, and are thus presented with the choice between Original Medicare options and Medicare Advantage. [13] Aetna and Humana argue that Medicare Advantage organizations must compete for these age-ins, in addition to seniors already enrolled in Medicare Advantage or Original Medicare options.

The companies argue that the parties' recent Medicare Advantage enrollment data makes this clear. In 2015 only 45% of Aetna's and Humana's Medicare enrollees switched from a different MAO; the remaining 55% enrolled either as they aged into Medicare (21%) or switched from an Original Medicare option (34%). Tr. 3044:7–20 (Orszag). Focusing just on the behavior of seniors who have already selected a Medicare Advantage plan is like standing outside a Ford dealership and asking those who emerge with Ford keys "What do you think about Fords?" Tr. 3646:15–18 (closing argument). That survey would reveal that some drivers have a preference for Fords, but it would also obscure the broader competitive picture. Here, defendants insist, the broader competitive picture shows that a hypothetical monopolist of all Medicare Advantage plans could not impose a price increase. If it tried, some Medicare Advantage enrollees may remain within the market; but ***33** the age-ins would turn to Original Medicare options in sufficient numbers to make the price increase untenable. See Tr. 48:21–49:13 (opening statement).

In the Court's view, Aetna and Humana understate the importance of the switching data, which indicates not only that some seniors opt for Medicare Advantage, but that those seniors stick with it in the face of price increases or plan exits. Their argument implies that age-ins are as a group somehow closer to the margin between Medicare Advantage and Original Medicare options than seniors who have already made an initial selection. But there is little evidentiary support for that contention. Despite the unrelenting torrent of age-ins, Aetna and Humana focus their competitive efforts primarily within the Medicare Advantage market. Still, the companies' basic point is well-taken: the market definition analysis in this case must rest on a complete assessment of the demand for individual Medicare Advantage. For that assessment, the Court now turns to the economists.

4. Econometric Evidence

The government's economist, Dr. Aviv Nevo, analyzed whether the proposed market for the sale of individual Medicare Advantage plans would satisfy the hypothetical monopolist test. As set out in the Horizontal Merger Guidelines, that test asks whether

> a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant

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and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.

Guidelines § 4.1.1. If so, the candidate market may be the relevant product market. See Sysco, 113 F.Supp.3d at 33–34; H & R Block, 833 F.Supp.2d at 51–52. Because Medicare Advantage passed under all formulations of his hypothetical monopolist tests, Nevo concluded that individual Medicare Advantage plans constitute a relevant product market. Tr. 1610:16–21 (Nevo).

Nevo's analysis began with his demand model, which provides several key inputs for his hypothetical monopolist test. Nevo used 2011 to 2016 CMS data on Medicare Advantage plan enrollment, premiums, and characteristics. PX0551 (Nevo Report) ¶¶ 152–53. The CMS data thus reflects the choices made by millions of seniors—including age-ins, those who chose Original Medicare options, and those who chose Medicare Advantage. Tr. 1603:6–21, 1604:9–15 (Nevo). Like other economists who have studied demand for Medicare Advantage products, Nevo used a "nested logit model." See PX0551 (Nevo Report) ¶ 150. Nested logit models are appropriate "where some consumers may prefer a group, or 'nest,' of choices to the other choices" available to them. PX0551 (Nevo Report) ¶ 148. Applied here, the nested logit model can be used to test whether, and to what degree, a senior might prefer "a Medicare Advantage plan because it is a Medicare Advantage plan." PX0051 (Nevo Report) ¶¶ 147, 148.

The model incorporates a "nesting parameter" that reflects the presence and strength of any such preference. PX0551 (Nevo Report) ¶¶ 148, 149. The nesting parameter can vary from zero to one, although any positive nesting parameter indicates that some seniors "have a distinct preference for [Medicare Advantage] plans as a group." Tr. 1602:4–9 (Nevo). Nevo's nested logit model yielded a nesting parameter of .65, indicating that many seniors ***34** do have a distinct preference for Medicare Advantage compared to other coverage options. Tr. 1602:4–9, 1602:25–1603:5 (Nevo). Nevo's work is in line with the academic literature, which has consistently estimated positive nesting parameters when studying demand for Medicare Advantage. See PX0551 (Nevo Report) ¶ 150 & Ex. 9 (reporting that earlier studies' "preferred nesting parameter estimate[s]" ranged between 0.32 and 0.84, "with all but one being greater than 0.50").

The size of the nesting parameter has implications when examining measures of consumer substitution. The nesting parameter can be used to calculate an "aggregate diversion ratio" for a particular product, which applied here, "represents the share of seniors who would respond to a price increase on their current Medicare Advantage plan by choosing another Medicare Advantage plan." PX0551 (Nevo Report) ¶ 164. The higher the nesting parameter, the higher the aggregate diversion ratio; and the higher the aggregate diversion ratio, "the more closely Medicare Advantage plans compete with each other rather than with other coverage options." PX0551 (Nevo Report) ¶ 165. Using his nesting parameter of .65, Nevo calculated an aggregate diversion ratio of 70%—that is, 70% of seniors leaving a Medicare Advantage plan in response to a price increase would switch to a different Medicare Advantage plan. Tr. 1605:1–3 (Nevo). As a check on his analysis, Nevo compared his aggregate diversion ratio to the switching data summarized above. Because that data generally shows that more than 80% of seniors leaving one Medicare Advantage plan switch to another, Nevo believes that his estimated aggregate diversion ratio is actually conservative. Tr. 1604:16–16:05:12 (Nevo); PX0552 (Nevo Reply Report) ¶ 57 & Ex. 7.

Armed with his demand estimates, Nevo turned to the hypothetical monopolist test. In deciding whether to impose a price increase, the hypothetical monopolist is trying to balance two effects. On the one hand, the price increase will likely drive away some consumers, thereby costing the monopolist a number of sales and the associated profit; but on the other hand, the monopolist will make higher profits on sales it retains, so that whether the price increase would be profitable depends on the relative sizes of those effects. Tr. 1608:24– 1609:6 (Nevo). To simulate those effects, an economist needs measures relating to the number of customers who would leave the hypothetical monopolist's product in response to the price increase (elasticities), the number who would remain within the market rather than leave it (the aggregate diversion ratio), and the profit associated with each sale (margins). See PX0551 (Nevo Report) ¶ 177; see also Tr. 1611:15–21 (Nevo). Nevo's elasticities were derived from his nested logit model. His margins were computed using those elasticities and what Nevo has described as a "standard model of competition." See PX0551 (Nevo Report) ¶ 177; Tr. 1611:22–1612:1 (Nevo).

Nevo ran two versions of the hypothetical monopolist test. The first asked whether a hypothetical monopolist of all the Medicare Advantage plans in a particular county could increase profits by imposing a SSNIP on at least one Aetna or Humana plan. Tr. 1611:2–4 (Nevo); see also Guidelines § 4.1.3 (describing this inquiry as a "[c]ritical loss analysis"). Using his demand estimates, Nevo concluded that the hypothetical monopolist could impose a SSNIP of five or ten percent on at least one Aetna or Humana Medicare Advantage plan in all 364 complaint counties. Tr. 1612:6–15 (Nevo); see also PX0551 (Nevo Report) ¶ 178 & Ex. 12. Nevo's second version of the hypothetical monopolist test ***35** was based on a "merger simulation." Tr. 1615:9–15 (Nevo). There, instead of raising prices only on one plan, the hypothetical monopolist is permitted to simultaneously raise prices on all of the Medicare Advantage plans being offered in a particular county. The test then asks whether the monopolist, empowered to set a profit-maximizing price for every Medicare Advantage plan, would increase the price of at least one plan by a SSNIP. Tr. 1614:21–1615:8 (Nevo); see also PX0551 (Nevo Report) ¶ 181. Again, using his demand estimates, Nevo concluded that the candidate market passed the hypothetical monopolist test. In all 364 complaint counties, the hypothetical monopolist would impose a SSNIP on at least one Aetna or Humana plan. Tr. 1618:5–8 (Nevo); see also PX0551 (Nevo Report) ¶ 187 & Ex. 14. Under his tests, Nevo concluded that individual Medicare Advantage plans constitute a relevant product market. [14] Tr. 1619:8–9 (Nevo).

Aetna and Humana, relying largely on their economist, Jonathan Orszag, attempt to undermine Nevo's analysis in various ways. They first lodge technical criticisms of Nevo's econometric methods. Like Nevo, Orszag used a nested logit model to assess demand for Medicare Advantage products. And like Nevo's, Orszag's model predicted positive nesting parameters. But his nesting parameters were lower than Nevo's, ranging from .23 to .35. Tr. 3145:16–19 (Orszag); DX0419 (Orszag Report) ¶ 94. The comparatively lower nesting parameters, in turn, translate into comparatively lower aggregate diversion ratios. Whereas Nevo found that, in response to a price increase in Medicare Advantage, the aggregate diversion to other Medicare Advantage plans would be 70%, Orszag estimates it at only 49%. Tr. 3142:2–6 (Orszag). He attributes these differences primarily to differences between the models' instrumental variables, an econometric tool used to disentangle correlation from causation. Tr. 3157:8–11 (Orszag). Digging into the models yet further, Orszag offered a number of reasons why, in his view, Nevo's method for constructing instrumental variables lacked "a good intuition" and thus distorted his results. Tr. 3165:13–14 (Orszag); see generally Tr. 3157:8–3167:11 (Orszag).

Orszag also opines that certain of the inputs and assumptions undergirding Nevo's analysis are inconsistent with how the market operates in practice. In particular, Orszag criticizes Nevo for basing his calculations on an average economic margin of 24%, even though medical-loss regulations require MAOs to spend 85% of the revenue associated with a particular contract on medical care (thus leaving a maximum of 15% for administrative costs and profit). [15] Tr. 3177:5–17 (Orszag). Orszag ***36** further faults Nevo for assuming in his merger simulation that the hypothetical monopolist would set prices at the county-level, despite the fact that Medicare Advantage organizations typically set a plan-level price that applies in all the various counties where the plan is offered. See Tr. 3168:11–3169:20 (Orszag); see also Tr. 1723:9–16 (Nevo) (acknowledging that Medicare Advantage organizations "offer plans at a service area level").

When these flaws are assessed together, Orszag contends, the whole of Nevo's economic analysis is fatally undermined: both versions of his hypothetical monopolist test—critical loss analysis and merger simulation—rely on erroneously high diversion ratios and margins which, once incorporated, bias his results toward the adoption of a Medicare Advantage only market. The version using the merger simulation is doubly flawed, Orszag believes, because it also incorporates unrealistic assumptions about the manner in which MAOs set plan prices. Tr. 3186:17–3187:13 (Orszag). Aetna and Humana therefore assert that Nevo's conclusions regarding market definition are faulty and they urge the Court to disregard them.

In his rebuttal testimony, Nevo has offered defenses of his instrumental variables, his margin figures, and the assumptions in his merger simulation. Fortunately, however, the Court does not need to referee to resolution this econometric battle of the experts. By performing much of his analysis using Orszag's estimates, in addition to his own, Nevo has largely insulated his work from defendants' critiques. [16] Specifically, Nevo performed his first hypothetical monopolist test, the critical loss analysis, using estimates derived from eight different specifications of Orszag's demand model. Tr. 3503:3–9 (Nevo); see also PX0552 (Nevo

Reply Report) ¶ 38. These estimates included Orszag's elasticities, the margins implied from those elasticities, and diversion ratios derived from Orszag's nesting parameters. See Tr. 3598:19–3599:3 (Nevo); see also PX0552 (Nevo Reply Report) Note to Ex. 2. No matter which set of estimates Nevo used, and no matter whether he imposed a SSNIP of 5% or 10%, the candidate market—Medicare Advantage—passed the hypothetical monopolist test for the majority—and usually for the overwhelming majority—of the complaint counties. See PX0552 (Nevo Reply Report) ¶ 39 & Ex. 2. That was true even for those iterations of the test where Nevo used economic margin figures below the 15% ceiling that Orszag believes is implied by regulation. Tr. 3509:11–24 (Nevo).

Nevo likewise performed his second hypothetical monopolist test, which relies on his merger simulation, using estimates derived from the eight specifications of Orszag's model. Once again, the Medicare Advantage only market passed the hypothetical monopolist test in the overwhelming majority of the complaint counties. Tr. 3503:16–20 (Nevo); PX0552 (Nevo Reply Report) ¶¶ 40–41 & Ex. 3. Thus, it seems that Nevo's analysis is largely unaffected by defendants' technical critiques. The companies have not really attempted to argue otherwise, either in their proposed findings and conclusions or during their closing arguments. See Defs.' Proposed Findings & Conclusions at 120–21; Tr. 3762:8–3763:7 (post-trial argument). As a ***37** result, the Court is comfortable moving past these criticisms and focusing instead on defendants' other arguments. [17]

Again relying on Orszag, Aetna and Humana next argue that Nevo has misapplied the Horizontal Merger Guidelines when performing his hypothetical monopolist test. The crux of Orszag's argument is that, in response to a price increase on a particular Medicare Advantage plan, there are likely to be Original Medicare options that enjoy greater diversion than the plan's most distant Medicare Advantage substitute. Applying what he calls the "circle principle," which he derives from "Example 6" of the Guidelines, Orszag argues that any such Original Medicare options must be included in the product market. By ignoring the circle principle, defendants assert, Nevo has defined an overly narrow and conceptually flawed product market.

To assess this argument, the Court turns first to the language of the Guidelines:

> Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may [therefore] identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.

Guidelines § 4.1.1. In Example 5, the Guidelines provide an illustration of that principle. There, they posit a candidate market containing two products, A and B. In response to a price increase on either, two-thirds of the lost sales are diverted to products outside the market. Nonetheless, based on the margin assumptions included in the example, "economic analysis shows that a hypothetical profit-maximizing monopolist controlling Products A and B would raise both of their prices by ten percent." Id. Under these circumstances, the Guidelines conclude, a market of Products A and B satisfies the hypothetical monopolist test, even though "customers would substitute significantly to products outside that group in response to a price increase." Id.

Broadly speaking, Example 5 is helpful for the government, since it means that a Medicare Advantage only market may satisfy the hypothetical monopolist test despite fairly significant diversion to Original Medicare options. But the Guidelines continue with language on which defendants rely:

> When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product.

> The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.

***38** Id. This "circle principle" is then illustrated in Example 6:

> Example 6: In Example 5, suppose that half of the unit sales lost by Product A when it raises its price are diverted to Product C, which [like Products A and B] also has a price of $100, while one-third are diverted to Product B. Product C is a closer substitute for Product A than is Product B. Thus Product C will normally be included in the relevant market, even though Products A and B together satisfy the hypothetical monopolist test.

Defendants have made two attempts to identify an Original Medicare "Product C" that must intrude into the proposed Medicare Advantage only market. Both are grounded upon an analysis of diversion ratios. First, Orszag treated Aetna's or Humana's Medicare Advantage products as Product A and all Original Medicare options—that is, all the possible combinations of Original Medicare plus the various MedSupp and prescription drug plans—as Product C. Using the estimates from his own demand model, and applying the "circle principle," he concluded that all Original Medicare options must be included in the market. See Tr. 3068:11–3069:10 (Orszag). If all Aetna Medicare Advantage plans are Product A, there is 23% diversion to Humana plans, 49% diversion to all Medicare Advantage plans (including Humana's), and 51% diversion to Original Medicare options. DX0418 (Orszag Reply Report) ¶ 53 & Table II-4. And if all Humana Medicare Advantage plans are Product A, there is 16% diversion to Aetna plans, 44% diversion to all Medicare Advantage plans (including Aetna's), and 56% diversion to Original Medicare options. DX0418 (Orszag Reply Report) ¶ 53 & Table II-4. Original Medicare options, then, must be included in the market—even if one uses all other Medicare Advantage products as the operative Product B. Tr. 3068:11–18, 3069:7–10 (Orszag).

The Court finds this application of the "circle principle" unpersuasive. In effect, Orszag has taken all the sales escaping the government's proposed market, relabeled them as "Product C," and then asserted that, under that new moniker, they must be included in the product market. But as Example 5 makes clear, a market may satisfy the hypothetical monopolist test, and thus be considered as a proper antitrust product market, "even if customers would substitute significantly to products outside that group in response to a price increase." Guidelines § 4.1.1. Endorsing Orszag's first application of Example 6 would create an exception that completely swallows that rule. [18] In Example 5, two-thirds of diversion escapes the market. Here, even using Orszag's lower diversion ratios, only slightly more than half does. That diversion fits squarely within Example 5, and Orszag's first purported application of the "circle principle" will be rejected.

So too will Orszag's second proposed application, although for different reasons. Rather than treating all Original Medicare options collectively as one Product C, Orszag's second application posits that each possible combination of Original Medicare, MedSupp, and Part D plans might constitute its own product. Neither Orszag nor Nevo calculated diversion ratios between every Medicare Advantage plan and every conceivable individual Original Medicare option. [19] Tr. 3070:7–13 ***39** (Orszag); Tr. 3567:5–20 (Nevo). But Orszag thinks it likely that some individual Original Medicare "Product Cs" are closer substitutes for some Medicare Advantage plans than their most distant Medicare Advantage competitors. His reasoning is as follows. Enrollment data reveals that there is basically no diversion between some sets of Medicare Advantage plans. The data also reveals that diversion from Aetna or Humana Medicare Advantage plans to Original Medicare as a whole is substantial—slightly more than 50% using Orszag's estimates. He reasons that "by definition," then, there must be some Original Medicare "products" that enjoy more diversion from Aetna and Humana Medicare Advantage plans than their most distant Medicare Advantage substitutes. Pursuant to the circle principle, Orszag concludes, any such products must be included in the market. Tr. 3070:25–3072:24 (Orszag).

The problem with this more nuanced argument, however, is that it is almost entirely speculative. Orszag has not identified an Original Medicare product of the kind that he describes above, although Nevo has not proved that one does not exist. Defendants imply, but stop short of explicitly arguing, that this gap in the factual record should fall on the government as the party with the ultimate burden. When asked at closing arguments whether, in order to prove its candidate market was a valid product market, the government needed to "calculate a diversion ratio for every product that has a potential to be in the market," counsel for defendants was somewhat noncommittal. See Tr. 3764:1–11 (post-trial argument). Regardless, defendants plainly believe that the lack of a complete set of diversion ratios undermines the government's ability to carry its burden on market definition.

The Court disagrees. If taken to its logical conclusion, defendants' position implies a purely econometric approach to market definition, requiring the government to calculate individual diversion ratios for all the products potentially in the market, rank them from highest to lowest, and, at some point, draw a line between those products that fall within the market and those products that fall outside. But that technical approach is not taken by the cases. Econometric evidence can be powerful evidence, but it is not the only evidence that courts consider in defining the relevant market. Indeed, the cases relied upon by both parties here have considered the Brown Shoe factors and ordinary course of business documents, in addition to econometric evidence, before reaching conclusions about the proper market definition. In this case, the government has marshalled a wide array of qualitative evidence. Most of it points to the existence of a Medicare Advantage only market. And none of it suggests frequent, close competition between Medicare Advantage plans and particular Original Medicare "Product Cs." That evidence cannot now be disregarded, simply because the government has not undertaken a particular bit of economic analysis. The qualitative evidence in this case is still persuasive—and largely supports the conclusion that the relevant product market is Medicare Advantage plans alone.

Nor does the possible existence of a specific Original Medicare "Product C" require the Court to disregard the government's econometric evidence. The Guidelines make clear that the hypothetical monopolist test does not aim to identify a "single relevant market." See Guidelines § 4.1.1. Rather, the test "ensures that markets are not defined too narrowly" and, in so doing, identifies a market ***40** that will "illuminate the evaluation of competitive effects." Id. Within these parameters, the government "may evaluate a merger in any relevant market satisfying the [hypothetical monopolist] test," and will "usually do so in the smallest" market that qualifies. Id.; see also Sysco, 113 F.Supp.3d at 26 (adopting this "narrowest market" principle) (citing Arch Coal, 329 F.Supp.2d at 120); see also H & R Block, 833 F.Supp.2d at 59 (same).

The government has operated within those parameters here. Based on the qualitative evidence, it has (properly, in the Court's view) identified individual Medicare Advantage plans as a candidate product market in which to evaluate the merger's competitive effects. Through multiple applications of the hypothetical monopolist test, the government's expert determined that a hypothetical monopolist in that market could impose a SSNIP on at least one plan sold by Aetna or Humana. Admittedly, those tests would be even more persuasive if they conclusively foreclosed the existence of an Original Medicare "Product C." But that does not mean that they are of no persuasive value. Like the rest of the government's evidence, the hypothetical monopolist tests tend to establish the existence of a market for the sale of individual Medicare Advantage plans alone. The Court will not disregard that evidence, and risk broadening the market in violation of the narrowest market principle, simply because one of the Guidelines' examples says that a hypothetical Product C, if it exists at all, should "normally" be included. That is especially true here, where there is no showing whatsoever that such a Product C exists. Even if there are a limited number of as yet unidentified Product Cs that might be included in the market, moreover, defendants have not explained why that should suffice to bring in all Original Medicare options.

Defendants' final economic argument is based on quantitative analysis by Orszag, rather than on a critique of Nevo. Orszag's economic analysis focused on the relationship between competition and prices in Medicare Advantage. To study that relationship, he used a regression that employed various measures of concentration and plan price. See DX0419 (Orszag Report) ¶ 108. Orszag's regression identified no statistically significant relationship between the two.[20] DX0419 (Orszag Report) ¶ 108 & Table II-6. He believes that this analysis answers the same question as the various hypothetical monopolist tests run

by Nevo. When real-world MAOs face decreases in competition, defendants contend, they do not increase prices. Therefore, Nevo's abstract models notwithstanding, the government's proposed market “does not pass the hypothetical monopolist test when you use a real-world test.” Tr. 3062:20–23 (Orszag).

But defendants cannot so easily lay claim to the “real world.” To assess the relationship between Medicare Advantage competition and prices, Orszag himself used a model—and that model is not impervious to econometric critique. One persuasive criticism has been levied by Nevo.[21] Using what he calls “plan fixed ***41** effects,” Orszag's model focuses exclusively on the changes to the prices of particular plans over time. Tr. 3191:3–8 (Orszag). The problem with that approach, according to Nevo, is that it misses an important competitive dynamic: Medicare Advantage organizations sometimes introduce new plans or segment existing ones in response to competition, rather than adjusting price. Tr. 3513:5–23 (Nevo). The government has cited a number of documents where defendants contemplate segmenting plans in order to “target one or more counties” for a “different premium/cost-share” than the other counties currently covered by the plan. See PX0379–689 (Aetna “Bid Segmentation Concept Brief”); PX0035–808 (Humana document recommending segmenting a plan “to increase premium where competition allows”).

When Nevo removes the “plan fixed effects” in order to account for that dynamic, he finds a statistically significant relationship between Medicare Advantage premiums and concentration in a particular county; as concentration increases, so do average premiums. PX0552 (Nevo Reply Report) ¶ 68 & Ex. 9; see also Tr. 3512:13–3513:9 (Nevo) (explaining his adjustments to Orszag's model). In that respect, Nevo's adjusted regression is consistent with the academic literature, which has generally concluded that decreased competition decreases the extent to which Medicare Advantage organizations pass benchmark increases through to beneficiaries as lower costs or better benefits. Tr. 129:14–130:18 (Frank); see also PX0553 (Frank Report) ¶¶ 58–63 (citing studies); PX0552 (Nevo Reply Report) ¶ 64 (same). The companies have presented the Orszag regression as powerful evidence regarding the incentives of the hypothetical monopolist that fully rebut the results of Nevo's hypothetical monopolist tests. But in light of Nevo's critique and the academic literature, the Court concludes that Orszag's regression cannot bear that weight. On balance, then, the expert case too tilts clearly toward the government.

5. Summary

Considering the evidence collectively, the Court concludes that the government has established the existence of a product market including the sale of individual Medicare Advantage plans but excluding Original Medicare options. Original Medicare and Medicare Advantage are functionally interchangeable as ways for a senior to receive basic health benefits. And, in some sense, Medicare Advantage plans compete with Original Medicare. As a prerequisite to offering a plan, an MAO must sufficiently differentiate it from Original Medicare.

But most MAOs do that successfully, and create products different from Original Medicare in a number of important respects: they have a limited network, cap out-of-pocket spending, coordinate care, and generally offer supplemental benefits like prescription drug coverage. These differences limit the extent to which one is reasonably interchangeable with the other, although seniors can make Medicare Advantage and Original Medicare into closer substitutes by purchasing a MedSupp or prescription drug plan. In many cases, these options will be offered to the senior by the same vendor at the same time.

That does not necessarily mean, however, that they all belong in the same product market. The evidence tends to show the opposite. The Brown Shoe factors generally point toward the existence of a Medicare Advantage market. And the ordinary course of business documents make plain that, rather than focusing their efforts on competition with Original Medicare, Aetna and Humana focus on competition with other Medicare Advantage ***42** organizations. To do so, they compile impressive amounts of local, plan-specific competitive intelligence about Medicare Advantage offerings in markets across the country. MedSupp plans rarely, if ever, figure into that assessment. Aetna's and Humana's focus on competition within Medicare Advantage, along with seniors' observed strong tendency to switch from one Medicare Advantage plan to another when faced with a plan cancellation or price increase, make it unlikely that competition from Original Medicare options will suffice to discipline Medicare Advantage pricing.

The econometric analysis supports the same conclusion. Although the Court does not (and does not need to) adopt his analysis in every detail, Professor Nevo has performed a battery of tests that all point to the same conclusion: the sale of individual Medicare Advantage plans satisfies the hypothetical monopolist test and thus is a relevant product market. That result generally holds up whether Nevo uses a critical loss analysis or a merger simulation, and whether he uses his own estimates, Orzsag's, or those from the academic literature.

Ultimately, Aetna's and Humana's litigation position implies that competition between Medicare Advantage organizations is not needed to discipline Medicare Advantage plan prices or quality. Even in the 70 counties where the merged firm would be the only Medicare Advantage organization post-merger, the companies believe there is no competition problem. But the evidence in this case suggests otherwise. Based on careful consideration of all that evidence, the Court concludes that the proper markets for evaluating the merger are those for individual Medicare Advantage plans in the 364 complaint counties.

B. Competitive Effects

To establish its prima facie case, the government next attempts to show that the merger would "lead to undue concentration in the market" for individual Medicare Advantage plans in all 364 complaint counties. See Baker Hughes, 908 F.2d at 982. Market concentration, which "is a function of the number of firms in a market and their respective market shares," is often measured using the Herfindahl–Hirschmann Index, or HHI. See Arch Coal, 329 F.Supp.2d at 123–24. The HHI "is calculated by summing the squares of the individual firms' market shares, and thus gives proportionately greater weight to the larger market shares." Guidelines § 5.3. "Sufficiently large HHI figures establish the [government's] prima facie case that a merger is anti-competitive." Heinz, 246 F.3d at 716. Under the Guidelines, a market is "highly concentrated" if it has an HHI over 2,500. Guidelines § 5.3. If a merger would produce a highly concentrated market and "involve an increase in the HHI of more than 200 points," then it "will be presumed to be likely to enhance market power." Id. Courts have adopted these thresholds in determining whether a merger is presumptively unlawful. See Heinz, 246 F.3d at 716 (applying a prior version of the Guidelines); FTC v. Staples, Inc., 190 F.Supp.3d 100, 128–29 (D.D.C. 2016) (Staples II) (applying the current version of the Guidelines); Sysco, 113 F.Supp.3d at 52–53 (same).

There is no suspense about the outcome of this HHI analysis here: the Aetna–Humana merger easily surpasses the Guidelines' concentration thresholds in all 364 of the complaint counties. PX0551 (Nevo Report) ¶ 196; Tr. 1622:17–20 (Nevo). Indeed, in more than 75% of the counties, the post-merger HHI would be greater than 5,000, and in more than 70% ***43** of the counties, the merger would cause an HHI increase of more than 1,000 points. PX0551 (Nevo Report) ¶ 196. And in 70 counties where Aetna and Humana are the only MAOs currently in the market, the post-merger HHI would reflect a merger to monopoly. PX0551 (Nevo Report) ¶ 195; Tr. 1622:21–1623:2 (Nevo). Based on these compelling concentration figures, the government has established its prima facie case. Defendants do not attempt to argue otherwise. Tr. 3774:21–3775:4 (closing argument). Thus, the government is entitled to a presumption that the merger would substantially lessen competition in the sale of individual Medicare Advantage plans in all 364 complaint counties.

The government, however, has not rested on that presumption. Instead, it has introduced evidence tending to show that the merger would substantially lessen competition. "Mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition." Staples II, 190 F.Supp.3d at 131; see also Sysco, 113 F.Supp.3d at 61 (same) (collecting cases); Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."). That can be true even where the merging parties are not the only, or the two largest, competitors in the market. See Sysco, 113 F.Supp.3d at 62 (citing Heinz, 246 F.3d at 717–19; H & R Block, 833 F.Supp.2d at 83–84). Mergers between close competitors might have unilateral anticompetitive effects if "the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from

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other firms." H & R Block, 833 F.Supp.2d at 81. Anticompetitive effects are more likely still when "the merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market." Staples, 970 F.Supp. at 1083.

Aetna is just such a "particularly aggressive" Medicare Advantage competitor. Following its acquisition of Coventry in 2013, Aetna became the fourth largest Medicare Advantage insurer in the country. DX0290–113. And in the intervening years it has continued to aggressively expand its Medicare Advantage footprint, targeting many new counties for expansion each year. Tr. 1330:2–19 (Bertolini). Between 2013 and 2016, Aetna expanded into 640 new counties—more than twice as many as the next most prolific entrant. PX0551 (Nevo Report) ¶ 218 & Ex. 18. When Aetna enters a new market, it generally does so with a focus on building a high value provider network and offering zero-premium plans. PX0036–427 (Aetna 2016 "Medicare Deep Dive Overview" noting a commitment to "[g]rowing [high value networks] to help sustain $0 premiums"); see also Tr. 346:6–347:3 (Cocozza). Aetna considers its zero-premium plans as "a cornerstone in most markets to drive growth." PX0046–324; see also Tr. 354:21–355:2 (Cocozza) (over 50% of Aetna enrollees are in zero-premium plans); Tr. 347:4–25 (Cocozza) (Aetna's zero-premium PPO, since being introduced in 2014, has contributed to market-share growth in a number of local markets). Even without the Humana merger, Aetna intends to continue expanding its geographic footprint and maintain its focus on building value-based networks. PX0036–427 (Aetna 2016 "Medicare Deep Dive Overview" setting forward-looking targets).

Aetna's expansion has put it on a collision course with Humana. In 2011 Aetna and Humana competed in Medicare Advantage in just 79 counties, but by 2016, they competed in 675. PX0551 (Nevo Report) ¶¶ 219–20 & Ex. 19; Tr. 1582:13–15 (Nevo) (Aetna and Humana collectively ***44** boast more than 59% of the 1.7 million Medicare Advantage enrollees in the complaint counties). That growing overlap is not merely geographical. It is also philosophical. At trial, Bertolini and Broussard discussed their shared outlook on the future of healthcare. See Tr. 1837:1–15 (Broussard) ("[Mark and I] almost finished each other's sentences.") Like Aetna, Humana has employed a strategy to "build networks around value-based arrangements." Tr. 327:14–15 (Cocozza); see also Tr. 2106:13–18 (Follmer) (acknowledging that, in Georgia, Humana has "value-based contracts with providers that are more advanced than other Medicare Advantage plans"). In a 2015 email, Cocozza touches on both these areas of overlap when assessing the nature of the competition between Aetna and Humana: "[Humana] was #1 in growth and is our most formidable competitor. We compete with them everywhere and they have momentum. They continue to lead in terms of aggressive pursuit of strategic provider relationships and are willing to deploy capital in many forms to secure preferred standing and exclusivity." PX0007–847.

The parties disagree about whether significant head-to-head competition is reflected in the econometric data. According to defendants, the data reveals that the head-to-head competition between Aetna and Humana is not special. For support, they rely on two regressions performed by Orszag. The first, already discussed above, purports to find no general relationship between competition and plan price in Medicare Advantage. Tr. 3087:10–24 (Orszag); DX0419 (Orszag Report) ¶¶ 117–18 & Table II-6. The second, which focuses specifically on head-to-head competition between Aetna and Humana, concludes that the presence of one defendant in a county has no statistically significant impact on the prices charged by the other. Tr. 3090:1–20 (Orszag); DX0419 (Orszag Report) ¶¶ 121–24 & Tables II-7 & II-8.

By focusing solely on changes in the price of a particular plan, however, both these regressions are susceptible to the same critique: namely, that they will fail to discern changes to competition that result from the introduction of new plans or the segmentation of old ones. PX0552 (Nevo Reply Report) ¶ 75. In the Court's view, that limits the persuasive value of Orszag's regressions. Moreover, when Nevo performs a similar regression focused instead on changes in market share, he finds evidence of substantial head-to-head competition between Aetna and Humana. Specifically, Nevo concludes that Aetna's presence in a particular county depresses Humana's market share by 9.4 percentage points—more than twice the effect associated with other insurers. PX0552 (Nevo Reply Report) ¶¶ 76–77 & Ex. 11; Tr. 3520–3521:3 (Nevo). Switching data also reveals close (and increasing) head-to-head competition between Aetna and Humana. In 2014, Aetna Medicare Advantage products ranked as the ninth most popular option among seniors switching from Humana; in 2016, they ranked second. PX0551 (Nevo Report) ¶ 222. Thus, even if Orszag's analysis was air-tight, Nevo's (largely uncontroverted) analysis suggests that there is substantial competition between Aetna and Humana.

Given Nevo's analysis, it is not surprising to find significant evidence of head-to-head competition between Aetna and Humana throughout the country. See, e.g., PX0023–628–29 (2015 Humana document comparing Aetna, United, and Humana plans in 15 markets where "Humana held stable" and United or Aetna was "aggressive"); PX0027–229 (Aetna document calling Humana "our primary MA competitor"); PX0397–647 ("Humana will be [Aetna's] most serious threat [in Georgia] ***45** in the near future."); PX0455–601 ("Today, Humana (~50k mbrs.) and Aetna (~34k mbrs) dominate the Kansas City Market."); PX0050–116 (Humana email referring to "[o]ur #1 NC Competitor Aetna"). They compete on multiple dimensions of Medicare Advantage plan design, including network and cost. For example, in anticipation of the upcoming 2015 annual enrollment period, Aetna compared its provider network to Humana's in Alabama and recommended "some network fortification." PX0394–862; see also PX0013–344. If one company fails to keep pace, the competitive consequences can be significant. In Georgia, for instance, Humana and United had the misfortune of raising premiums on their PPO plans in the same year as Aetna introduced its zero premium PPO. Tr. 2101:2–21 (Follmer). As a result, Aetna enjoyed a "bonanza." PX0393–185.

This head-to-head competition benefits seniors who shop for Medicare Advantage plans in the form of broader networks and lower costs. Two illustrations will suffice. The first relates to Aetna's 2014 introduction of its zero-premium PPO in Raleigh (Wake County), North Carolina. At that time, Humana was selling an LPPO, a regional PPO, and an HMO in Wake County. Unlike Aetna's PPO, Humana's PPOs had premiums of $53 and $81 respectively. Tr. 770:2–4, 773:10–16 (Farley). Humana's HMO had no premium, but that plan was built on a "coordinated care type of model," which provided "less access to various hospitals and doctors." Tr. 770:7–19 (Farley). Duke University Hospital was among those hospitals outside the Humana HMO's network in Wake County. Tr. 773:17–19 (Farley). Aetna's zero-premium PPO wedged between these various Humana offerings by combining a zero-premium price with a broader PPO network encompassing all the major hospital systems in Wake County, including Duke. See Tr. 773:20–23 (Farley). Upon learning of Aetna's plan, one impressed Humana marketing employee remarked "Wow. A $0 premium on a PPO plan." PX0024–129.

By late 2015, Aetna's PPO was "dominating in [W]ake County." PX0038–804. Humana's HMO, on the other hand, "[was] not selling." PX0038–804. Part of Aetna's success lay in its ability to exploit the Humana HMO's limited provider network. PX0295–285; Tr. 779:2–15 (Farley). An Aetna employee in Wake County even emailed all the brokers in the area to say that Humana would not be continuing its affiliation with Duke in the coming year, predicting that the change would "help you boost all of your sales with the Aetna Product." PX0050–119. Although the email was not accurate (Duke still accepted Humana's PPO products), it is indicative of the competition between the companies. In response to the pressure from Aetna, Humana began actively recruiting new providers in order to expand its HMO network. PX0352–884; Tr. 819:5–20 (Farley).

Another example comes from San Antonio, where Aetna and Humana offer competing HMO plans. For its 2016 bid, Aetna decided to improve the value proposition on its San Antonio HMO in order to "compete with United and Humana HMOs." PX0039–711. In the ensuing annual enrollment period, broker Raul Gonzalez moved a number of his clients out of Humana's HMO and into Aetna's. Tr. 1040:11–20 (Gonzalez). He said that, "[f]or a lot of people, it was an easy transition": while both plans had similar networks, the Aetna plan had a specialty co-pay that was $15 dollars lower. Tr. 1040:23–1042:2 (Gonzalez). For the following year, Humana dropped its specialty copay by $15 to ***46** match Aetna's. Tr. 1042:3–9 (Gonzalez). [22]

Together, this evidence suggests that there is significant head-to-head competition between Aetna and Humana, that it drives improvements to plan cost and quality, and that—if the merger were consummated—that competition would be lost, with some resulting deterioration in the Medicare Advantage products offered. To predict the likely competitive effects of the proposed merger in a more quantitative manner, the government relies on a second merger simulation by Nevo. This merger simulation assumes that all Aetna and Humana Medicare Advantage plans are owned by one firm, which will set prices on each "in order to maximize total profits across all their plans within each county." PX0551 (Nevo Report) ¶¶ 208–09. The merged firm's pricing behavior depends in part on seniors' demand for various Medicare Advantage plans and Original Medicare options (modeled using the elasticities and aggregate diversion ratios derived from Nevo's nested logit model). PX0551 (Nevo Report) ¶¶ 207–08. Pricing behavior also depends on inputs regarding plan cost and profit margin. PX0551 (Nevo Report) ¶ 208. When Nevo performs his merger simulation using his own estimates, he predicts substantial annual competitive harm as a result of the

merger: premiums in the complaint counties would increase by 60%, seniors would pay $360 million more in rebate-adjusted premiums, and taxpayers would pay an additional $140 million in the form of higher payments from CMS to insurers. Tr. 1630:3–8, 1631:16–21 (Nevo). In sum, Nevo's preferred version of the merger simulation predicts $500 million per year in combined anticompetitive harm to seniors and taxpayers.[23] Tr. 1631:21–1632:1 (Nevo).

Aetna and Humana again object to Nevo's newest merger simulation. Relying on Orszag, the companies argue that Nevo's model has "debilitating flaws," because it assumes that Medicare Advantage plans are priced at the county level, uses margin figures not consistent with observed margins, and predicts premium increases that are unreasonably high. See Defs.' Proposed Findings & Conclusions at 51–52; see also id. at 120–21; Tr. 3175:5–11 (Orszag). Defending his merger simulation on rebuttal, Nevo sounded a somewhat humbler note about its probative value. The merger simulation, he explained, is not meant as an "exact prediction model for pricing" at a county-by-county level. Tr. 3517:22 (Nevo). Instead, it aims to assess whether, and to what extent, the merged firm would have an incentive to raise prices after the merger. Tr. 3517:24–25 (Nevo). When interpreting the results, therefore, the focus should not be on "the exact number[s]," but rather on the "direction" of the changes. Tr. 3518:18–20 (Nevo). And here, Nevo concludes, all iterations of the merger simulation point toward a price increase following the merger.

Although the merger simulation is "an imprecise tool," it "nonetheless has some ***47** probative value in predicting the likelihood of a potential price increase after the merger." H & R Block, 833 F.Supp.2d at 88; see also Sysco, 113 F.Supp.3d at 67. Based on a comprehensive assessment of demand, and in its various iterations that include utilizing Orszag's demand estimates, Nevo's merger simulation predicts that the merged firm would have the incentive and ability to increase quality-adjusted premiums in the complaint counties. The Court considers the merger simulation as econometric evidence in support of that limited proposition, in part because its results are consistent with the other evidence regarding the likely competitive effects of the proposed merger. As reflected by the HHI scores, the merger would create 364 (very) highly concentrated markets, including 70 county-level monopolies, and hence must be presumed to substantially lessen competition. The merger would also extinguish the competitive fire generated by Aetna's rapid expansion—through value-based networks and aggressively priced plans—into Humana's Medicare Advantage territory. The observed competition between these Big 5 insurers is intense, encompasses various dimensions of plan design, and has greatly benefitted seniors. Freed from that competition, the merged firm may have an incentive to raise premiums—or, perhaps, to relent from lowering them and improving plan quality. The results of Nevo's merger simulation, then, provide additional support for that inference.

Based on its market concentration figures, the government has established a prima facie case and is entitled to a presumption that the Aetna-Humana merger would substantially lessen competition in the market for individual Medicare Advantage plans in all 364 complaint counties. It is not a stretch to call the government's prima facie case based on the HHI analysis under the Guidelines an overwhelming one, given how high the concentration figures are. The government has also introduced additional evidence supporting that presumption that could be used to carry its ultimate burden of persuasion, if Aetna and Humana are successful in rebutting the presumption. The Court turns next to Aetna's and Humana's rebuttal arguments.

C. Government Regulation

Aetna's and Humana's first attempt to rebut the presumption of anti-competitive effects focuses on the role played by CMS, and the federal government more generally, in regulating competition in Medicare Advantage. The companies do not contend that this system of federal regulation confers implied immunity from the antitrust laws. See Tr. 3725:20–23 (post-trial argument). It is unlikely that they could succeed in doing so, because "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 388, 101 S.Ct. 2415, 69 L.Ed.2d 89 (1981) (internal quotation marks omitted). There is no indication of such "repugnancy" here.

Nonetheless, the government's regulation of Medicare Advantage remains relevant. "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." Verizon Commc'ns Inc. v. Law Offices of Curtis V.

Trinko, LLP, 540 U.S. 398, 411, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004); see also Brown Shoe, 370 U.S. at 321–22, 82 S.Ct. 1502. “Part of that attention to economic context is an awareness of the significance of regulation.” Trinko, 540 U.S. at 411, 124 S.Ct. 872. “One factor of particular importance is the existence of a regulatory ***48** structure designed to deter and remedy anticompetitive harm.” Id. at 412, 124 S.Ct. 872. Where such a structure exists, the likelihood of anticompetitive harm may be “significantly diminish[ed].” Id. (internal quotation marks omitted) (quoting Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.)).

Aetna and Humana assert that federal regulation of Medicare Advantage leaves “no opening for the anticompetitive effects that the Government posits.” Defs.' Proposed Findings & Conclusions at 129. The Court disagrees. Based on the evidence presented, the Court concludes that CMS regulation was not “designed to deter and remedy anticompetitive harm.” See Trinko, 540 U.S. at 412, 124 S.Ct. 872. And because it is unlikely to do so here, its existence does not suggest that the government's “prima facie case inaccurately predicts the [merger's] probable effect on future competition.” Baker Hughes, 908 F.2d at 991.

Many of the CMS rules and regulations at issue here are applied through the annual bid process. In June, a Medicare Advantage organization must submit a separate “bid” to CMS for each plan that they wish to offer in the following year. Tr. 1178:11–17 (Cavanaugh); Tr. 1910:22–1911:2 (Paprocki). Putting together a bid is an arduous task. Each bid must include detailed estimates of the plan's revenue requirement, cost structure (including both medical and administrative costs), and margin projections, backed up by extensive data and calculations. Tr. 1910:1–6, 1935:24–1936:2, 1958:8–15 (Paprocki). Every bid must also be certified by an actuary. Tr. 1952:21–25 (Paprocki). Each year, CMS produces two lengthy documents—a “call letter,” describing the terms of the Medicare Advantage program, and a set of instructions about bid submission—that together contain many of the applicable CMS rules and regulations. See DX0014 (call letter); DX0349 (bid instructions). Once the bids have been submitted, CMS, in collaboration with outside actuaries it retains, reviews the bids to ensure that they comply with all these requirements. Tr. 1178:20–23 (Cavanaugh); Tr. 1959:1–2 (Paprocki). That process, sometimes called the “desk review,” usually lasts from about mid-June until the end of July. Tr. 1959:14–17 (Paprocki). Non-compliant bids will not be approved. Tr. 2554:12–14 (Coleman).

When the desk review uncovers a problem with a bid, CMS will typically reach out to the MAO and explain its concerns. Tr. 1143:13–16 (Cavanaugh); Tr. 1991:22–1992:2 (Paprocki). Sometimes, the MAO has simply made a mistake, in which case it will correct the bid. [24] Tr. 1992:24–1993:1 (Paprocki). But on other occasions, CMS and the MAO might disagree about whether a bid is compliant and discussion then ensues. The government characterizes that discussion as a “negotiation” where the MAO pushes back and, if it makes any changes at all, will make them in “baby steps” until CMS relents. See Pls.' Proposed Findings & Conclusions at 90–91; see also Tr. 2006:6–2007:12 (Paprocki). Defendants, on the other hand, see an interaction where CMS can instruct the MAO to make any changes it deems necessary, because CMS has all the leverage. See Tr. 1991:16–1993:12 (Paprocki). Whatever the proper characterization, however, the outcome is the same: the MAO usually revises the bid until CMS determines it complies ***49** with all requirements. Tr. 453:12–16 (Cocozza); Tr. 2554:20–22 (Coleman).

Whether CMS regulation would be likely to ameliorate any competitive harm resulting from the merger depends on the particular regulatory tools at CMS's disposal. In contending that these tools would be sufficient, Aetna and Humana ask the Court to consider “a truly ill-intentioned MAO” intent on exercising “its [market] power to the greatest extent possible,” but hemmed in on every side by CMS regulation. See Defs.' Proposed Findings & Conclusions at 129–31. Significant competitive harm, however, could be caused by a (much) less rapacious firm. Accordingly, the Court will focus more generally on the extent to which federal regulation would prevent the merged firm from increasing premiums or reducing benefits on particular plans.

Some of the regulatory tools identified by the companies do not really address that issue. The companies think it important that the government, “an undeniably sophisticated entity,” can influence the amount that Medicare Advantage organizations are paid through its control over the benchmark. See id. at 107. But the Court does not see how CMS could use the benchmark,

which CMS merely calculates based on a statutory formula, to resist a change to a particular plan. Tr. 1137:12–16 (Cavanaugh). Other regulatory tools are similarly unlikely to impose a constraint. There would be plenty of room for the merged firm to increase premiums without violating the statutory cap on beneficiary out-of-pocket costs, which is currently set at $6,700 per year. CMS's rules about minimum network adequacy, which Aetna and Humana typically exceed, would likewise do little to stave off a premium increase. See Tr. 291:8–16 (Cocozza); Tr. 547:8–20 (Wheatley). And the "meaningful difference rule," which generally prohibits MAOs from offering two plans with substantially similar out-of-pocket costs in the same county, takes no position on what those estimated out-of-pocket costs must be. [25] See DX0014–161.

Some regulatory tools are more closely related to premiums or plan quality, but still are not well-suited to preventing unwanted changes at the plan level. Limits on medical loss ratios fall into this category. By statute, MAOs must spend at least 85% of the revenue obtained under a contract (whether from CMS or from beneficiaries) on medical services, see 42 U.S.C. § 1395w–27(e)(4); Tr. 1147:2–6 (Cavanaugh), meaning that only 15% of that revenue may be retained as profit or to cover administrative costs. Revenue retained in excess of that amount must be returned to beneficiaries. And if an MAO remains out of compliance with the medical loss ratio for three consecutive years, it may be barred from enrolling new members. Tr. 1148:6–13 (Cavanaugh). All else equal, then, an increase in plan premium or a decrease in benefits may have the effect of decreasing a plan's medical loss ratio—i.e., having it fall below 85%.

However, these provisions are a poor tool for regulating plan price or quality. First, the medical loss ratio requirements are applied at the contract rather than at the plan level. Tr. 2008:22–24 (Paprocki). Because contracts often cover multiple plans—indeed, sometimes as many as 30 or 40—a change to a single plan is likely to have only a highly attenuated impact on the medical loss ratio of the contract as a whole. See Tr. 2008:15–19 (Paprocki). Individual ***50** plans covered by larger contracts may thus have medical loss ratios less than 85%, thereby enabling greater profits—and, in fact, some of Aetna's plans do. Tr. 2009:6–8 (Paprocki). And it is unlikely that CMS could use the medical loss ratio regulations to request changes to a particular bid. Medical loss ratios are not applied as part of the bid process at all. Instead, they are calculated after-the-fact, based on actual revenue and costs. Tr. 1147:10–16 (Cavanaugh). It would be largely up to the merged firm, therefore, to forecast whether a premium increase or benefit reduction would cause a contract to exceed the medical loss ratio regulations. [26] Hence, the medical loss ratio regulations have serious shortcomings as a tool for regulating the design of particular plans. And hanging over all of this is an additional layer of uncertainty: because CMS is only now preparing to release the first year of medical loss data, the Court and the parties can only speculate about how the regulations might operate in practice. Tr. 1148:14–17 (Cavanaugh).

The CMS margin rules have similar limitations. Most of the margin restrictions are "Aggregate–Level Requirements," meaning that they apply above—and sometimes far above—the bid level. DX0349–028. CMS regulations allow MAOs to decide whether to apply the aggregate-level margin requirements at the level of the contract, the legal entity, or the parent organization. DX0349–028; see also Tr. 2004:16–20 (Paprocki). Aetna chooses to apply them at the parent organization level, which incorporates "all of Aetna." Tr. 2004:16–2005:5 (Paprocki). Applied in that way, the aggregate margin rules require that Aetna's aggregate forecasted bid margins align with its actual margins from prior years and are within 1.5% of the margins on its overall business. See DX0349–029.

To be sure, it is likely that an increase in premiums or a reduction in benefits would increase the margin forecasted for a particular plan. But that particular plan is just a drop in the ocean. For the 2017 plan year, Aetna submitted 239 bids and Humana submitted over 400 more. Tr. 1994:11–13 (Paprocki); see Tr. 491:15–16 (Wheatley) (noting Humana has more than 400 Medicare Advantage plans). Increased premiums on one plan, or even on several plans, would thus be unlikely to have much of an effect on the merged firm's aggregated margin figures. Indeed, the evidence shows that a fairly low aggregate margin target can conceal wide variation (and much higher margins) at the regional or bid level. For example, even though Humana targets a margin of 4% at the parent organization level, it has submitted individual bids with margins as high as 20%. Wheatley Apr. 22, 2016 Dep. 138:11–23, admitted at Tr. 579:25–580:6 (Wheatley); see also Tr. 2196:16–22 (Fernandez) (some Humana plans earn margins as high as 12 and 15%); Tr. 2004:12–15 (Paprocki) (CMS has approved Aetna bids with margins of 13 and

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14%). All of this makes it very unlikely that CMS could wield the aggregate margin rules in order to force a change to the design of a particular plan—even one projecting a relatively high margin.

***51** The most precise regulatory tool at CMS's disposal is its rule concerning total beneficiary cost. By statute, CMS is empowered to reject a bid "if it proposes significant increases in cost sharing or decreases in benefits offered under the plan." 42 U.S.C. § 1395w–24(a)(5)(C)(ii). Pursuant to that authority, CMS limits an MAO's ability to adjust from one year to the next a plan's total beneficiary cost—a measure reflecting the Medicare Part B premium, the plan premium, and an estimate of the beneficiary's out-of-pocket costs. DX0014–163. Under the most recent version of the call letter, bids proposing changes in total beneficiary costs greater than $32 per member per month will be rejected. [27] DX0014–165.

Although this rule would constrain somewhat the merged firm's ability to increase premiums dramatically, it would not completely curtail it. Considerable leeway remains. For example, an MAO offering a plan with a $10 monthly premium could increase that premium by $10 (i.e. by 100%) without triggering the $32 threshold. Tr. 2013:25–2014:7 (Paprocki). In fact, because the threshold only measures changes from one year to the next, it would not prevent the MAO from imposing the same $10—or an even greater—price increase in subsequent years. Tr. 1226:22–1227:3 (Cavanaugh); Tr. 2014:15–19 (Paprocki). Indeed, the average Medicare Advantage plan premium of $40, see PX0553 (Frank Report) ¶ 40, could be increased each year by close to 80% without running afoul of the total beneficiary cost rule. As a result, this regulation also provides CMS with only very limited influence over plan price and quality.

At the start of trial, Aetna and Humana warned that the Court would likely hear from a "quite humble CMS" intent on downplaying the extent of its regulatory authority. Tr. 83:12–14 (opening statement). Throughout the trial, however, the companies sought to highlight various provisions of CMS guidance that they believe illustrate the true breadth of the agency's discretion and authority. In the call letter, for example, CMS explains that it "reserves the right to further examine and request changes to a plan bid even if a plan's [total beneficiary cost] is within the required amount"—that is, below the $32 per member per month threshold. DX0014–164. Likewise, in the bid instructions' section on margins, CMS warns that bids must "provide benefit value in relation to the[ir] margin level[s]" and that "[a]nti-competitive practices will not be accepted." DX0349–027. These broadly worded provisions, defendants contend, give CMS, which already enjoys considerable leverage in the bid review process, the tools that it needs to fend off price increases or quality reductions at the bid level.

But there is little historical precedent for CMS exercising such authority. By all accounts, CMS rarely questions the margins on specific bids. During the most recent bid cycle, for example, Aetna submitted 239 bids; CMS indicated that the margin was too high on three of them. Tr. 1930:8–19 (Paprocki). At Humana, Wheatley is unsure whether CMS even has that authority at all: in a 2014 email, he expressed the view that Humana has "to fight CMS regarding their ability to regulate our individual bid margins." PX0581; see also Tr. 576:24–577:21 (Wheatley). And as noted above, CMS has previously approved bids with fairly high margins. Tr. 2004:12–15 (Paprocki) (CMS has approved Aetna bids with margins of 13 and ***52** 14%); Tr. 2196:16–22 (Fernandez) (some Humana plans earn margins as high as 12 and 15%). Nor, it seems, is there precedent for CMS rejecting bids. Cavanaugh was not aware of a bid being rejected during his tenure at CMS. Tr. 1143:12–13 (Cavanaugh). Cocozza testified that an Aetna bid has never been rejected. Tr. 453:9–10 (Cocozza). In short, the record here suggests that CMS has not exerted considerable influence at the bid level before the proposed merger. That makes it very difficult for the Court to conclude that it would effectively do so after a merger.

Having reviewed the various regulatory provisions cited by the companies, and heard testimony from a number of CMS officials, the Court perceives little ability in CMS to prevent the merged firm from increasing its prices or reducing benefits. As several witnesses have testified, CMS regulations serve primarily to set "the boundaries or the contours" for competition between Medicare Advantage organizations. Tr. 3039:10–12 (Orszag); see also Tr. 138:10–13 (Frank) (CMS regulations define "the outer limits and the contours within which competition has to occur"); Tr. 1137:6–7 (Cavanaugh) (CMS creates "the framework that competition will happen within"). In that regard, regulation can be used to identify and correct a small number of plans that are "outliers." Tr. 1146:19–20 (Cavanaugh). But competition between Medicare Advantage plans remains the motor driving the creation and constant improvement of attractive plans for seniors. Indeed, if there is little in the CMS regulations that would

prevent an affirmative price increase or benefit reduction, there is even less that would prevent a slow erosion of plan quality or increase in premiums resulting from lessened competition over time. CMS regulation, then, does not "significantly diminish[ ] the likelihood of major antitrust harm." Trinko, 540 U.S. at 412, 124 S.Ct. at 881 (internal quotation mark omitted). Based on its significant HHI scores, the Aetna–Humana merger must be presumed to substantially lessen competition. The existence of some CMS regulation of Medicare Advantage does not rebut that presumption.

D. Entry

The companies also claim that entry by new competitors into the 364 complaint counties will counteract any anticompetitive effect of the merger. However, based on the applicable law, and an assessment of the expert and non-expert evidence for each specific element of the entry analysis, ultimately the Court concludes that new entry will not be "timely, likely, and sufficient" enough to counteract the anticompetitive effects of the merger.

1. Applicable Law

As part of its rebuttal case, a defendant may introduce evidence that entry by new competitors will ameliorate the feared anticompetitive effects of a merger. See Baker Hughes, 908 F.2d at 983; H & R Block, 833 F.Supp.2d at 73–77; FTC v. Cardinal Health, 12 F.Supp.2d 34, 54–58 (D.D.C. 1998); see also United States v. Waste Mgmt., Inc., 743 F.2d 976, 983 (2d Cir. 1984) (ease of entry, separate from actual entry, can constrain price). The Guidelines explain when new entry "alleviate[s] concerns about adverse competitive effects": when that entry would be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." Guidelines § 9. Although the Guidelines are not binding, courts have frequently relied on their formulation of "timely, likely, and sufficient" to guide the analysis concerning entry. See, e.g., Baker Hughes, 908 F.2d at 988 (discussing Guidelines regarding entry); ***53** Cardinal Health, 12 F.Supp.2d at 55–58 (discussing the "timely, likely, and sufficient" standard). Entry is timely, likely, and sufficient if it "fill[s] the competitive void that will result" from the merger. H & R Block, 833 F.Supp.2d at 73 (internal quotation marks omitted). Although the defendants bear the burden of production on this—and every other—element of their rebuttal case, the government bears the ultimate burden of persuasion. Id.; Baker Hughes, 908 F.2d at 983 (citing Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1340 & n.12 (7th Cir. 1981)).

2. Analysis

Aetna and Humana introduced evidence of recent new entry into several of the complaint counties. Conversely, the government introduced evidence that industry participants—when not preparing for or engaged in litigation—believe new entry into the individual Medicare Advantage market to be difficult. The parties also introduced expert analysis quantifying the likelihood, sufficiency, and timeliness of that entry based on data from past experience and econometric models. The bulk of the evidence on this issue was presented through the testimony of Orszag and Nevo. Thus the Court begins there.

Both experts analyzed historical data to predict the likelihood of new entry, the probability that new entrants would replace the lost competition of Aetna and Humana, and the time horizon during which that new entry would happen. Orszag and Nevo agree that three key differences in their definitions of entry drive the differences in their results. First, Orszag defines "entry" more stringently than Nevo. Orszag only considers an MAO an "entrant" once it achieves a 5% market share in the relevant county, whereas Nevo considers an MAO an "entrant" as soon as it begins offering plans within a county. Orszag described this as a "5% threshold." He also counts the year in which the MAO achieved a 5% market share as the year in which it entered. He argues that including this 5% threshold focuses his calculations on competitively significant entry, rather than diluting his results with "competitively insignificant fluctuations" that are "not 'real' entry in any meaningful sense." See DX0418 (Orszag Reply Report) ¶¶ 89–90. Nevo responds that employing the threshold overstates the likelihood of success of a new entrant and obscures the timeline—in other words, that the use of the threshold means that Orszag's calculations answer the questions of how many MAOs entered and were moderately successful, and what market share those moderately successful MAOs achieved,

rather than the questions of how many MAOs entered at all, how successful all MAOs were, and the timeliness of that entry. See PX0552 (Nevo Reply Report) ¶ 94.

Because Orszag counts an MAO as an "entrant" at the moment it crossed the 5% threshold, he counts an MAO as an "entrant" multiple times if that MAO achieves a 5% market share, then falls below that threshold, but then once again surpasses the threshold. See PX0552 (Nevo Reply Report) ¶ 92 & n.108. In other words, such an MAO would count as a "new entrant" twice (or perhaps more) even if it never left the relevant county. This also means that Orszag's definition of entry counts an incumbent firm as a new entrant if the incumbent firm previously had less than a 5% market share, and then surpassed 5% in a subsequent year.

Importantly, Orszag includes Aetna and Humana in the historical data he uses regarding entry, whereas Nevo does not. Nevo argues that Aetna and Human must be excluded from the data because "neither Aetna nor Humana will be among the entrants who are available to mitigate the ***54** effects of the merger." PX0552 (Nevo Reply Report) ¶ 93. Orszag believes that keeping Aetna and Humana in the historical data allows more accurate forecasts because, were Aetna and Humana not present, another comparable MAO—presumably another large, sophisticated, well-funded MAO—would sense the same profit opportunity that Aetna and Humana would have and step into their shoes. See Tr. 3193:12–23 (Orszag).

Nevo runs multiple calculations using Orszag's data and definition of entry, but excluding Aetna and Humana from historical data, excluding incumbents, and using the actual year of entry (but still including the 5% threshold). He terms this "Orszag's corrected definition." PX0552 (Nevo Reply Report) ¶¶ 93–95. The Court will use that terminology as well. The discussion below examines the results of the experts' analysis as well as the non-expert evidence in the framework of determining the likelihood, sufficiency, and timeliness of entry.

(a) Likelihood of New Entry

When analyzing the likelihood of any entry at all, it makes sense to use Nevo's definition of entry, that is, one without any threshold. Under this definition, on average only 13.3% of the complaint counties had any entry in a given year between 2012 and 2016, and more than half experienced no entry during that five-year period. See PX0551 (Nevo Report) ¶ 253 & Ex. 25; Tr. 1656:8–18 (Nevo). One would expect this number to be higher than an equivalent calculation that used the 5% threshold, because using a threshold would necessarily exclude some entrants. And in fact it is higher. Nevo ran the same calculation using his "corrected" version of Orszag's definition of entry (that is, including the 5% threshold, but excluding Aetna and Humana, excluding incumbent MAOs, and using the actual year of MAO entry), and found that under that definition, only 5.5% of complaint counties experienced any entry in a given year from 2012 through 2016. See PX0552 (Nevo Reply Report) ¶ 98 & Ex. 14.

But Orszag's analysis—without any "corrections" from Nevo—yields a higher number. He calculates that 20.7% of complaint counties experienced entry, on average, within a given year between 2012 and 2016. DX0419 (Orszag Report) Table II-10; PX0552 (Nevo Reply Report) Ex. 14. However, as discussed above, this calculation includes both Aetna and Humana in its historical data. The Court finds that doing so is not appropriate. By definition, Aetna and Humana would not be available to offset the competitive effects of their proposed merger. Orszag's decision to include them rests on the premise that were Aetna and Humana not present, another firm would take their place. See Tr. 3193:12–23 (Orszag). But that assumes the conclusion. The Court cannot rely on an analysis that assumes new competition will replace lost competition when trying to determine whether new competition will in fact replace the lost competition—to do so would be circular reasoning. Moreover, there is other evidence in the record to suggest that Aetna in particular is not a typical entrant—specifically, that Aetna is much more likely to enter new markets and succeed in those new markets than another market participant, even one of the Big 5. See, e.g., PX0551 (Nevo Report) ¶¶ 218, 220–23, 225 & Ex. 18; Tr. 1330:2–19 (Bertolini). In fact, of the 398 entrants in the complaint counties between 2012 and 2016 identified by Orszag, 191 of them (nearly half) are either Aetna or Humana. PX0552 (Nevo Reply Report) ¶ 93. This makes it especially inappropriate in assessing the likelihood of entry to rely on an analysis that assumes a competitor will take Aetna and Humana's place once they are no longer available as potential new entrants.

***55** Orszag also presents a more granular analysis of the potential entrants in the complaint counties that he argues shows that entry is more likely than the above numbers suggest. He identifies several types of potential entrants that, based on historical data, are particularly likely to enter: MAOs that offer individual Medicare Advantage plans in nearby counties (either in an adjacent county or elsewhere in the same state), MAOs that offer other types of Medicare Advantage plans in the relevant county (either special needs plans or group Medicare Advantage plans), or firms that offer commercial insurance in the relevant county. See DX0419 (Orszag Report) ¶¶ 147–148 & Table II-15 (showing probability that each of these types of MAOs would enter relevant county). Based on this analysis, Orszag identifies 1,684 potential entrants across all 364 complaint counties that fit into these categories and are therefore particularly likely to enter. See DX0419 (Orszag Report) ¶ 149. He shows that each complaint county has at least one or as many as twelve of these likely potential entrants; the average complaint county has five. See DX0419 (Orszag Report) ¶ 149 & Figure II-4.

This analysis by Orszag, moreover, aligns with the non-expert evidence Aetna and Humana introduced showing that some counties did experience new entry in recent years. Four of the eight MAOs offering plans in North Carolina—Cigna, Moses Cone Health, Gateway Health, and FirstHealth—entered within the past four years. Tr. 835:16–21 (Farley). At least three MAOs—Centene, Tenet Health, and United Health Services—either entered or expanded into new counties in the San Antonio market in recent years. Tr. 1046:18–1047:18 (Gonzalez); Tr. 2135:2–8, 2145:11–2146:23 (Fernandez). Two new MAOs—Centene and Eon Health—entered in Georgia in the past year. Tr. 2089:8–10 (Follmer). These plans, like the Humana and Aetna plans in Georgia, offer "rich" benefits—that is to say, low out-of-pocket costs for consumers, in the form of a "zero premium, zero PCP [primary care physician] plan, and zero co-pays for drugs." Tr. 2092:8–15 (Follmer). BlueCross BlueShield started offering a Medicare Advantage plan in Louisiana last year—the "[e]ntrants coming in and out of states ... it's part of the business, and it happens every year." Tr. 2093:4–2093:9 (Follmer).

But the Court does not find this more granular analysis persuasive. First, it suffers from the same weakness that Orszag's basic entry analysis does: it includes Aetna and Humana in the historical data that forms the basis of the analysis. Once Aetna and Humana are removed, the number of likely potential entrants decreases dramatically. Nevo uses Orszag's own model and data to show that, with Aetna and Humana removed, 99 of the 364 counties have less than a 5% chance of experiencing any entry, and the median county has only a 9% chance of experiencing any entry. See PX0552 (Nevo Reply Report) ¶ 100 & Ex. 15.

Second, Orszag's testimony during trial demonstrated that although he identified 1,684 likely potential entrants, that number might significantly overstate how many of those MAOs would actually enter the complaint counties or achieve any substantial market share. For example, he identified Mecklenburg County, North Carolina (which includes Charlotte) as an example of a complaint county with three likely potential entrants: Cigna, Moses Cone Health, and FirstHealth. Tr. 3290:6–16 (Orszag). (This is consistent with Farley's testimony, discussed above). But Orszag acknowledged that Cigna is currently under CMS sanction and cannot enroll new members in its Medicare Advantage plans; therefore, it is unable to expand into a new county until those sanctions ***56** are lifted. Tr. 3290:17–22 (Orszag); see also Tr. 329:20–330:4 (Cocozza) (explaining Cigna's restrictions due to sanctions). Orszag also acknowledged that both Moses Cone and FirstHealth are provider-based plans tied to those providers' specific hospital systems outside of the Charlotte area, and to enter Mecklenburg County, they would likely need to contract with a hospital system in Charlotte. Tr. 3296:18–3299:19 (Orszag). There is evidence that would be unlikely. Thus, while Mecklenburg County has three potential entrants under Orszag's analysis, none are actually likely to enter. Similarly, Orszag acknowledged that the fourth entrant in North Carolina (but not in Mecklenburg County) that Farley identified, Gateway Health, had only 54 members in Wake County, North Carolina, which Orszag would not even count as an "entrant" in that market. Tr. 3300:13–3301:17 (Orszag). This casts some doubt on how many of the rest of Orszag's 1,684 likely potential entrants are truly likely to enter the complaint counties.

Hence, based on the expert analysis that the Court finds persuasive—the analysis excluding Aetna and Humana from historical data on entry—either 13.3% or 5.5% of complaint counties have experienced new entry in any given year over the past five years. Case law does not provide a particular threshold above which entry is likely enough to allay fears of anticompetitive harm, nor did the parties provide one in their briefing or at closing arguments. But the core inquiry is whether entry is timely,

likely, and sufficient enough to replace the lost competition from the merger. The Court finds that if only 13.3% or 5.5% of complaint counties experience any new entry per year, then entry is not likely enough to allay these concerns.

This is corroborated by the non-expert testimony indicating that industry leaders believe there are significant barriers to entry in the individual Medicare Advantage market. The government argues that the barriers to new entry are (1) the difficulty in building a competitive provider network, and the needs for (2) high star ratings, (3) a strong brand, and (4) Medicare Advantage-specific operational expertise and IT infrastructure. The President of Humana's Retail Segment (the Humana division responsible for Medicare Advantage) testified that "[t]he hardest part about getting into this business is knowing how to build networks, knowing how to file products, knowing how to manage CMS compliance, [and] knowing how to think about star ratings." Tr. 631:13–16 (Wheatley). These barriers may be more applicable to competitors who are brand new to Medicare Advantage than to firms that offer Medicare Advantage in other counties and are considering expanding. Tr. 1206:11–13 (Cavanuagh) ("a company like Aetna that has more resources and can build a robust network might have an ability to be more competitive than a small regional provider").

In light of these barriers, the government introduced statements from industry participants indicating that industry members believe entry is difficult. The CEO of Humana has stated publicly that barriers to entry are increasing in the Medicare Advantage market, and therefore "the stronger will get stronger and the weaker will get weaker." PX0551 (Nevo Report) ¶ 251. A Humana business plan acknowledged some of Humana's challenges in expanding Medicare Advantage into new regions, noting that "[n]ew market entry presents several challenges, including building local competitive intelligence, developing provider relationships, and understanding the nuances of local distribution." DX0506–048. Aetna's internal documents convey the same perspective. The President of Aetna's Medicare product line has stated that "Medicare has unique aspects ***57** that require a clinical engagement approach, scorecard, stars element and coding/revenue attention that is different" from other forms of health insurance. PX0007–848. Another Aetna executive specifically acknowledged that the growth and increasing importance of value-based contracts "[c]reates barriers to entry to other payers." PX0603–358. In-court testimony confirmed that Cocozza believes an insurer's track record in operating "viable, successful Medicare Advantage plans" is important in convincing a provider to enter into a value-based contract—indicating that a new entrant might struggle to do so. See Tr. 348:1–18 (Cocozza).

The Court finds this evidence persuasive. These statements were primarily made in the ordinary course of business and are therefore likely to accurately reflect an unvarnished viewpoint. They express the opinion of knowledgeable industry leaders. And they are consistent with the expert analysis. Together, the expert analysis and the other evidence paint a picture of new entry not being particularly likely, and the barriers to entry being high.

(b) Sufficiency of New Entry

The analysis of the sufficiency of new entry is simpler because, despite the different conclusions that the experts draw, the actual data show that there is a relatively low probability that new entry would be sufficient to replace the lost competition of Aetna or Humana regardless of which expert approach is used.

To determine how likely all new entrants (as a whole) are to replace the competition lost by the merger, one must first determine the market share of the smaller of the two defendants in each of the complaint counties. See PX0551 (Nevo Report) ¶ 255. In 77% of the complaint counties, the smaller of Aetna or Humana has a market share above 10%. PX0551 (Nevo Report) ¶ 255. In fact, in nearly half of the counties, the smaller of Aetna or Humana has a market share of over 20%. PX0551 (Nevo Report) ¶ 255. These numbers are uncontested.

Using Nevo's definition of entry, nationwide 19.1% of new entrants gain a market share of above 10%. PX0551 (Nevo Report) ¶ 256. Nevo then calculated that, in the median complaint county, there is a 10.3% chance that all new entrants (combined) would replace competition lost by the merger, and a 9.9% chance that an individual new entrant would replace competition lost by the merger. PX0552 (Nevo Reply Report) Ex. 27 (10.3% probability for all entrants combined) & Ex. 26 (9.9% probability for individual entrant). That calculation does not use a 5% threshold, and therefore one would expect the result to be lower than the corresponding one calculated by Orszag. In fact, that is the case. Using Orszag's full definition of entry—with the 5%

threshold, with Aetna and Humana's historical data, with incumbents, and using the year that an entrant surpassed 5% as the year of entry—an entrant who achieves a 5% market share goes on to achieve a 33% mean market share within three years, and a 27% median market share within three years. DX0419 (Orszag Report) ¶ 134 & Table II-11. But again, it is illogical to include Aetna and Humana's historical data, for the reasons discussed earlier. Excluding Aetna and Humana historical data from the calculation and using the actual year of entry, but otherwise employing Orszag's definition of entry, an entrant who achieves a 5% market share goes on to achieve only a 16% mean market share within three years, and a 7% median market share within three years. PX0552 (Nevo Reply Report) ¶ 109. This results in a median probability of only 10.2% that an individual new entrant would replace the competition ***58** lost by the merger in a given county. PX0552 (Nevo Reply Report) ¶ 112 & Ex. 17.[28] This analysis is persuasive, and alone is enough to conclude that entry is not likely to be sufficient.

But even using Orszag's full definition of entry with no alterations, in the median complaint county there is only a 25.5% chance that new entrants will replace the lost competition from the merger. So, even if the Court were to fully embrace Orszag's definition of entry and reject Nevo's, the Court would still find that new entrants would not be sufficient to "fill the competitive void" from the merger. H & R Block, 833 F.Supp.2d at 73 (internal quotation marks omitted).[29]

(c) Timeliness of New Entry

Orszag built a model to "quantif[y] the likelihood that another MAO will enter in one, two, or three years" when the number of MAOs in a given county is below the equilibrium number of MAOs for that county. DX0419 (Orszag Report) ¶ 138. He defines equilibrium within a county as when "it is not profitable for any MAO to exit or enter." DX0419 (Orszag Report) ¶ 140. He calculates the equilibrium number of MAOs in a given county based on the number of MAOs present in a particular year, the number of MAOs present in past years, and certain characteristics of that county that are correlated with profitability. DX0419 (Orszag Report) ¶ 141. Once he has calculated an equilibrium number of MAOs for a given county, he can then calculate the rate at which the actual number of MAOs converged on the equilibrium number. DX0419 (Orszag Report) ¶¶ 143–44. Based on this model, he ultimately concludes that within three years, 87% of the gap between the actual and equilibrium number of MAOs will be closed. DX0419 (Orszag Report) ¶ 145 & Table II-14.

Nevo does not build his own countervailing model. Rather, he critiques Orszag's model as uninformative because it is built on circular logic: it estimates an equilibrium number of MAOs based on the number of actual MAOs present, and then tries to predict how many and how quickly MAOs will enter to achieve that number in the future. See PX0552 (Nevo Reply Report) ¶ 104. Nevo describes this model as "non-standard." PX0552 (Nevo Reply Report) ¶ 104 n.129. Instead, he looks to the historical experience following the Humana-Arcadian merger in 2012. He finds that, following that merger, only 33% of the counties that met the presumption of unlawfulness based on market concentration—presumably, prime candidates for entry—experienced any entry in the four years following the merger. PX0551 (Nevo Report) ¶ 238. Of the 33% of presumption ***59** counties that had any entrants, 73% of them only received their first entrant during year 3 or year 4 after the merger. PX0552 (Nevo Reply Report) ¶ 108.

The Court finds Nevo's critique of Orszag's model for equilibrium and timely entry to be persuasive. Orszag's model only yields informative results with respect to timeliness if its estimates of the equilibrium number of MAOs are correct. But there is no evidence, either in this record or in academic literature brought to the Court's attention, to support the theory that an equilibrium number of MAOs can be deduced from the current number of firms. Orszag did testify that the concept of an equilibrium number of firms, and the rate at which a market adjusts to reach that number, is a common economic concept. See Tr. 3098:3–3099:13 (Orszag). But he presented no specific citations or other evidence to explain when or how models estimating an equilibrium number of firms overcome the circularity concern, and how this particular model does so. The Court, therefore, will not rely on the timeliness calculations resulting from Orszag's model. The Court finds Nevo's analysis of the timeliness of entry following the Humana–Arcadian merger more informative, although only somewhat persuasive. The parties presented evidence on whether the Humana–Arcadian merger is comparable for the purpose of evaluating the effects of divestiture, but little evidence on how the relevant counties might compare to the complaint counties here with respect to new entry. See, e.g., Tr. 3128:12–3129:19 (Orszag). Ultimately, then, the Court is reluctant to draw conclusions from what may or may not be an

appropriate historical analogue. Thus, the Court cannot draw firm conclusions on the timeliness of new entry were this merger to occur.

3. Summary

Given the analysis of sufficiency and likelihood, the Court finds that, overall, new entry would not be timely, likely, and sufficient to replace the competition lost by the merger. The most persuasive expert analysis demonstrates that entry is likely to occur in, at most, an average of 13.3% of the complaint counties per year. Moreover, using the analysis most favorable to the defendants, there is just a 25.5% chance that new entrants will replace the lost competition in the median county. That number drops dramatically—to approximately 10%—if one excludes Aetna's and Humana's past performance from the historical data used to create a projection. So, even under the most generous of the plausible calculations the median county has a 13.3% chance of experiencing any entry, and a 25.5% chance that this new entry will be sufficient to replace the lost competition. There is therefore a relatively small chance overall of replacing the competition lost by the proposed merger. This rebuttal argument based on entry therefore fails.

E. Molina Divestiture

Defendants' next rebuttal argument is that the proposed divestiture of certain assets to Molina Healthcare would counteract any anticompetitive effects of the merger. Molina [30] is a health insurer that has historically focused on offering Medicaid, and Medicaid–related, insurance plans. This section first explains the applicable law, and then provides background on Molina, the process by which Aetna, Humana, and Molina agreed to the divestiture, the terms of the divestiture agreement, ***60** and the barriers to the divestiture. Next, it summarizes and evaluates the evidence as to whether Molina would successfully replace the competition lost by the merger—including the statements made by Molina executives and board members at the time, Molina's history in the Medicare Advantage market, and the purchase price. Finally, it briefly considers the expert testimony, before reaching the ultimate conclusion that the proposed divestiture would not replace the competition lost due to the merger.

1. Applicable Law

In rebuttal, a defendant may introduce evidence that a proposed divestiture would " 'restore [the] competition' " lost by the merger counteracting the anticompetitive effects of the merger. See Sysco, 113 F.Supp.3d at 72 (quoting Ford Motor Co. v. United States, 405 U.S. 562, 573, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972)). A divestiture must "effectively preserve competition in the relevant market." U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (2011) ("Remedies Guide"). In other words, the divestiture must "replac[e] the competitive intensity lost as a result of the merger." Sysco, 113 F.Supp.3d at 72 (internal quotation marks omitted). Like the Merger Guidelines, the Remedies Guide is frequently used by courts to guide their analysis, although it is not binding law. Id. Divestiture of an "existing business entity" might be more likely to "effectively preserv[e] the competition that would have been lost through the merger," because it would have the "personnel, customer lists, information systems, intangible assets, and management infrastructure" necessary to competition, but divestiture of some lesser set of assets might be appropriate when the purchaser already has, or could easily attain, the other capabilities needed to compete effectively. See Remedies Guide 8–9. Courts are skeptical of a divestiture that relies on a " 'continuing relationship[ ] between the seller and buyer of divested assets" because that leaves the buyer susceptible to the seller's actions —which are not aligned with ensuring that the buyer is an effective competitor. Sysco, 113 F.Supp.3d at 77 (quoting FTC v. CCC Holdings, Inc., 605 F.Supp.2d 26, 59 (D.D.C. 2009)); see also White Consol. Indus. v. Whirlpool Corp., 781 F.2d 1224, 1227–28 (6th Cir. 1986).

Defendants in a merger challenge bear the burden of producing evidence tending to rebut the government's prima facie case. See Baker Hughes, 908 F.2d at 982; Staples, 970 F.Supp. at 1089. Part of that burden of production includes producing evidence that the divestiture will actually occur. Cf. FTC v. Arch Coal, Inc. No. 04–0534 (JDB), slip op. at 5 (D.D.C. July 7, 2004). Obviously, defendants cannot produce evidence showing that the divestiture would create an effective competitor

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unless they first produce evidence that the divestiture is likely to occur. But, of course, antitrust deals in "probabilities, not certainties." Brown Shoe, 370 U.S. at 323, 82 S.Ct. 1502. Hence, the divestiture need not be iron clad for a court to consider it. Rather, once the divestiture is sufficiently non-speculative for the court to evaluate its effects on future competition, then further evidence about the likelihood of the divestiture goes to the weight of the evidence regarding the divestiture's effects.

2. Background on Molina

Although the parties hotly contest the effect of the proposed divestiture to Molina, they do not contest the basic facts about Molina. Molina's core business is Medicaid. Tr. 2336:21–2337:2 (Dr. Molina). It was founded in 1980 by the father of the current CEO, Dr. Mario Molina, and the ***61** current CFO, John Molina. Tr. 2200:23–2201:12 (Dr. Molina). It was initially founded as a medical clinic for Medicaid enrollees, and then expanded into providing health insurance in 1994. Tr. 2200:24–2201:21 (Dr. Molina). It became a publicly traded company in 2003. Tr. 2205:19–23 (Dr. Molina).

Today, the bulk of its members are in Medicaid plans. At the time of trial, Molina had approximately 4.2 million members. Tr. 956:4–6 (Mr. Molina). [31] Of that total, approximately 550,000 are enrolled in individual commercial plans through the public exchanges. Tr. 958:1–4 (Mr. Molina). Another approximately 100,000 are enrolled in plans for persons who are eligible for both Medicare and Medicaid, known as dual-eligibles. Tr. 1010:2–5 (Mr. Molina); 2214:6–13 (Dr. Molina). Molina offers two types of these plans: a dual-eligible special needs plan (D–SNP) and a Medicare–Medicaid Plan (MMP). A D–SNP is a type of Medicare Advantage plan, but is not an individual Medicare Advantage plan in the market at issue in this case. An MMP is a demonstration plan, that is, a pilot program run by CMS. See Tr. 960:1–3 (Mr. Molina). Approximately half of those 100,000 members are in MMPs, and half are in D–SNPs. Tr. 1010:6–10 (Mr. Molina). Molina has only approximately 424 enrollees in individual Medicare Advantage plans. Tr. 1010:11–14 (Mr. Molina). Approximately 3.5 million are enrolled in Medicaid plans.

Molina offers its plans in 12 states plus Puerto Rico. [32] Tr. 955:24–956:3 (Mr. Molina). It offers Medicaid plans in all of those locations, and commercial plans through the exchanges in nine of those states. Tr. 2349:14–25 (Dr. Molina). Molina also serves as the Medicaid claims processing contractor for five states. Tr. 2233:4–8 (Dr. Molina). In 2016, it offered individual Medicare Advantage plans in only six counties across two states: California and Utah. PX0559 (Burns Report) ¶ 559, Exs. 1 & 3; see also Tr. 960:21–961:4 (Mr. Molina). For 2017, it will only offer individual Medicare Advantage plans in Utah. Tr. 2293:9–2294:3 (Dr. Molina).

Much of Molina's growth has occurred in recent years. Molina's membership has more than doubled in the past three years, from 1.9 million members in 2013 to 4.2 million at the end of 2016. Tr. 956:4–6 (Mr. Molina); PX0230 at 2. Obviously, none of that growth has been in individual Medicare Advantage plans. Molina's revenue has also increased four-fold over the past five years, from $4.2 billion in 2011 to near $17 billion in 2016. Tr. 2203:11–15 (Dr. Molina); PX0230 at 2. Much of that growth is through acquisitions: in 2015 alone, it had approximately 10 acquisitions. Tr. 1000:5–8 (Mr. Molina); Tr. 2260:9–12 (Dr. Molina); DX0133; DX0140–014–16. It currently has a market capitalization of $3.09 billion, and is a Fortune 500 company. [33] Tr. 2207:6–11, 2382:24–2383:4 (Dr. Molina).

***62** Despite focusing on Medicaid, Molina has made forays into the individual Medicare Advantage market in the past. None have succeeded, although the parties disagree as to why. Throughout its history, Molina has sold individual Medicare Advantage plans in a total of 63 counties. PX0559 (Burns Report) ¶ 42. Its most significant expansion into Medicare Advantage started in 2008. PX0092–680. By 2011, it had enrolled only 4,620 members across eight states in these plans. PX0092–680. And by early 2012, it had decided to exit from all of those states except New Mexico. See PX0249–923; PX0559 (Burns Report) ¶ 46. As explained in a 2011 memo from Lisa Rubino, the Molina executive responsible for its Medicare business, the plans were losing money because the "benefits, network and formulary" for pharmacy benefits were "average to below average" as compared to competitors. PX0092–681; see also PX0242 (internal email discussing same); PX0107–710 (internal email discussing same). Molina later withdrew from New Mexico as well for similar reasons. PX0559 (Burns Report) ¶¶ 46–48.

Another of Molina's experiences in individual Medicare Advantage came when it acquired a health insurer in Wisconsin called Abri in 2010. See Tr. 2303:5–15 (Dr. Molina). A year later, Molina exited the individual Medicare Advantage portion of that business. Dr. Molina testified that Abri's individual Medicare Advantage plans were struggling when Molina made the acquisition, and Molina was not permitted to run the plans directly because the contract required that they continue to be operated by a third party. Tr. 2386:3–20 (Dr. Molina). Thus the company made a strategic decision to cease offering those plans. Tr. 2386:3–20 (Dr. Molina). Molina's most recent effort to expand into Medicare Advantage began in 2014, when it started offering the individual Medicare Advantage plan in Utah that it still operates today (although with only about 400 members). See Tr. 2375:8–13 (Dr. Molina).

Molina's effort to expand into Medicare Advantage through this divestiture began in June 2016. Aetna and Human approached 14 potential buyers about a sale of certain Aetna and Humana assets. PX0536 at 7. Ultimately, only five potential buyers submitted initial bids. PX0536 at 7; Tr. 1346:7–14 (Bertolini). Of those, just three submitted bids for all of the divestiture assets: Molina, InnovaCare, and WellCare. PX0536 at 7. InnovaCare operates only in Puerto Rico. Tr. 392:11–20 (Cocozza). WellCare had trouble with law enforcement, as well as with CMS compliance. Tr. 393:8–14 (Cocozza). Aetna and Humana selected Molina as the divestiture purchaser. See PX0433 (Aetna analysis of divestiture bids). Molina ultimately paid approximately $401 per member acquired, or $1,400 per member including statutory capital (that is, the capital that an insurer must set aside to maintain its insurance license). Tr. 2252:9–14 (Dr. Molina); DX0262–234; DX0264–230.

Aetna and Humana each entered into an Asset Purchase Agreement (APA) and Administrative Services Agreement (ASA) with Molina. See DX0262 (Humana and Molina); DX0264 (Aetna and Molina). Under the agreements, the defendants will transfer to Molina certain Medicare Advantage plans that include approximately 290,000 members in as many as 437 counties. See DX0262–019, 218–22; DX0264–019, 216–19. The divested plans cover 21 states, and all 364 complaint counties. See DX0262–218–22; DX0264–216–19. Under the ASA, Aetna and Humana will continue to operate the divested plans for the remainder of the calendar year in which the merger closes. If it closes in 2017, then Molina has the option to extend the ASA for up to two 6 month periods. DX0262–110; DX0264–109; Tr. 2462:10–15 (Rubino). ***63** During that time, all plan administration services, such as IT, claims processing, and broker services, will be managed by Aetna and Humana. DX0262–095; DX0264–094. Their contracts with providers will still be in place, and members may continue to see their own providers. Tr. 2459:7–17 (Rubino); Tr. 2510:15–20 (Buckingham); DX0017. However, a provider may be able to withdraw from that network during the period of the ASA, depending on the terms of that provider's contract with Aetna or Humana. See Tr. 3747:6–15 (post-trial argument). After the ASA expires, the divested plans will be fully operated by Molina.

3. Whether the Divestiture Will Occur

The parties disagree over how likely the divestiture is to happen, and the implication of that assessment. The government identifies several hurdles—including ones outside of the parties' and Molina's control—to the divestiture. First, CMS must approve the novation, that is, the transfer of CMS's contracts with Aetna and Humana to Molina. See 42 C.F.R. § 422.550(c) (defining novation); DX0262–063 (novation a condition of closing); DX0264–063 (same). Although CMS has a policy against approving novations that are not an entire "book of business," so as to prevent insurers from selling off portions of plans, this policy is sub-regulatory and not binding on the agency. See Tr. 1153:11–1154:10 (Cavanaugh); PX0104 at 538–39, ch. 12 § 30.3 (CMS Medicare Managed Care Manual describing "entire book of business" policy). CMS approved a novation of less than an entire book of business in the Humana–Arcadian merger in 2012, when a court permitted the merger if it was accompanied by a divestiture, and a CMS official testified that CMS was likely to do so again here if necessary. See Tr. 2573:11–2575:23 (Coleman). Thus, the novation requirement does not appear to be an insurmountable barrier to the divestiture proceeding, even though it raises some doubt.

Second, Molina has the opportunity to withdraw from the divestiture agreement if CMS does not give "reasonable adequate assurances" that the plans' star ratings will transfer to Molina. DX0262–064 (APA § 6.02(e)); DX0264–063–64 (APA § 6.02(e)). Such a transfer would be contrary to CMS's usual practice of assigning the purchaser's new contract with CMS the average star rating of that purchaser (i.e., of Molina). See DX0151–026–27; DX0349–009. However, Molina has expressed an interest

in continuing with the divestiture even if the star ratings do not transfer over. Tr. 987:4–13 (Mr. Molina); Tr. 2388:16–2389:9 (Dr. Molina).

Finally, state insurance regulators have expressed concern with the merger and divestiture. See PX0476 ¶ 22 (Florida Office of Insurance Regulation noting that divestiture "is not in the best interest of policyholders in the state of Florida"); PX0076 (Missouri Department of Insurance preliminary order blocking merger). As Dr. Molina acknowledged, the merger is "not a done deal." Tr. 2381:9–22 (Dr. Molina).

However, the Court need not reach a conclusion on whether the divestiture would occur if the Court approved the merger accompanied by the divestiture. Rather, Molina has shown that it is sufficiently likely to occur for the Court to at least consider evidence of the effect of the merger: CMS does not seem likely to block the novations, and the remaining barriers are largely within Aetna, Humana, and Molina's control. This is sufficient for the Court to consider the effects of the divestiture, and to consider the likelihood that it would not occur as a factor going to the weight of the evidence. Ultimately, ***64** however, given that the Court finds that the divestiture would not counteract the loss of competition from the proposed merger even if it were to occur as planned, there is no need for the Court to further consider the divestiture's likelihood.

4. Analysis

Aetna and Humana have advanced four affirmative arguments for why Molina would be a successful competitor in the Medicare Advantage market following the divestiture. The Court considers these in turn, then considers the low purchase price, Molina's history in the individual Medicare Advantage market, and the expert testimony.

(a) Defendants' Affirmative Arguments

Defendants argue, first, that Molina has the capability to provide care management to lower-income populations; second, it will be able to build competitive provider networks; third, it has the internal capacity to manage the divested health plans; and fourth, it will be able to use marketing and brokers to retain members (i.e., the 290,000 divested members) and attract new members. However, although defendants advance much evidence of Molina's capabilities, ultimately each of these arguments is undermined by other contradictory evidence presented at trial, especially statements made by Molina executives and board members while the deal was being negotiated.

i. Care Management

Defendants assert that a key reason Molina will be successful in the Medicare Advantage market is its skill in providing care management in the Medicaid market. See Tr. 2231:25–2232:10 (Dr. Molina). Molina's Medicaid population tends to have particularly complex health needs. Its dual-eligible members have, on average, 4.5 chronic medical conditions, as opposed to one chronic medical condition for its individual Medicare Advantage members. Tr. 2230:24–2231:5 (Dr. Molina). Molina's Medicaid and dual-eligible members often have other barriers to good health as well, such as drug abuse and homelessness. Tr. 2231:6–24 (Dr. Molina). Defendants argue that if Molina can successfully manage this population, then it is well suited to manage care for the healthier, more affluent Medicare Advantage population. See Tr. 632:21–633:4 (Wheatley).

The government does not dispute Molina's care management experience in the Medicaid and dual-eligible populations or the importance of care management to successfully operating Medicare Advantage plans. See Tr. 1232:8–1233:8 (Burns) (care management as one of the six engines of a successful MAO). Indeed, as discussed above, the core value proposition of Medicare Advantage is that private MAOs can coordinate care better than Original Medicare, and therefore provide better quality care at a lower price.

Instead the government contests whether Molina will be able to transfer this care management expertise in Medicaid and dual-eligible plans over to Medicare Advantage. The government argues that because of Molina's lack of provider networks—and

specifically value-based provider networks—in nearly all of the complaint counties, it will not be able to provide that care coordination to the acquired members. And because Molina has never offered a PPO, the argument goes, it does not know how to provide care management in that context. See Tr. 983:14–17 (Mr. Molina) (acknowledging that Molina has never offered a PPO). A PPO generally gives a member access to a broader network of providers, and does not require the primary care physician to serve as a "gatekeeper." Approximately 60% of the divested plans are PPOs. Tr. 983:18–21 (Mr. Molina); Tr. 2397:13–17 ***65** (Rubino). This fact surprised Mr. Molina when he first learned it. In an email to Rubino on August 16, 2016—approximately two weeks after Molina agreed to the divestiture—Mr. Molina stated "[H]ow did we miss this?!" PX0247; Tr. 983:24–984:17 (Mr. Molina). Indeed, there is some evidence that Molina has in the past avoided trying to attract members from PPO plans. See PX0250 (October 2011 email from Rubino stating as to PPO members that "I don't think we need to go after them").

ii. Provider Networks

There is no dispute that provider networks are an essential component of offering a competitive Medicare Advantage plan. See PX0559 (Burns Report) ¶ 69; Tr. 292:1–5, 292:24–293:8, 318:3–7 (Cocozza); PX0102–449 (email from Rubino stating that if Molina loses essential providers, it "will lose members in droves"); PX0015–846, -856 (Humana disenrollment survey identifying provider network as a key reason members leave plans); Tr. 296:10–21 (Cocozza) (members often leave plans if their provider is no longer in-network). But there is sharp disagreement over whether Molina will be able to build provider networks to serve the 290,000 members acquired in the divestiture. Molina has no presence in 89% of the complaint counties, and no Medicare presence in 95% of them. PX0650 (Burns Reply Report) ¶ 5. Currently, Molina has some presence in 39 of the 364 complaint counties, and 114 of the 437 divestiture counties overall. Tr. 1243:15–24 (Burns). [34] Of those 39 counties, it only has any Medicare presence (through its dual-eligible plans) in 15 counties. Tr. 1244:3–7 (Burns). And although Molina has a network of non-dual Medicare Advantage providers in six counties, these are not part of the divestiture counties or complaint counties. Tr. 1244:13–18 (Burns).

Molina is not acquiring Aetna's or Humana's provider contracts. Tr. 380:5–9 (Cocozza); Tr. 2538:9–23 (Buckingham). It therefore will need to build its non-dual Medicare Advantage provider network essentially from scratch in all 364 complaint counties, in 325 of which it has no presence whatsoever.

Although Molina does not dispute these numbers, it views them differently. Rubino testified that of the 290,000 members in the divestiture plans, 90% of them are in 12 states. Tr. 2402:16–24 (Rubino). Molina has some presence in 6 of those 12. Tr. 2403:12–25 (Rubino). Rubino also identified the top 20 hospitals and 50 providers in the divestiture plans—based on information from Aetna and Humana—and determined that Molina already has some sort of relationship with a significant number in those 6 states. Tr. 2404:14–2405:13 (Rubino); see DX0145 (Molina analysis of network overlap). Thus, although Molina has no Medicare presence in the vast majority of the complaint counties, Rubino believes that it already has relationships with a large portion of the key providers.

The parties also disagree on whether Molina can build adequate provider networks in the time available. Rubino testified that in a market where Molina has some presence, it might only take two to three months, while in a new market it might take four to six months. Tr. 2400:6–17 (Rubino). Renee Buckingham, the Humana executive responsible for managing the divestiture testified that building a network in a new market might take seven to ***66** eight months. See Tr. 2521:16–2522:3 (Buckingham) ("late summer or early fall" through February). She also stated that value-based contracts that include downside risk for the provider—that is, the possibility of losing money based on poor performance—take "much longer to negotiate." Tr. 2521:7–14 (Buckingham). The president of Aetna's Medicare business testified that it can take up to 18 months to build a provider network that meets CMS network adequacy requirements in a new market. Tr. 342:6–13 (Cocozza). She also testified that it could take up to a year even in a market where Aetna has a pre-existing relationship with providers. Tr. 342:14–17 (Cocozza).

Under CMS's network adequacy requirement, each plan must have a sufficient network before it can be offered to consumers. Tr. 1140:6–16 (Cavanaugh). This network adequacy requirement is "robust" and "very stringent," and the companies try to

build networks that are broader than what CMS requires. See Tr. 291:8–16 (Cocozza); Tr. 547:8–20 (Wheatley). An MAO must submit network information for adequacy review in February of the year prior to the plan. Tr. 341:21–342:5 (Cocozza). Therefore, if the divestiture occurs in early 2017 and Molina extends the ASA as long as possible—through the end of 2018—Molina would have approximately one year to create provider networks that would meet the adequacy requirement. [35]

There was conflicting testimony about the difficulty of building provider networks. Rubino testified that the process of building provider networks is "quite easy" in Medicare Advantage where the rates cluster closely around Original Medicare rates. See Tr. 2398:7–10, Tr. 2403:3–11 (Rubino) (Medicare Advantage rates are 95–100% of Original Medicare rates); see also Tr. 2515:8–2516:5 (Buckingham) (Medicare Advantage rates similar to Original Medicare rates). In Medicaid rates are often as low as 70% of the Medicare rates, leading to more difficult contract negotiations. See Tr. 2263:16–22 (Dr. Molina). Buckingham testified that an MAO's scale in a marketplace may not affect the provider rates it is able to negotiate, because Medicare Advantage provider rates are driven by Original Medicare provider rates. See Tr. 2515:8–2516:18 (Buckingham). Defendants introduced evidence that the process of contracting with providers is straightforward, and consists largely of reaching out to physicians by mail or phone to sign standardized contracts, and meeting with hospitals in person. See Tr. 2398:7–2400:5 (Rubino); Tr. 2511:10–2512:14 (Buckingham). Buckingham also testified that Molina will be well positioned to create provider networks because it will already know which providers are in Aetna's and Humana's networks for the divestiture plans, and therefore which providers those 290,000 members want. Tr. 2522:21–2523:2 (Buckingham); see also Tr. 2404:14–2405:13 (Rubino).

In fact, Molina is so confident in its ability to build a provider network that Dr. Molina would prefer to develop new contracts with providers rather than take over existing Aetna or Humana contracts. See Tr. 2385:9–17 (Dr. Molina); but see Tr. 955:19–23 (Mr. Molina) (Molina is still interested ***67** in Aetna and Humana's provider contracts "to the extent they can be assigned"). This is a change from the approach that Aetna, Humana, and Molina earlier took, when the companies tried to assign Aetna and Humana contracts to Molina. See Tr. 379:5–380:8 (Cocozza) (Aetna originally planned to assign contracts to the divestiture buyer but no longer intends to after discovering a low percentage are assignable). The implication the defendants draw from the testimony about the length of time it takes to build a provider network, the lack of variability in provider rates, the straight-forward process for contract negotiation, and Dr. Molina's preference for creating new contracts is that Molina will have no trouble building a competitive provider network during the period the ASA applies.

Defendants' suggested conclusion, however, is undermined by their other arguments, and by contemporaneous emails sent by Molina executives. The evidence that provider rates in Medicare Advantage are closely tied to Original Medicare rates is relatively persuasive. But there is some evidence to the contrary. Defendants' expert on efficiencies presented evidence that Humana and Aetna sometimes receive dramatically different rates in contracts with providers. See Tr. 2917:19–2918:6 (Gokhale). While he used this evidence to argue that the merger would result in efficiencies because the merged entity could use the lower of the two contracts, here this evidence simply means that there are some substantial differences between rates in Medicare Advantage contracts. Moreover, according to Board of Directors' meeting minutes, Dr. Molina claimed that the acquisition "would provide additional negotiating leverage with respect to its provider contracts," although at trial he disclaimed this statement. Compare PX0103–268 with Tr. 2369:20–2370:3 (Dr. Molina). Mr. Molina made the same statement in an email exchange with a board member. PX0271–809. The government also presented evidence that some of Molina's contracts include rates significantly above Original Medicare rates. See PX0708; Tr. 2470:16–2473:12 (Rubino) (Molina's contract with Hospital Corporation of America in Florida pays rates "considerably above" Original Medicare). It is unclear whether those numbers are outliers or indicate a systemic lack of bargaining power due to Molina's smaller size. But the primary problem with defendants' argument is that the conclusion that building provider networks is easy does not follow from the premise that negotiating provider rates is easy. There are significant non-rate terms in provider contracts—a fact that Molina, Aetna, and Humana executives highlighted elsewhere in their testimony.

Specifically, defendants repeatedly emphasize Molina's ability to provide sophisticated care management. See, e.g., Tr. 2231:25–2232:10, 2273:20–2275:19 (Dr. Molina). That requires, in part, engaging in value-based contracts with providers to align incentives for providers to manage their patients' care and overall health. See Tr. 2262:23–2263:11 (Dr. Molina); PX0412–735 (Aetna internal document stating that "ability to drive provider performance to improve revenue, quality and outcomes"

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is core driver of success). Dr. Molina emphasized Molina's strength in value-based contracting as a core reason why it would provide high quality care management to its Medicare Advantage members. Tr. 2216:11–22 (Dr. Molina). Other witnesses acknowledged that value-based contracts—the type that Molina believes important to success in this business—are significantly more difficult and time consuming to negotiate. See, e.g., Tr. 2521:7–14 (Buckingham). Cocozza testified that Aetna's scale and its history of "operat[ing] ***68** viable, successful Medicare Advantage plans" is important for negotiating value-based contracts with providers. Tr. 348:1–13 (Cocozza) (history of success); Cocozza Dep. 189:6–19, admitted at Tr. 344:25–345:8 (scale). Wheatley agreed, emphasizing that scale does matter in "get[ting] the providers' attention" to form a value-based contract. Tr. 543:11–544:4 (Wheatley). Thus, even if rate negotiations are not that difficult in Medicare Advantage, the Court does not accept that forming provider contracts as a whole is not difficult. Indeed, Rubino herself at one time agreed: she stated in an email sent while Molina was putting together its final bid that successfully implementing the divestiture would be a "big fricken lift." PX0102–449; Tr. 2502:7–13 (Rubino).

Rubino's view is consistent with the evidence presented. Molina would have at most about a year, even if it extends the ASA to the maximum extent, to build a provider network before it would need to submit network information to CMS for adequacy review. It can take more than that—up to 18 months—to build a provider network in a new market, and can take even more time to build a value-based network. And without value-based networks, Molina will not be able to implement the care management that it believes is essential to success in Medicare Advantage. Based on all the evidence, then, the Court finds that Molina likely could not build a competitive Medicare Advantage provider network in all (or even most) of the 364 relevant counties in the timeframe available.

iii. Internal Capacity

Defendants argue that Molina has the internal capacity—including IT infrastructure, personnel who can manage star ratings, and management and staff with relevant expertise—to successfully operate the divestiture plans, based on its experience with Medicaid, dual plans, and the public exchanges. They emphasize that Molina has the internal IT capacity to manage shifting 290,000 members onto its platform. Molina is in the midst of a $50 million IT upgrade. Tr. 990:22–991:5 (Mr. Molina). Because the company is already processing claims for "9 or 10 million patients," in its own plans and in its role as the Medicaid claims processor for five states, "adding 300,000 Medicare patients is not a stretch." Tr. 2233:4–11 (Dr. Molina). And the period of the ASA—at most, just under two years—is sufficient to transfer those members onto Molina's IT platform. Tr. 954:24–955:1 (Mr. Molina). In fact, Rubino believes it can be accomplished in three to four months. Tr. 2455:12–2457:11 (Rubino). The government countered that Molina underestimates the difficulty of IT integration. For example, Aetna and Coventry merged in 2013, and now Aetna intends to fully integrate those systems by January 2019—six years after the merger. See Tr. 386:12–19 (Cocozza); see also Tr. 381:10–382:3 (Cocozza).

Molina also emphasized that it has personnel with the necessary knowledge to manage star ratings. There are two ways in which star ratings could be important: higher star ratings might lead a senior to prefer a particular plan and might also affect the payments that MAOs receive from CMS (because they affect both benchmarks and rebates). The parties presented conflicting evidence as to whether star ratings really matter to seniors—with the companies presenting conflicting evidence themselves. Compare Tr. 1342:16–22 (Bertolini) ("all other things being equal" seniors will choose a plan with higher star ratings); with Tr. 2044:21–2045:4 (Kauffman) (Humana broker agreeing that she "cannot recall any senior expressing interest in star ratings"). But it is uncontroverted that star ratings matter for the latter ***69** purpose—increasing payments to an MAO. See Tr. 540:25–541:7 (Wheatley) (star ratings "absolutely impact [Humana's] ability to keep premiums and benefits stable"); PX0008–329 ("Aetna's star ratings are helping us to maintain our $0 premium Medicare Advantage plans as well as to preserve valuable supplemental benefits. ... Through high star ratings, we are able to create and maintain solidly competitive MA plans."); PX0102–449 (Molina "at risk of not being able to honor current benefits" if star ratings of divested plans do not transfer over to Molina). Indeed, Molina even insisted on the option of withdrawing from the divestiture agreement if CMS does not permit the star ratings of the divested plans to transfer to Molina. DX0262–064 (APA § 6.02(e)); DX0264–064 (APA § 6.02(e)); Tr. 986:22–987:3 (Mr. Molina) ("We put that in there because we wanted to protect the star ratings."); Tr. 2484:9–10 (Rubino) (Molina "repeatedly"

requested that contract term). Molina now appears open to waiving this term. Tr. 987:4–13 (Mr. Molina); Tr. 2388:16–2389:9 (Dr. Molina)).

Aetna and Humana argue that Molina has experience managing star ratings because its D–SNPs are subject to the same system. One of Molina's D–SNPs has a 4 star rating; the rest have just 3.5 stars. Tr. 2358:9–15 (Dr. Molina); Tr. 978:5–8 (Mr. Molina). D–SNPs have, on average, half a star lower rating than comparable non-dual plans. Tr. 1166:5–1167:12 (Cavanaugh); see also Tr. 2269:15–20 (Dr. Molina). However, CMS already adjusts for this in the ratings assigned. Tr. 1167:7–12 (Cavanaugh). Molina has a division responsible for managing star ratings, which, it asserts, will be able to maintain high ratings on the divestiture Medicare Advantage plans. See DX0553–007 (Molina has a "Dedicated Unit" for "Quality and Star Ratings"); DX0134 (discussing Molina's "Member Engagement Program," which is "designed to improve overall member satisfaction and help increase quality measure scores"); Tr. 2270:15–20 (Dr. Molina); Tr. 2457:17–2458:21 (Rubino).

Defendants also contend that Molina has the necessary personnel and management expertise to be a successful competitor following this divestiture. Molina intends to hire 1,500–2000 more employees, including actuaries and employees with finance and Medicare experience. Tr. 991:24–992:14 (Mr. Molina). The company has hired a regional president with Medicare Advantage experience, and is filling other management-level positions. Tr. 2452:5–23 (Rubino). Molina emphasizes that the period of the ASA gives Molina an additional cushion of time to build its internal capacity as necessary. Tr. 2253:20–2254:7 (Dr. Molina).

But statements made by Molina board members and executives prior to litigation—at the time that Molina was considering the deal—undermine the in-court claims about Molina's capabilities. In a June 30, 2016, email, Dale Wolf—a Molina board member and former CEO and CFO of Coventry—stated "this is a very different business from what we do, including commercial marketing, pricing, contracting, etc[.] Unless we can acquire some talent as part of the deal, I think we are woefully under-resourced to be able to take this on." PX0083; see Tr. 967:19–968:17 (Mr. Molina). Mr. Molina, the CFO, responded: "Agree wholeheartedly. Our medical management team (at Corporate) has a great deal of experience with" Medicare Advantage, but "I think our poor performance on our current SNP business provides ample evidence that we need to beef up Medicare resources." PX0083. On July 2, Richard Schapiro, another board member, listed several pros and cons of the deal, and stated "[w]e lack management with the requisite Medicare skills and the handful of people we have won't ***70** cut it." PX0084. Mr. Molina again responded: "I agree with you on all points" and "I would put more weight on the 'con'cerns." PX0084. The next day, another board member expressed a similar concern, stating "[t]he sales and marketing of MA is a really different process for us." PX0271–807. And in a particularly colorful exchange between Schapiro and Dr. Molina, Schapiro described the divestiture as follows: "The image that comes to my mind here is the dog chasing the car and we are the dog. What happens if we catch it?" PX0086. Dr. Molina responded "I guess it depends on if it is a mini Cooper or a Suburban." PX0086. Schapiro later stated that he and Wolf "both agree that we don't have the internal talent to run it." PX0086.

At trial, Mr. Molina and Dr. Molina explained that those emails only represent the preliminary thoughts of a handful of board members who ultimately voted in favor of the divestiture, and therefore the Court should look to the board's ultimate vote as evidence of a thorough decision-making process. See Tr. 963:1–12 (Mr. Molina); Tr. 2242:6–2243:23, 2246:16–2247:4 (Dr. Molina). Mr. Molina explained this his response to Wolf's email that he "[a]gree[s] wholeheartedly" does not represent his real views; rather, he was merely placating a board member before explaining his disagreement. Tr. 968:18–24 (Mr. Molina). He also stated that he was incorrect in his statement that Molina's D–SNP plans are performing poorly. Tr. 969:23–972:10 (Mr. Molina). (But in fact, Molina's D–SNPs are not profitable, as Mr. Molina later testified at trial. Tr. 975:3–7 (Mr. Molina); see PX0106–077). Similarly, Mr. Molina described his apparent agreement with Schapiro on the pros and cons of the divestiture as not his true views, but just an attempt to softly disagree with a board member, rather than express his views more clearly. Tr. 976:22–977:10, 980:12–25 (Mr. Molina). Dr. Molina likewise explained his email exchange with Schapiro as merely "banter." Tr. 2247:13–20 (Dr. Molina). He further testified that while he did not say so in the email, he disagreed with the statement that Molina doesn't "have the internal talent" to manage the divestiture assets—in fact, he thinks the board was "ignorant of [Molina's] capabilities" because he had failed at "making sure they're better informed." Tr. 2251:17–2252:4 (Dr. Molina).

The Court is more persuaded by the contemporaneous email exchanges than by the in-court attempts to explain or disavow those documented exchanges. The totality of the evidence suggests that Molina is not likely to have the internal capacity—including IT, ability to manage star ratings, and necessary personnel and management—to successfully operate the divestiture plans so as to replace the competition lost by the merger. The emails are clear and blunt, and were made when the board, Dr. Molina, and Mr. Molina were deciding how to proceed. Although opinions can change and a single email is not determinative, taken as a whole these emails present a different view of Molina executives' assessment of the company's capacity to compete successfully than the view presented at trial. The explanations that Mr. Molina and Dr. Molina offered at trial—essentially, that they were not forthcoming in their communications with board members—are not credible. See Tr. 969:23–971:8 (Mr. Molina); Tr. 2251:17–2252:4 (Dr. Molina). And if those explanations are true, then the Court would need to reject the fact that Molina's board ultimately approved the transaction because by Mr. Molina's and Dr. Molina's own admissions, the board was being misinformed by senior executives. The Court cannot simultaneously consider the board's ultimate approval of the transaction as evidence that Molina can compete successfully, yet disregard ***71** contemporaneous statements to the contrary.

Moreover, while the ASA gives Molina some time to build its internal capabilities (and its provider networks), the ASA does not remedy Molina's deficiencies. The Court will not rely too heavily on the ASA, because Aetna and Humana have no incentive to provide any assistance beyond the bare minimum during this period, lest they create too powerful a competitor. See Sysco, 113 F.Supp.3d at 77; White Consol. Indus., 781 F.2d at 1228. And more importantly, the ASA only gives Molina time to build its own capacity—it does nothing to provide Molina with the resources it would need to do so.

In short, before even looking at Molina's internal emails, there are reasons to doubt that it has the internal capabilities needed to manage the divestiture plans. Molina executives and board members have the same concerns, at least when expressing their views candidly at the time. It seems more likely that Molina and its board moved forward with the divestiture because, for the price, it was low-risk and high-reward for the company, despite their belief that Molina was not well positioned to be an effective competitor.

iv. Brand, Marketing, and Brokers

Aetna and Humana argue that Molina will be able to retain many of the 290,000 members it acquires through the divestiture, and will be able to attract more members during the Annual Enrollment Period. The parties agree that Molina is not well-known in the Medicare Advantage space. Tr. 1350:3–9 (Bertolini); Tr. 2535:11–18 (Buckingham); Tr. 980:12–17 (Mr. Molina); PX0271–809 ("I wonder how people will feel going from Aetna to a relatively unknown Molina in the [M]edicare space"). Defendants argue that brand name is often less important to retaining and attracting customers than network and plan benefits are. See Tr. 744:20–745:4 (Farley) (Humana able to compete successfully in markets where it did not have established brand); Tr. 2514:13–2515:7 (Buckingham) (same); Tr. 2436:16–21 (Rubino) (brand is only one factor seniors consider); see also DX0419 ¶ 179 (national brand not correlated with success in a particular county). Perhaps, but there is contrary evidence in the record as well. See Tr. 289:15–22 (Cocozza) (strong brand can compensate for other weaknesses); Tr. 794:25–795:12 (Farley) (Humana reputation strong enough to overcome $19 premium differential); Tr. 3340:4–3341:1 (Orszag); PX0271–809. Defendants also argue that to the extent brand matters, Molina knows how to build its brand recognition due to its experience doing so in the public exchanges. See Tr. 2208:15–21 (Dr. Molina); Tr. 2437:20–2438:17 (Rubino). Molina contends that although Medicaid does not have individual enrollment like Medicare Advantage does, Molina has sufficient experience in its D–SNP and exchange plans to understand how to market itself to individuals. See Tr. 2236:18–2237:9 (Dr. Molina); see also Tr. 1242:16–21 (Burns) (Medicaid beneficiaries are automatically enrolled); Tr. 1214:20–1215:5 (Cavanaugh) (MMP members automatically enrolled). Finally, Molina argues that it knows how to build a broker network based on its experience in the exchanges, and will be able to successfully do so in Medicare Advantage. Tr. 2424:12–15, 2427:12–23, 2397:5–9 (Rubino); Tr. 967:1–2 (Mr. Molina), see also DX0136; DX0137.

The Court concludes that brand is sometimes important to consumers and sometimes not, and that Molina does have some experience building its brand and finding brokers in new markets. Hence, the Court does not believe that lack of brand

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recognition, inexperience with marketing, and lack of existing broker networks will be major ***72** barriers to Molina retaining and attracting new customers. However, based on all the evidence concerning Molina's ability to successfully operate the divestiture Medicare Advantage plans, the Court finds that Molina is not likely to be able to replace fully the competition lost by the merger. Two other types of evidence—the low purchase price and Molina's history in Medicare Advantage—also support this conclusion.

(b) The Purchase Price

The low purchase price raises concerns about whether Molina can be a successful competitor. There is no dispute that the price is extremely low. Dr. Molina testified that the usual purchase price for individual Medicare Advantage plans is $7,000–$10,000 per member, including statutory capital. Tr. 2250:9–14, 2251:8–13 (Dr. Molina). Mr. Molina wrote in an email that the usual price is $3,000–$5,000 per member, without statutory capital. See PX0100 ("Everyone acknowledges the bargain price paid– 400 per member vs normal px for these lives that seems to range from 3–5k"). Molina paid $1,400 per member with statutory capital, and $401 without. Tr. 2251:9–14 (Dr. Molina); DX0262–234; DX0264–230. Indeed, Dr. Molina believes he got a "screaming good price," as one of his board members described it. Tr. 2328:24–2329:6 (Dr. Molina); see also PX0100 (Mr. Molina describing it as a "bargain"). Defendants argue that the low price reflects the parties' relative bargaining power: Aetna and Humana needed to find a divestiture buyer, and Molina knew that. The government counters that it reflects the riskiness of the transaction, and makes Molina more able to abandon many plans, counties, and members (i.e., not adequately replace lost competition) while still making a profit given the modest outlay.

The Remedies Guide acknowledges this possibility. It warns against the scenario where a divestiture purchaser is willing to buy assets at a "fire sale" price. Remedies Guide at 9. An extremely low purchase price reveals the divergent interest between the divestiture purchaser and the consumer: an inexpensive acquisition could still "produce something of value to the purchaser" even if it does not become a significant competitor and therefore would not "cure the competitive concerns." Id. The Remedies Guide accurately captures the Court's concern here. The emails sent by Molina executives and board members at the time of the divestiture agreement indicate their significant concerns with the viability of the divesture. They support the inference that the government urges the Court to draw from the low purchase price. Additional statements by Molina executives indicate that Molina might decide to withdraw from several of the divestiture counties in short order, and instead only compete in some—exactly as the Remedies Guide warns against. See, e.g., PX0090–195 ("[w]here there is low membership volume or potential we might reduce the county footprint"); Tr. 2493:8–2494:6 (Rubino) (confirming the same); Tr. 2403:16–2404:2 (Rubino) (Molina will focus on building network in 12 top-tier states, before 9 second-tier states); PX0241–460 (identifying "key states"); PX0248–445 (identifying states for "immediate action"). The low purchase price thus further supports the conclusion that Molina has serious doubts about its own ability to manage all the divestiture plans but is willing to try given the low risk to the company reflected in the bargain price. That does not give the Court confidence in Molina's ability to effectively replace the competition lost by the merger.

(c) Molina's History in the Individual Medicare Advantage Market

Molina's history in the individual Medicare Advantage market also raises concerns ***73** about its ability to successfully compete following the divestiture. Molina has repeatedly tried to enter the Medicare Advantage space but has not succeeded. Some of these efforts should have had the same advantages now submitted as reasons why Molina will succeed. For example, Molina began offering its individual Medicare Advantage plan in Utah in 2014, Tr. 2375:8–13 (Dr. Molina); PX707 at 1, where it had a Medicaid presence for 19 years and a D–SNP for 8 years, Tr. 2376:22–2377:3 (Dr. Molina). Molina also launched this plan already having a relationship with a large provider, the University of Utah. PX707 at 1. But despite its existing brand presence, its relationship with a provider, its claimed care management knowledge, its capacity to build a strong provider network, and knowledge of marketing and brokers, the Utah plan has not been successful. It currently has just 400 members, and less than a 1% market share. Tr. 2380:17–2381:2 (Dr. Molina). Molina presents no explanation as to what would be different for the divestiture plans compared with the Utah plan. Much of the same is true for Molina's individual Medicare Advantage plan in California, where Molina is headquartered, which has not succeeded and is no longer offered in 2017. While past performance is not

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perfectly predictive of the future, the Court gives some weight to Molina's consistently unsuccessful attempts to enter Medicare Advantage, particularly since Molina's theories for why this attempt would be different have not been borne out elsewhere.

(d) Expert Testimony

Finally, the Court's conclusions are consistent with those of Dr. Burns, the government's expert on divestitures. He testified regarding when divestitures fail and when they succeed, and concluded that the Molina divestiture does not have the characteristics of a successful divestiture. See generally PX0559 (Burns Report); PX0560 (Burns Reply Report). In his view, a successful health insurer has “six engines”: product development, sales and marketing, operations, member management, provider management, and care management. Tr. 1232:8–1233:8 (Burns). He testified that Molina did not have any of these, nor did the ASA provide it with them. Tr. 1238:21–1239:7 (Burns). Although the Court finds Burns' framework helpful in understanding the evidence regarding the divestiture, ultimately the Court does not give significant weight to his analysis. He acknowledged that he conducted very little analysis specific to Molina or to this divestiture agreement. See Tr. 1282:8–1283:18, 1285:17–1286:14 (Burns). Thus, while his framework is useful, for the most part his conclusions regarding Molina are not. Still, the Court's conclusions, and the factors it has considered, are consistent with his analysis.

5. Summary

In sum, the Court finds that the divestiture would not “restore [the] competition” lost by the proposed merger. See Sysco, 113 F.Supp.3d at 72; Remedies Guide at 1. Molina has demonstrated that the divestiture is likely enough for the Court to consider whether it would counteract the anticompetitive effects of the merger. But the evidence does not show that it would.

Molina is primarily a Medicaid company. Although it has substantial experience serving the Medicaid population, the Court concludes that this experience will not transfer so as to enable it to be a successful competitor in the individual Medicare Advantage market. In particular, the Court finds persuasive the evidence that Molina would struggle to put together a competitive provider network in the available time frame. It would be especially difficult for Molina to create a value-based ***74** provider network—and Molina cannot effectively implement its care management capabilities without a value-based network. Internal Molina emails reveal the board, CFO, and CEO all doubted Molina's ability to successfully operate the divestiture plans. That, combined with the extremely low purchase price, raises genuine concern about Molina's prospects for broad success in the Medicare Advantage market. Finally, Molina's history of unsuccessful attempts to expand into Medicare Advantage is telling, given that Molina has presented little explanation for why a different result is likely now. Ultimately, then, the Court concludes that the proposed divestiture would not ameliorate the anticompetitive effects of the merger.

F. Conclusion Regarding Medicare Advantage

The government has established the existence of a product market for the sale of individual Medicare Advantage plans. When viewed within that market, and based on its significant HHI scores, the Aetna–Humana merger is presumptively unlawful in all 364 complaint counties. In further support of that presumption, there is clear evidence that the proposed merger would eliminate valuable head-to-head competition between two close rivals, one of which (Aetna) has been particularly aggressive in recent years. All of this evidence establishes that the merger is likely to substantially lessen competition. The companies' rebuttal arguments are unpersuasive, whether assessed individually or altogether. Government regulation of Medicare Advantage does not preclude, or even substantially diminish, the likelihood of competitive harm. And neither entry by new competitors nor the proposed divestiture to Molina are likely to replace the competition eliminated by the merger. For all these reasons, the Court concludes that the merger of Aetna and Humana is likely to substantially lessen competition for the sale of individual Medicare Advantage plans in the 364 complaint counties in violation of section 7.

II. The Public Exchanges

The government alleges that the effect of the merger between Aetna and Humana “may be to substantially lessen competition” in the public exchange markets in 17 counties in Florida, Georgia, and Missouri. 15 U.S.C. § 18; see Compl.¶ 47. The wrinkle

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here is that shortly after the complaint was filed, Aetna announced that it would no longer offer on-exchange plans for 2017 in any of those 17 counties. As discussed below, the parties vociferously disagree both as to why Aetna withdrew, and as to the legal implications of that decision. The market definition in this portion of the case is undisputed: each county is a separate geographic market, and on-exchange health plans is the relevant product market. But that's where the agreement ends.

This section first discusses the difference between actual competition (the standard framework for analyzing antitrust claims) and potential competition (a never-embraced theory for antitrust liability), and concludes that the standard method of antitrust analysis is appropriate here. After a discussion of the legal implications of Aetna's reasons for withdrawing from the 17 counties, the Court assesses the evidence in order to answer the ultimate question whether the merger may substantially lessen competition in those markets. For the merger to lessen competition, there must be competition to begin with. The Court finds that Aetna withdrew from the 17 counties to improve its litigation position. The Court further finds that Aetna is likely to compete in the public exchanges in only the three complaint counties in Florida after 2017, and that the ***75** merger may substantially lessen competition in those three counties.

A. Legal Framework

1. Actual Competition Versus Potential Competition

The government argues that because Aetna decided not to offer plans on the exchanges in the 17 complaint counties for 2017 for the purpose of evading antitrust review of the proposed merger, the Court should act as if Aetna had not taken this action. Instead, the government proposes, the Court should look to the state of competition as it existed in 2016—when Aetna and Humana competed in all 17 counties—and project forward from there. It relies on a line of cases beginning with United States v. General Dynamics Corp., 415 U.S. 486, 504–05, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974), that explain that a company's post-merger behavior—specifically, decisions not to engage in anticompetitive activities while under government scrutiny—is a weak predictor of whether it will engage in anticompetitive actions in the future. This is for the "obvious" reason that companies could "stave off [enforcement] actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." Gen. Dynamics, 415 U.S. at 504–05, 94 S.Ct. 1186.

The companies, in contrast, argue that regardless of why Aetna chose not to offer plans on the exchanges in the 17 complaint counties in 2017, once the decision was made, that was the ball game. [36] They rely on the observation in International Shoe Co. v. FTC, 280 U.S. 291, 298, 50 S.Ct. 89, 74 L.Ed. 431 (1930), that an "acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected." Int'l Shoe, 280 U.S. at 298, 50 S.Ct. 89. Rather, they argue, because Aetna is not offering plans on-exchange in 2017, the only possible lens through which the government could prove antitrust liability is the theory of "actual potential competition." See Defs.' Proposed Findings & Conclusions at 161. "Potential competition" is two separate theories: "perceived potential competition" and "actual potential competition." United States v. Marine Bancorp., 418 U.S. 602, 623–625, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974); see also Lewis A. Kaplan, Potential Competition and Section 7 of the Clayton Act, 25 Antitrust Bull. 297, 298–99 (1980) (explaining doctrines). The perceived potential competition theory posits that if market participants believe that a firm outside of the market is likely to enter, that perception can have a procompetitive effect on the market (whether or not that firm is actually likely to enter). See Marine Bancorp., 418 U.S. at 624–25, 94 S.Ct. 2856; United States v. Falstaff Brewing Corp., 410 U.S. 526, 537, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973) (adopting doctrine). Thus, if the outside firm merges with a market participant, the elimination of that threat of entry can substantially lessen competition. Marine Bancorp., 418 U.S. at 624–25, 94 S.Ct. 2856. The actual potential competition theory asserts that a merger of a firm outside of the market with a firm inside of the market can substantially lessen competition if the outside firm would have entered the market anyway absent the merger. Id. at 625, 94 S.Ct. 2856. Whether actual potential competition is a viable theory of section 7 liability has not been answered by the Supreme Court. Id.; see also Kaplan, supra, at 300–01. Indeed, the companies contend that it is a discredited ***76** legal theory, and thus the

necessary implication of adopting that framework here would be that the government's case fails. See Defs.' Proposed Findings & Conclusions at 161. Additionally, the companies argue that General Dynamics and its progeny are inapplicable because those cases are concerned with post-merger conduct, whereas the conduct here is pre-merger. Id. at 152–57.

Neither side's analysis of the law is completely persuasive. Luckily, the case law itself provides clearer guidance. The core question remains whether the proposed merger may substantially lessen competition. See 15 U.S.C. § 18. Antitrust law is concerned with a "company's future ability to compete," Gen. Dynamics, 415 U.S. at 501, 94 S.Ct. 1186, and deals in "probabilities, not certainties," Brown Shoe, 370 U.S. at 323, 82 S.Ct. 1502. While there can be no substantial lessening of competition if there is no pre-existing competition to begin with, see Int'l Shoe, 280 U.S. at 298, 50 S.Ct. 89, the case law does not support defendants' approach of viewing competition as an on-off switch where a merging party can simply switch it off entirely by withdrawing from a market (potentially temporarily). Rather, courts routinely view competitors that may have one foot in and one foot out of the market as actual competitors, and evaluate the anticompetitive effects of a merger using the standard tools of antitrust analysis. Supreme Court cases discussing the "actual potential competition" doctrine describe a situation wholly unlike the one present here, and thus are not the appropriate framework for evaluating this case.

Other courts, including the Supreme Court, have viewed competitors who were marginally in the market as "actual competitors." This line of cases begins with United States v. El Paso Natural Gas Co., 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964). There, El Paso purchased Pacific Northwest Pipeline Corporation. Id. at 652–53, 84 S.Ct. 1044. In simplified terms, El Paso had a contract with the primary gas distributor for Southern California, effectively blocking Pacific Northwest out of the market. Id. at 654–55, 84 S.Ct. 1044. But Pacific Northwest had competed for that contract (unsuccessfully), and had made other efforts to break into the California market in the past. Id. The Court analyzed El Paso's acquisition of Pacific Northwest as a merger between actual competitors, rather than a merger between one competitor and one potential competitor. Id. at 659–662, 84 S.Ct. 1044; see also Marine Bancorp., 418 U.S. at 623, 94 S.Ct. 2856 (stating that El Paso was an actual competitor, not potential competitor, case).

Two other cases from courts of appeals are instructive. In Polypore International, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012), the Eleventh Circuit considered whether a battery parts manufacturer (Microporous) was in the automotive battery market, or only in the motive battery market (motive batteries are used in industrial machinery). Polypore Int'l, 686 F.3d at 1211. Microporous had made numerous attempts to enter the automotive battery parts market in recent years, including beginning contract negotiations with one buyer and entering a memorandum of understanding with another. Id. at 1212. But at the time that Microporous was acquired by Polypore, it was not actually selling any products in the automotive battery market. Id. at 1211. The court rejected Polypore's argument that Microporous should be analyzed as a potential competitor, not an actual competitor. Id. at 1213–16. It explained that, as in El Paso, although the "acquired company had not actually sold [any products] in the market," section 7 is "concerned with probabilities, not certainties." Id. at 1214. Moreover, Microporous ***77** was already selling a similar product in the motive battery market, and had taken actions to try to shift that product line into the automotive battery market for the future—indicating that it was actually a competitor in the automotive battery market despite not yet making any sales in that market. Id. at 1214–15.

The Ninth Circuit reached a similar conclusion in a case that has some echoes of this one. In FTC v. Warner Communications, Inc., 742 F.2d 1156 (9th Cir. 1984), Warner, the parent company of three record labels, proposed a joint venture and partial merger with Polygram Records, a smaller record company. Id. at 1159. Polygram argued that it "intend[ed] to leave the

distribution market due to economic necessity,”[37] and thus the merger could not have an anticompetitive effect. Id. at 1164. The court rejected this theory, holding “that a company's stated intention to leave the market ... does not in itself justify a merger.” Id. at 1165.

The companies' favored line of authority involves entirely different scenarios. They urge this Court to apply Marine Bancorporation and Falstaff Brewing instead. These cases discuss the potential competition theory of antitrust liability.

Aetna and Humana argue that the actual potential competition theory is the only legitimate lens through which to analyze the government's case. But that ignores the facts of the two Supreme Court cases discussing the doctrine and how far distant they are from the scenario at hand. In Marine Bancorporation, the Supreme Court considered Marine, a bank with locations in the Seattle area, that proposed acquiring Washington Trust Bank, a bank with locations only in the Spokane area. Marine Bancorp., 418 U.S. at 606–07, 94 S.Ct. 2856. Marine never had any locations near Spokane, had never attempted to enter the Spokane market, had no plans to do so, and under state law, it would have been nearly impossible for it to enter the Spokane market de novo. Id. at 624–639, 94 S.Ct. 2856. Hence, the Court held that even assuming the actual potential competition doctrine is valid, there was no section 7 violation. Id. at 639, 94 S.Ct. 2856.

Falstaff Brewing primarily concerned perceived potential entry, which is not at issue here. See Defs.' Proposed Findings & Conclusions at 161 (specifying “actual potential competition theory”). In that case, Falstaff, a beer brewing company with a presence across the nation but not in New England, acquired Narraganset, a local New England brewery. Falstaff Brewing, 410 U.S. at 527–29, 93 S.Ct. 1096. The district court found that Falstaff had decided not to enter the market de novo regardless of the acquisition. Id. at 530–31, 93 S.Ct. 1096. It did not consider the government's perceived potential entrant theory. Id. at 532–33, 93 S.Ct. 1096. The Supreme Court explicitly did not reach the question whether the actual potential competition theory is valid, but instead remanded for the district court to consider the perceived potential competition theory. Id. at 537–38, 93 S.Ct. 1096.

The facts here are unquestionably much closer to those in El Paso, Polypore, and Warner, than to those in Marine Bancorporation and Falstaff Brewing. None of the cases are on all fours with this one—indeed, it is hard to imagine there could be such a case given the idiosyncrasies of the health insurance market—but El Paso and its ilk are closer in relevant ways. Here, like Polygram's past participation in the ***78** market in Warner, Aetna offered health insurance plans in all 17 of the challenged markets in 2016 and before. Like Microporous in Polypore, Aetna continues to offer very similar products in adjacent markets—both geographically nearby (plans on other public exchanges) and conceptually nearby (off-exchange plans in all 17 counties, see Tr. 1465:12–15 (Kelmar)). And similar to Pacific Northwest in El Paso, there are indications that Aetna will once again attempt to compete in the challenged markets in the near future. It is undisputed that Aetna could compete in those markets after 2017, see Tr. 1541:7–16 (Mayhew), and that at the time the merger agreement was entered and the complaint was filed, Aetna planned on competing in those markets in 2017 and subsequent years, see PX0112 at 10.

This case is wholly unlike the facts described in Marine Bancorporation, where state laws blocked Marine from competing in the market of the firm it sought to acquire. Moreover, neither Marine nor Falstaff ever had a market presence in the relevant geographic market—the reason for their respective acquisitions was to expand into a new geographic market—which is just the opposite of Aetna and Humana, which both had a market presence in the 17 counties through 2016.

Regardless of why Aetna withdrew from the public exchanges in the 17 counties, then, this case is closer to El Paso than to Marine Bancorporation and Falstaff Brewing.[38] The Court will therefore employ the standard tools of section 7 analysis to ascertain the effects of the proposed merger on future competition, and determine whether the proposed merger will substantially lessen competition in the challenged markets. See Baker Hughes, 908 F.2d at 988 ("[p]redicting future competitive conditions ... calls for comprehensive inquiry").

Where the government has alleged that Aetna acted intentionally in order to evade judicial review, it would be especially inappropriate to apply a legal framework that would limit judicial inquiry. Courts appropriately guard their ability to ascertain the actual facts at issue, rather than allow a party to thwart judicial review through its own machinations. See, e.g., United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case" because "courts have rightly refused to grant defendants such a powerful weapon against public law enforcement"); United States v. Trans–Missouri Freight Ass'n, 166 U.S. 290, 309, 17 S.Ct. 540, 41 L.Ed. 1007 (1897) ("The defendants cannot foreclose [the public's] rights [under the Sherman Act] by any such action as has been taken in this case."). Employing only the lens of the actual potential competition theory here would prevent the Court from undertaking its obligation to conduct a close analysis of the effects of the proposed merger on future competition. That would create incentives for firms to take similar actions in the future to evade antitrust review. This, then, is an independent reason not to adopt the companies' view that the only relevant legal framework is one of actual potential competition.

2. Whether Aetna's Reasons for Withdrawal Matter

Once the Court's analysis is guided by the El Paso line of cases, the framework for how to evaluate the implications of ***79** Aetna's reasons for its withdrawal from the exchanges for 2017 becomes clearer. The ultimate question is whether the merger may substantially lessen competition on the public exchanges in the 17 counties. Again, for competition to be lessened, there must necessarily be competition to begin with. See Int'l Shoe, 280 U.S. at 298, 50 S.Ct. 89. Thus, there can be no lessening of competition for 2017. The Court will not adopt the government's proposed approach of simply ignoring the reality that Aetna is not offering plans for 2017 in the relevant markets, and pretend that the facts are frozen as they were in 2016.

But the Court is not limited to looking just at 2017. Analyzing the anticompetitive effects of the proposed merger necessarily "focus[es] on the future." See Baker Hughes, 908 F.2d at 991. None of the cases cited by either party indicate that the analysis is limited to one year. Indeed, no case identifies a specific timeframe at all, and even the defendants do not argue that the Court is limited to considering only one year. While predictions too far in the future risk becoming mere "ephemeral possibilities," Falstaff, 410 U.S. at 563, 93 S.Ct. 1096, an assessment that only looks at one year fails to determine "the probable effect of the merger upon the future as well as the present which the Clayton Act commands the courts ... to examine," Brown Shoe, 370 U.S. at 333, 82 S.Ct. 1502. Rather, the proper timeframe for evaluating the effects of the merger on future competition must be "functionally viewed, in the context of its particular industry." See Brown Shoe, 370 U.S. at 321–22, 82 S.Ct. 1502. In the health insurance industry, firms routinely plan more than one year out, and the evidence the Court heard about a firm's future behavior and the competitive effects of that behavior applies not just to the following year. See, e.g., PX0324 ("Vision 2020," Aetna's five-year plan including Humana acquisition). While the Court need not specify the exact time frame for considering the competitive effects of the proposed merger, it must look at 2018, 2019, and 2020 because the firms make business decisions and projections over that time frame.

The question then becomes whether Aetna will compete in the 17 counties after 2017, and whether the merger will substantially lessen that competition. "Predicting future competitive conditions in a given market, as the statute and precedents require, calls

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for a comprehensive inquiry." Baker Hughes, 908 F.2d at 988. One piece of evidence is the fact that Aetna chose not to compete in the 17 complaint counties in 2017. If that decision was made for sound business reasons, the Court might consider it to be powerful evidence that Aetna would not compete in those markets in 2018 and beyond. But if that decision was made to improve Aetna's litigation position, then it would be weak evidence of Aetna's likely future conduct. The Supreme Court has recognized this simple proposition. See Gen. Dynamics, 415 U.S. at 504–05, 94 S.Ct. 1186. Lower courts have as well, and have expanded it to include evidence that "could arguably be subject to manipulation." See Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 435 (5th Cir. 2008) (some emphasis omitted); Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1384 (7th Cir. 1986) ("We agree with the Commission that it was not required to take account of a post-acquisition transaction that may have been made to improve [defendant's] litigating position."); see also ***80** United States v. Bazaarvoice, Inc., No. 13–cv–00133–WHO, 2014 WL 203966, at *73 (N.D. Cal. Jan. 8, 2014).[39] The companies argue that these cases are inapposite because they concern a firm's actions post-merger, rather than after merger was agreed to but before it was consummated, as is the case here. That is a distinction without a difference. These cases embody the common-sense proposition that a firm's behavior undertaken with the aim of persuading a court or the government regarding the legality of a merger may not be predictive of how that firm will behave once the court or the government are no longer engaged. This holds true whether the actions in question are after the merger was announced or after it was consummated.[40]

Thus, the Court considers the fact that Aetna is not offering plans in the 17 complaint counties in 2017 as one piece of evidence about whether Aetna will offer plans in the 17 complaint counties in 2018 and beyond. The Court will give that evidence the weight it deserves—less if Aetna withdrew for the purpose of improving its litigation position; more if Aetna withdrew for sound business reasons. Ultimately, if the Court finds that Aetna is likely to offer plans on the exchanges in any of the 17 complaint counties in 2018 and later, then the Court will assess whether the merger would substantially lessen competition in any of those counties.

B. Analysis

1. Aetna Withdrew From the Complaint Counties to Improve its Litigation Position

Based on the facts presented at trial, the Court finds that Aetna withdrew from the 17 complaint counties for 2017 at least in part for the purpose of improving its litigation position. There is significant evidence—primarily in the form of contemporaneous emails among senior Aetna executives—that Aetna thought of the 17 complaint counties as one unit, and that it withdrew from those 17 counties to improve its position in this lawsuit. The companies presented evidence of how unprofitable the public exchanges around the country were, and argued that Aetna withdrew as a business decision. But while that evidence tends to show that Aetna had good business reasons for reducing its exchange footprint across the country, it does not show that Aetna withdrew from these specific counties for business reasons.

***81** A review of the timeline is a helpful place to start. The key dates to keep in mind are July 21, 2016, when the complaint was filed, and August 15, 2016, when Aetna announced that it would not be offering on-exchange plans for 2017 in 11 of the 15 states where it had participated during 2016. Prior to filing the complaint, DOJ conducted an investigation. During that time, Aetna executives had multiple meetings with both DOJ and HHS, where Aetna connected this lawsuit with its future participation in the exchanges. Also prior to the complaint being filed, starting on July 9, 2016, a team of senior Aetna executives was considering Aetna's future participation in the exchanges across the country. It is the internal documents and emails that this team produced that are ultimately the most illuminating.

(a) Public Exchange Participation as Connected to the Merger

Aetna and its CEO, Mark Bertolini, have long been supporters of the public exchanges. Tr. 1350:13–19, Tr. 1386:21–1387:5 (Bertolini). Bertolini believes that "every American should be insured," and that doing so through the exchanges is a good business opportunity. Tr. 1387:4–5, 1351:1–22 (Berolini); PX0112 at 4 (Aetna Q1 2016 earnings call); PX0162 at 6 (Aetna Q3

2015 earnings call). He has consistently expressed a desire for Aetna to "have a seat at the table" and to help ensure everyone is covered. Tr. 1473:15–19 (Kelmar); Tr. 1387:4–13, 1390:9–12 (Bertolini).

During the investigation but before the complaint was filed, Aetna tried to leverage its participation in the exchanges for favorable treatment from DOJ regarding the proposed merger. On May 11, 2016, Bertolini was deposed in DOJ's investigation. At that deposition, Aetna's counsel stated that if Aetna was not "happy" with the results of an upcoming meeting regarding the merger, "we're just going to pull out of all the exchanges." Tr. 1353:6–10 (Bertolini). Bertolini affirmed his counsel, stating "Nice." Tr. 1353:15–18 (Bertolini). The next day, Bertolini, Steven Kelmar (Aetna's Executive VP and Bertolini's Chief of Staff) and HHS Secretary Sylvia Burwell (among others) had a meeting. There, Kelmar told Secretary Burwell that if the merger was blocked, Aetna "would likely have to revisit its plans for and presence on the public exchanges." Tr. 1354:2–6 (Bertolini); Tr. 1453:12–23 (Kelmar); PX0134 at 7 (Aetna's third response to interrogatories). In a phone call on June 15, 2016, Bertolini told Secretary Burwell "if, by chance, you get a reach-out from the DOJ about us as a candidate for this merger, I would appreciate a good word for all that we've done with you." Tr. 1356:21–23 (Bertolini); see also PX0134 at 7. In preparation for that call, Kelmar sent Bertolini talking points that drew the connection between Aetna's participation in the exchanges and the merger more explicitly, stating: "By getting this deal done, I can make the commitment that we will expand our exchange footprint and continue to take a leadership position on expanding the value of exchanges to a greater part of the population," and, conversely, "[i]f we can't get to a good path forward on this deal the break-up fee of 1 billion dollars will significantly impact our business model and have some very tough consequences for us and the market." PX0113; Tr. 1454:18–1456:2 (Kelmar).

Ultimately, Bertolini expressed this sentiment in a July 5, 2016, letter to DOJ (and forwarded to Secretary Burwell) where he stated: "if the DOJ sues to enjoin the transaction, we will immediately take action to reduce our 2017 exchange footprint"; "we would also withdraw from at least five additional states"; and if the merger is blocked, "we believe it is very ***82** likely that we would need to leave the public exchange business entirely." PX0117 at 2; Tr. 1357:19–1358:24, Tr. 1359:20–1360:1 (Bertolini); PX0118. Bertolini expressed a similar sentiment in a later email with Ron Williams, the former CEO of Aetna, after the complaint was filed, where he wrote that "the administration has a very short memory, absolutely no loyalty and a very thin skin." PX0131; Tr. 1365:22–1366:1 (Bertolini). When asked during his deposition what he meant by that, Bertolini explained that "it was about my involvement in helping them get the Affordable Care Act structured and properly done. And so that was our feeling was that we were doing good things for the administration and the administration is suing us." Bertolini Oct. 11, 2016 Dep. 127:20–128:6, admitted at Tr. 1367:9–15 (Bertolini).

This evidence shows that Aetna and its CEO, Bertolini, viewed participation on the exchanges as closely connected to DOJ's attempt to block the merger. Bertolini believed that DOJ should not block the merger in view of Aetna's role in advancing the ACA and participating in the exchanges, and Aetna was willing to offer to expand its participation in the exchanges if DOJ did not block the merger, or conversely, was willing to threaten to limit its participation in the exchanges if DOJ did. This is persuasive evidence that when Aetna later withdrew from the 17 counties, it did not do so for business reasons, but instead to follow through on the threat that it made earlier. But the most persuasive evidence is yet to come—internal Aetna documents and emails showing the factors that went into its decision-making process.

(b) Aetna's Decision–Making Process

Starting in early July, Bertolini convened a team of senior executives to evaluate Aetna's participation in the exchanges. Tr. 1360:17–22, 1362:5–1363:17 (Bertolini). This was prompted by information that Bertolini received on July 9 that Aetna had suffered large second quarter losses in its public exchange business. Tr. 1362:5–25 (Bertolini). The team included Karen Lynch, Aetna's President, Sean Guertin, Aetna's CFO, Jonathan Mayhew, the head of Aetna's exchange business, Fran Soistman, Aetna's Executive Vice President and head of government services, Kelmar, and Tom Sabatino, Aetna's General Counsel. Tr. 1363:1–17 (Bertolini); Tr. 1476:13–1477:6 (Lynch). This team ultimately put together a set of recommendations regarding how to reduce Aetna's exchange footprint that Bertolini approved without alteration in mid–August. Tr. 1449:21–1450:8 (Bertolini); Tr. 1473:23–1474:1 (Kelmar); Tr. 1497:19–24 (Lynch).

The day the complaint was filed, Aetna employees were instructed to gather information regarding the 17 complaint counties. PX0220–290. The team evaluating Aetna's exchange participation jumped into action as well. The following day, Soistman wrote in an email: "By the way, all bets are off on Florida and every other state given the DOJ rejected our transaction." PX0121–106. Later, he wrote to Kelmar: "I also need to share with you what I've learned about the 17 counties in the DOJ's complaint. We have a very narrow window of opportunity to affect changes in footprint particular with the off exchange business." PX0122–638. Soistman forwarded that email to Lynch saying: "I need to share with you what I learned during my meeting. Did not want to involve you officially as it may get ugly." PX0122–638. The following day, July 23, Kelmar asked Soistman: "Do the counties in the suit overlap with Humana's recent announcement of withdraw [sic]?" PX0124–626. When Soistman responded that "Humana remains in all 17 counties," Kelmar wrote: ***83** "Then that makes it easy we need to withdraw from those." PX0124–626 [41] ; Tr. 1460:10–1461:6 (Kelmar). At the same time, Kelmar told Lynch: "Most of this is a business decision except where DOJ has been explicit about the exchange markets. There we have no choice." PX0125; Tr.1462:4–13 (Kelmar). Lynch responded: "Agree." PX0125.

The following day, the team took steps to update their recommendations to include the 17 complaint counties, without a business analysis of the exchanges in those locations. Mayhew sent Lynch a draft document entitled (in part) "Strategic Options for 2017 Footprint." PX0126 at 4; PX0127; Tr. 1481:9–1483:1 (Lynch); Tr. 1505:15–22 (Mayhew). Lynch responded, asking: "Does this include the 17 places in the DOJ complaint[?]" PX0127; Tr. 1483:2–11 (Lynch).

In response, Mayhew began what would become a series of emails where Aetna executives tried to conceal from discovery in this litigation the reasoning behind their recommendation to withdraw from the 17 complaint counties. Mayhew explained: "I was told to be careful about putting any of that in writing. I will have the attorney client privilege ccd by tomorrow." PX0127. Mayhew acknowledged at trial that he was told to include the reference to attorney-client privilege so as to prevent these documents from being produced in this litigation. Tr. 1508:3–7 (Mayhew). He agreed that the purpose of shielding these documents was to conceal how Aetna was handling the decisions about its exchange footprint. <u>See</u> Tr. 1509:7–11 (Mayhew). Lynch also relayed to Soistman the same concern. She told Soistman that bcc'ing her on an email "doesn't protect" the document because "it shows on the scan," which she explained referred to the scan "they do for discovery." PX0122–638; Tr. 1489:24–1491:24 (Lynch). [42] Mayhew acknowledged Aetna executives instructed each other to call, rather than email, to avoid creating a written trail that could be revealed in discovery. Tr. 1509:7–11 (Mayhew); PX0122–638 ("Best we talk live."); PX0124 ("Can you take another quick call?").

Despite these efforts, relevant documents were revealed in discovery. On Sunday, July 24—after conferring with Soistman, Kelmar, and Lynch—Mayhew instructed his team to update the document reflecting options for Aetna's exchange footprint with the 17 counties. PX0128–987; Tr. 1509:12–1511:18 (Mayhew). The newly updated document not only recommended exiting all 17 complaint counties, but also broke them out as a separate bullet point, rather than including the counties (or states) in a list with others that the team recommended exiting. <u>See</u> PX0129–243 (stating "Exit targeted service areas (17 counties in total; 3 states)"). A document from August 2, 2016 reflected this same difference in how the 17 counties were treated, compared with how every other geographic market was treated. In this summary spreadsheet describing one potential scenario for Aetna's exchange footprint moving forward, a series of states and regions are listed, followed ***84** by one entry for "17 Counties." PX0130 at 4.

Other documents and testimony also indicate that the team of executives did not evaluate the profitability of the 17 counties in the same manner as it did for the other states from which Aetna was considering withdrawing. Lynch testified that the team never assessed the profitability of Aetna's individual business in the 17 complaint counties. Tr. 1498:1–9 (Lynch). Had they done so, they would have seen that Aetna chose to withdraw from some profitable states and stay in some unprofitable ones. <u>See</u> DX0009–002. Aetna chose to remain on-exchange in Delaware, Iowa, Nebraska and Virginia—all projected to be unprofitable for 2016—yet withdrew from Florida, which is projected to be profitable on-exchange. DX0009–002. In fact, Florida is projected to be unprofitable off-exchange, and only profitable overall because of the strength of its on-exchange business. DX0009–002; Tr. 2758:6–2759:1 (Guertin). Florida was Aetna's third most profitable state for its on-exchange business in 2015 and the first half of 2016. Tr. 2756:14–2757:18 (Guertin); DX0009–002. (Both Missouri and Georgia were projected to be unprofitable for 2016,

on-exchange and overall. DX0009-002). Ultimately, the team recommended to Bertolini that Aetna withdraw from Florida, Georgia, Missouri, and eight other states. [43] Tr. 1497:12–18 (Lynch). Bertolini adopted this recommendation without change. Tr. 1449:21–1450:8 (Bertolini).

The inescapable conclusion from these contemporaneous emails and documents is that the Aetna team making recommendations to Bertolini did not view withdrawing from the 17 complaint counties as a business decision. Rather, it saw the other potential withdrawal states as business decisions, but there was "no choice" about these 17 counties. The emails between Soistman, Mayhew, Kelmar, and Lynch demonstrate that each of them viewed the 17 counties as a separate bloc from the other locations under consideration. The documents regarding the recommendation to Bertolini reflect the same dichotomy between the 17 complaint counties (included for non-business reasons) and the other states (included for business reasons). Lynch's admission that the team did not consider the profitability of those counties strongly supports the inference that Aetna withdrew from them for litigation-related reasons. And for the Florida on-exchange markets, the underlying data regarding profitability supports this inference as well. Moreover, although seeking advice of counsel and protecting documents under the attorney-client privilege does not by itself indicate malfeasance, repeated efforts to conceal a paper trail about this decision-making process (rather than to actually seek legal guidance) do give rise to such an inference. Collectively, then, the evidence provides persuasive support for the conclusion that Aetna withdrew from the on-exchange markets in the 17 complaint counties to improve its litigation position. The Court does not credit the minimal efforts of Aetna executives to claim otherwise.

(c) The Florida Market President's Reaction

The reaction of Christopher Ciano, Aetna's Florida Market President—who was not involved in the decision—demonstrates how far outside of normal business practice this decision was. He wrote to Mayhew on August 4: "Really disappointed we are pulling the plug on Florida." PX0132–565. ***85** Ciano followed up with "I just can't make sense out of the Florida decision ... Never thought we would pull the plug all together. Based on the latest run rate data ... we are making money from the on-exchange business. Was Florida's performance ever debated?" PX0132–565. Mayhew responded with a request to discuss via phone "instead of email." PX0132–565. As Mayhew explained in court, these requests for phone calls were an attempt to avoid leaving a paper trail. Tr. 1509:7–11, 1508:3–7 (Mayhew). Ciano's reaction to Aetna's decision underscores that it was not a business decision. He specifically identifies that Florida is profitable, and that withdrawing from the whole state (rather than from underperforming counties, or less profitable off-exchange products) was never really discussed. Mayhew makes clear in his response that he does not want Aetna's reasons to be known to DOJ.

(d) Aetna's Explanation That It Made a Business Decision

Aetna argues that it in fact made a business decision to withdraw from the exchanges in the 17 counties for 2017. Aetna notes that it has been losing money in the public exchange markets nationally. It contends that there are structural problems that explain this, and that are unlikely to be fixed. And although until recently Aetna believed it was worth it to accept a short-term loss in this product line (assuming it would eventually turn a profit), the financial information received in July changed its perspective. This, Aetna argues, explains its turn-around and ultimate decision to withdraw from 11 states that include the 17 complaint counties.

Aetna has been losing money on the exchanges since the beginning. In 2014, Aetna predicted it would lose $70 million, and instead lost $100 million. Tr. 2672:18–2673:23, 2675:9–15 (Guertin). Nevertheless, it concluded it would "keep going forward" despite the losses, because it expected that a new market would be unprofitable for an initial period Tr. 2672:18–2673:23, 2675:9–15 (Guertin); DX0038. For 2015, Aetna projected a $100 million profit, but ultimately lost $131 million. Tr. 2680:14–20, 2694:20–23 (Guertin). However, Aetna was more optimistic for 2016. Because the exchanges were so new, Aetna's profit projections and plan pricing for 2014 and 2015 were largely guesswork; but going into 2016, it had claims data and therefore expected to be able to make more accurate predictions. Tr. 2689:22–2690:5 (Guertin). Aetna expected to make a "modest profit" in the exchanges in 2016. Tr. 2689:18 (Guertin).

In part, Aetna and Humana attribute their financial loss to features of the exchange markets. For example, the requirement that all individuals purchase health insurance coverage was designed to ensure that the pool of individuals who purchased insurance on the exchanges included both healthier individuals who might be tempted to forego insurance, as well as sicker individuals. See Tr. 1830:17–19 (Broussard); Tr. 2675:21–2676:9 (Guertin); DX–0019–005; cf. Tr. 2617:16–2619:3 (Counihan). But because the penalties for failing to purchase insurance were set too low, many individuals paid the penalty rather than paying for insurance. DX0149–001; Tr. 2676:2–9 (Guertin). Thus, the pool of individuals purchasing insurance was, on the whole, sicker (and therefore costlier) than expected. DX0004; DX0019–002; DX0032–011. [44]

***86** The exchanges also include three programs designed specifically to ensure stability in the marketplaces, known colloquially as the "three Rs": risk adjustment, risk corridors, and reinsurance. As Kevin Counihan, the CMS official responsible for overseeing the public exchanges, explained, both risk corridors and reinsurance were designed to be temporary—they expired at the end of 2016—because they only compensate for the difficulties in accurately pricing insurance and predicting the risk pool for a new market. Tr. 2615:23–25 (Counihan). The risk corridor program was designed to limit insurers' losses and gains to account for inaccurate premium-setting when insurers did not have sufficient data to properly price their plans. DX0547–003. The reinsurance program was designed to protect insurers who incurred unexpectedly high claims costs for individual enrollees who had higher-than-expected medical costs. Tr. 2613:18–21 (Guertin). The risk adjustment program is the only one that continues to operate after 2016. It is designed to spread risk among insurers by subsidizing insurers with sicker-than-average members through payments from insurers with healthier-than-average members. Tr. 2671:14–2672:13 (Guertin). However, it is a zero-sum program; thus, if all insurers have an overall membership that is costlier-than-expected, there are no funds to distribute. See Tr. 1375:9–21 (Bertolini).

But Congress has not funded these programs as expected, and therefore CMS has not paid out the anticipated amounts due to insurers—including Aetna—under these programs. For 2014, insurers as a whole requested $2.87 billion, but CMS only paid $362 million. Tr. 2612:11–20 (Counihan). CMS has not made any risk corridor payments for 2015 or 2016. Tr. 2613:12–17 (Counihan). For Aetna specifically, in 2015 it learned that CMS would only pay $12.5 million of the $100 million risk-corridor payment that Aetna was due for 2014. Tr. 2681:24–2682:11 (Guertin); DX0003–007 ("Unlike many competitors, Aetna showed early and prudent caution regarding the [risk corridor] program and never booked an accrual." (emphasis omitted)).

This evidence persuasively explains some of the reasons that Aetna was losing money on the exchanges. CMS officials do not contest Aetna's description of how these programs work, and at least in broad terms, do not contest the specific failings of these programs. See Tr. 2591:8–2592:4, 2610:12–15, 2623:8–18, 2625:23–2626:24 (Counihan). Moreover, CMS officials do not contest that as a result of these features of the exchanges, several insurers had already or were planning to reduce their exchange footprint moving forward. DX0067 (CMS Administrator acknowledging "there's a real possibility that the 2015 numbers are bad and the 2016 numbers won't be better"); Tr. 2592:11–2597:16 (Counihan).

But these failings of the marketplaces existed before Aetna chose to withdraw ***87** from the exchanges in August 2016. In fact, as late as July 19, 2016, Aetna was considering expanding into new exchange markets. In April 2016, Lynch and Guertin told investors that Aetna has a "very good" and "solid cost structure" in Florida and Georgia. PX0112 at 10. In June 2016, Aetna's Operating Committee considered additional investment in Florida and Georgia. Tr. 2748:23–2749:2 (Guertin); see also PX0208–029 (July 6 email discussing the same). Also in June, Aetna was compiling a "large" list of states for possible expansion in 2018. Tr. 1505:9–14 (Mayhew); PX0264–121; see also PX0259–733 (March 2016 Aetna strategy document). At that time, Aetna "Remained Committed to a Measured Multi–Year Approach to our Participation on Public Exchanges." PX0116–198 (circulated on June 29, 2016); see also PX0221–433, -435.

Aetna explains its about-face in August of 2016 as a response to financial information it received at the end of the second quarter of 2016. On June 30, 2016, CMS released the 2015 risk-adjustment report. Tr. 2723:2–2724:9 (Guertin); DX0192–002. From that report, and industry data received from a consultant between July 8 and 11, Aetna learned that it could not expect any relief from the risk-adjustment program for the 2016 plan year. Tr. 2720:16–2721:8 (Guertin); DX0204. Aetna revised its projection of a $50 million profit for its individual commercial business (that is, on-exchange and off-exchange plans together)

and instead projected a loss of over $300 million for 2016. Tr. 2727:16–24 (Guertin); DX0019. This led to Aetna taking a "premium deficiency reserve" of $65 million for 2016 after consulting with its external auditor. Tr. 2728:17–22 (Guertin). (A premium deficiency reserve is an accounting tool that acknowledges that a firm's projected losses are greater than its projected premiums. See Tr. 1496:4–25 (Lynch); Tr. 2688:9–16 (Guertin)). By that point, Guertin had formed the opinion that Aetna should completely withdraw from the public exchanges in every state. Tr. 2730:18–25 (Guertin).

But notwithstanding this new financial information, Aetna continued to view the exchange business positively. As late as July 19, Aetna still held open the possibility of entering additional public exchange markets, Tr. 1437:21–24 (Bertolini), and viewed its public exchange business as having "significant potential under the right conditions," PX0120–746. In July 19 notes for a presentation to Aetna's board, Soistman wrote that Aetna "will pursue a disciplined market participation strategy, targeting deliberate growth in on-exchange silver subsidized membership." PX0120–749. His notes also indicate that Aetna still planned to expand to 20 states (combined on- and off-exchange) in 2017. PX0120–756. And although all members of the team assessing Aetna's exchange footprint believed that Aetna should exit all exchanges across the country, two of them had believed that even prior to receiving the new financial information in July 2016. See Tr. 1464:6–8 (Kelmar) (wanted to withdraw nationally since early 2016); Tr. 2739:10–2740:24 (Guertin) (wanted to withdraw nationally since the end of 2014); Tr. 1497:21–22 (Lynch); Tr. 1541:21 (Mayhew).

The Court has no reason to doubt the financial information that Aetna presented, but it is not persuaded that this information explains why Aetna withdrew from the 17 counties identified in the complaint. The Court is persuaded that this financial information led Aetna to begin the process of rethinking and reducing its exchange footprint. Indeed, it is uncontested that this led Bertolini to form a team of executives to draft recommendations regarding Aetna's exchange footprint moving forward. It is even possible that, in the absence ***88** of this lawsuit, Aetna might have considered whether to continue its exchange participation in some counties in Florida, Georgia, and Missouri. But the documents that team put together clearly show that they did not approach the 17 complaint counties as part of the business decision. Those three states were not mentioned in the draft documents before the request to include the 17 counties. And once those counties were included in the recommendation documents, they were a separate bloc not evaluated by the same business criteria (e.g., profitability) as the other markets. Hence, while Aetna puts on a persuasive case that information received in July 2016 changed the value proposition for Aetna participating on the exchanges generally, the Court nonetheless finds on the basis of all the evidence that Aetna's decision with respect to the 17 complaint counties was not based on that value proposition. Instead, Aetna's decision not to offer on-exchange plans in the 17 counties for 2017 was a strategy to improve its litigation position.

2. Aetna Is Likely to Compete in Florida After 2017

The next question, then, is whether Aetna will compete in any of the 17 counties in 2018 and beyond. Both experts testified that one expects firms to operate in markets where they expect to be profitable. See Tr. 3034:25–3035:2 (Orszag); Tr. 1676:4–8 (Nevo). One would therefore expect Aetna to again offer plans on-exchange in those 17 counties after 2017 if it expects that doing so would be profitable. Bertolini affirmed that Aetna intends to act according to this basic intuition. Tr. 1365:7–13 (Bertolini).

Although the company was losing money in the exchanges overall, through July 2016 Aetna believed it was worth it to remain in the exchanges. This is reflected in Aetna's public statements and in its internal plans. See, e.g., PX0112 at 13 (describing exchanges as a "good investment" despite current unprofitability). Lynch has described Aetna's plans in Florida—which was profitable—as having "a very good cost structure," PX0112 at 10, and in June 2016 Aetna discussed the possibility of further investment in Florida, Tr. 2748:23–2749:2 (Guertin); PX0208–029. Aetna's past behavior is indicative of its future behavior. Aetna believed—as late as June 2016—that participating in the exchanges was a profitable long-term endeavor despite present losses.

The fact that Aetna withdrew from the 17 counties for the 2017 plan year is weak evidence of its future behavior. Because that behavior was not driven by what one would expect—a firm's profit motive (including its leader's long term assessment of its best interest)—it is not probative of how Aetna will behave in the future. Aetna's decision regarding its participation in the

2017 exchanges in the complaint counties was not only "arguably ... subject to manipulation," it was in fact manipulated. See Chicago Bridge & Iron, 534 F.3d at 435 (emphasis omitted). The Court therefore gives it little weight. See Gen. Dynamics, 415 U.S. at 504–05, 94 S.Ct. 1186; Hosp. Corp. of Am., 807 F.2d at 1384; Bazaarvoice, Inc., 2014 WL 203966, at *73.

Indeed, there is some evidence that Aetna intends to once again offer plans in at least some of the 17 counties in the near future. Aetna withdrew in a manner specifically designed to allow it to compete in those markets within the next five years. If an insurer withdraws from a state entirely—that is, offers no on-exchange or off-exchange plans—then it cannot once again offer plans in that state for another five years under state laws. Tr. 1364:20–25 (Bertolini). However, if an insurer withdraws from on-exchange plans but remains ***89** selling off-exchange plans, then it may expand its presence in that state at any time. See Tr. 1364:20–25 (Bertolini); see also PX0262. This is known as a "dormant strategy." Tr. 1501:3–19 (Mayhew). When Aetna decided to no longer offer on-exchange plans, it continued to offer off-exchange plans in all 17 counties. Tr. 1364:8–11 (Bertolini); Tr. 1520:11–16 (Mayhew). Aetna acknowledged that this was an effort to maintain its ability to offer on-exchange plans again within the next five years. Kelmar Oct. 27, 2016, Dep. 65:3–7, admitted at 1466:25–1467:7 (Kelmar); Tr. 1467:11–13 (Kelmar); Tr. 1489:21–23 (Lynch). As Bertolini explained, Aetna wanted to maintain some presence because it "needed to remain in the game" and wanted "to remain at the table to have influence over where exchanges [go] in the future." See Tr. 1387:11–12, 1412:6–7 (Bertolini).

There is some evidence that Aetna is unlikely to offer any on-exchange plans in these 17 counties in 2018. Three executives each testified that Aetna currently has no plans to compete in any of those counties in 2018. Tr. 1468:10–16 (Kelmar); Tr. 1489:11–15 (Lynch); Tr. 1541:3–16 (Mayhew). Mayhew testified that although there are no regulatory barriers to Aetna offering on-exchange plans in 2018, there were practical ones: Aetna would need to file applications with the relevant state agencies by April 2017, which would require that Aetna have already begun the necessary preparatory work. Tr. 1541:7–16 (Mayhew). But there are no legal barriers to Aetna doing so, only practical ones. The government elicited some evidence that these practical ones would not be insurmountable: Aetna continues to have the internal infrastructure (including IT and personnel) to compete in these markets, and Aetna already has the necessary relationships with the state regulators and can meet the solvency requirements. Tr. 1520:17–19, 1520:23–25 (Mayhew); Tr. 2656:9–21 (Counihan). Moreover, Lynch recently expressed interest in meeting with CMS to improve its public exchange business (although that is not specific to these 17 counties). Tr. 2655:15–2656:8 (Counihan)

More important than the general evidence about Aetna's future exchange participation is evidence specific to the complaint counties. In 2015, Aetna operated at a loss in both Georgia and Missouri on both the on-exchange and overall offerings. See DX0009–002. As of the second quarter of 2016, Aetna predicted a loss in those states for 2016 as well. DX0009–002. Given that one can expect firms to operate in markets where they can achieve a profit, this is strong evidence that notwithstanding the reason for Aetna's withdrawal, it is unlikely to compete in those markets in the near future. Because the merger "will not produce the forbidden result if there be no preexisting substantial competition to be affected," Int'l Shoe, 280 U.S. at 298, 50 S.Ct. 89, the Court therefore concludes that there will be no substantial lessening of competition on the public exchanges in the 14 counties in Missouri and Georgia.

But the picture looks different for Florida. In Florida, Aetna operated at a profit both on-exchange and overall in 2015. Aetna projects that it will operate at a profit again both on-exchange and overall in 2016. In fact, Florida's overall profit is due to the strength of its on-exchange offerings—Aetna's off-exchange offerings in Florida lost money. This is strong evidence that Aetna is likely to compete on-exchange in Florida after 2017. The email exchange between Mayhew and Ciano supports this inference as well. Ciano is, presumably, knowledgeable about the Florida market, and he predicted that it would be in Aetna's best interest to remain in Florida—as reflected by his incredulity that ***90** Aetna would withdraw from Florida. See PX0132–565.

The Court finds that, given this profitability picture, Aetna is likely to offer on-exchange plans in Florida after 2017. The same is not true for Georgia and Missouri. Although Aetna's decision to withdraw from those markets was not based on sound business reasons, those markets were operating at a clear loss, and were projected to continue to do so. Without any evidence that Aetna

is likely to compete in those markets after 2017, the Court will not assume that Aetna will compete there simply because it has done so (unprofitably) in the past. [45]

3. The Proposed Merger Would Cause Anticompetitive Effects in Florida

The government can establish its prima facie case by showing that the proposed merger would "lead to undue concentration in the market" for on-exchange plans in the three complaint counties in Florida. [46] See Baker Hughes, 908 F.2d at 982. A market concentration, as measured using the Herfindahl–Hirschmann Index (HHI), of above 2,500 and an increase in HHI of more than 200 points is sufficient to establish the government's prima facie case. Heinz, 246 F.3d at 716; Guidelines § 5.3; Staples II, 190 F.Supp.3d at 128–29 (applying the current version of the Guidelines); Sysco, 113 F.Supp.3d at 52–53 (same).

Here, the government demonstrates that the proposed merger leads to presumptively anticompetitive levels of market concentration in the three complaint counties in Florida. See PX0551 (Nevo Report)) ¶¶ 312–13, Ex. 33, App'x. M; Heinz, 246 F.3d at 716. Using the most recent 2016 market-share data available: Broward County would have an HHI of 6,633 and an increase in HHI of 887; Palm Beach County would have an HHI of 3,408 and an increase in HHI of 846; and Volusia County would have an HHI of 4,294 and an increase in HHI of 690. PX0551 (Nevo Report) App'x. M, Lines 1–3. Thus, the government has established its prima facie case. [47]

***91** But the government does not rest on the presumption—it also provides instances of specific head-to-head competition between Aetna and Humana in Florida. "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; see also Sysco, 113 F.Supp.3d at 61 (collecting cases); Horizontal Merger Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."). Executives at Aetna regularly identify Humana as a key competitor in the public exchanges, and specifically in Florida. See, e.g., PX0108 (email to Mayhew stating that Humana is a "big competitor" in Florida); Tr. 1524:3–1525:11 (Mayhew). A March 2016 Aetna presentation described Humana as one of four "Selected Competitors," noting that Humana has "[s]trong brand recognition and community-type culture." PX0259-743; see also PX0210–707, -709 (June 1, 2016, draft Aetna presentation noting that Humana has a "significant presence" in Florida); PX0267–542 (email from Humana executive identifying Aetna, Blue Cross and Blue Shield plans, United, and Centene as "[o]ur major competitors" in marketplaces).

They also compete head-to-head on prices and product design in the complaint counties in Florida. For example, in an email discussing Aetna's pricing for 2016 in Broward County, Aetna's Florida market president stated that he was "concerned that we have dropped to #2 behind Humana" and recommended that Aetna lower its rates by 4% to "maintain #1 in Broward." PX0263–987; Tr. 1528:5–1529:24 (Mayhew); see also PX0268 at 3 (Humana document describing Aetna as Humana's "biggest competitor" in Broward County). And a Humana executive asked for information on "where Aetna's footprint is a match and what they're [sic] pricing looks like by metal tier and how their high level benefit design compares to ours." PX0266–341, -342 (specifying multiple locations including the Florida counties); see also PX0116–201 (June 28, 2016, slides comparing Aetna's footprint to Humana's footprint in public exchanges).

Thus, the government has made a very strong prima facie case that the proposed merger may substantially lessen competition in on-exchange health plans in the three complaint counties in Florida, relying on both the presumption based on market competition and on direct evidence of head-to-head competition. The "more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." Baker Hughes, 908 F.2d at 991.

Aetna and Humana point to two rebuttal arguments in an attempt to show that "the market-share statistics give an inaccurate account of the merger's probable effects on competition." See Heinz, 246 F.3d at 715 (internal quotation marks and alterations

omitted). First, they raise the weakened firm defense: that one of the merging parties (Humana) is in a weakened position such that its "market share [will] reduce to a level that would undermine the government's prima facie case." FTC v. Univ. Health, Inc., 938 F.2d 1206, 1221 (11th Cir. 1991). The companies argue that Humana's price increases for 2017 indicate that Humana's future market share will be too small for the merger to lead to an increase in market concentration that is presumptively unlawful. Humana increased its prices in the 17 complaint counties to be, on average, 58% above the lowest-priced silver plan in that county. DX0418 (Orszag Reply Report) ¶ 171; Tr. 3031:1–4 (Orszag); Tr. 1831:1–17 (Broussard). This was a reaction to losses on the exchanges, and an attempt to become profitable (or less unprofitable) ***92** in that market. See Tr. 1831:1–1832:18 (Broussard). Orszag did a regression analysis showing that such a large increase in price relative to its competitors' prices will reduce Humana's average share in these counties below 1–2%. Tr. 3033:16–3034:18 (Orszag). He then conducted an HHI analysis assuming a 1–2% market share for Humana, and found that the proposed merger would not lead to an HHI or an increase in HHI above the presumptively unlawful levels in the 17 complaint counties. Tr. 3034:9–12 (Orszag); DX0418 (Orszag Reply Report) ¶¶ 170–74.

But there is insufficient evidence for the Court to conclude that this argument applies. The "weakened competitor" argument is only persuasive when the defendants "make[ ] a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the government's prima facie case." Univ. Health, 938 F.2d at 1221 (emphasis added). "Courts 'credit such a defense only in rare cases.' " ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 572 (6th Cir. 2014) (quoting Univ. Health, 938 F.2d at 1221). Indeed, it has been described as "the Hail–Mary pass of presumptively doomed mergers," ProMedica Health, 749 F.3d at 572; see also Arch Coal, 329 F.Supp.2d at 154 (describing it as the " 'weakest ground of all for justifying a merger' " (quoting Kaiser Aluminum & Chem., 652 F.2d at 1339)). This argument is disfavored because it fails to account for the fact that "financial difficulties not raising a significant threat of failure are typically remedied in a moderate length of time," whereas a merger is a relatively permanent action that eliminates the potential for future competition between the merging parties. 4A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 963a3 (4th ed. 2016). There is no argument here that Humana faces a "significant threat of failure"—if so, it could raise the failing firm defense (a separate, and entirely different, theory), which it does not.

Indeed, Humana has indicated that it is remedying its current weakness in the exchange markets. Humana's CEO testified that it is taking "corrective actions" to improve its business. Tr. 1876:7–1878:6, 1880:21–1881:3 (Broussard); see also PX0407 at 12 (Humana press release). It has adopted "a more insurance focused approach," is using narrower networks, and is featuring "leaner product design." Tr. 1876:19–1877:6, 1879:8–12 (Broussard). It also recently met with CMS to learn about ways to improve this product line. Tr. 2653:14–2655:23 (Counihan). Thus, Humana expects to offer "a high-quality and ultimately stable individual commercial health plan" despite the price increase. Tr. 1880:21–1881:3 (Broussard); see also PX0407 at 12. These are exactly the type of remedies one would expect a weakened, but not failing, firm to take—which is why the failing firm defense is only available if the firm "cannot resolve" its weaknesses. The defendants have not pointed to any evidence that Humana cannot remedy its current market weakness. Hence, the Court finds this rebuttal argument unpersuasive. [48]

Defendants' second argument is that this market is too volatile, and has too much entry and exit, for HHI analysis to accurately predict the state of competition in the market in the future. A market may be so "new" and "volatile" that the "bare ***93** market concentration ratios or percentages" might not "accurately depict the economic characteristics of the market." United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (internal quotation marks omitted). This argument fails because the companies do not point to any specific evidence to support it. It is true that this market is new: the exchanges have only operated since 2013 (for the 2014 plan year). PX0551 (Nevo Report) ¶ 273. It is also true that there is some volatility—or at least, some exits. Several insurers have exited the public exchanges for 2017. See Tr. 3025:13–3026:17 (Orszag) (for 2017, 36 insurers have withdrawn nationwide or reduced their footprint); see also DX0352–004.

But the companies do not present any evidence or argument for why the market's youth or number of exits make HHI an inappropriate tool to project market concentration. As the Second Circuit acknowledged in Siemens, perhaps there are some

markets where HHI is a poor indicator of concentration due to the market's general unpredictability, Siemens, 621 F.2d at 506, but defendants have not shown why this is one. Nor have they cited any cases explaining when youth or volatility (or here, exits) would make HHI too unreliable to form the basis of a prima facie case. Without any facts or law to go on, the Court is not persuaded by defendants' argument.

C. Conclusion

In sum, the Court concludes that competition is likely to be substantially lessened in the three complaint counties in Florida. The Court analyzes Aetna as an actual competitor, not an "actual potential competitor," in the public exchanges because of its active participation in those markets even if it is not offering plans for 2017. See El Paso Nat. Gas, 376 U.S. at 654–662, 84 S.Ct. 1044; Polypore Int'l, 686 F.3d at 1213–16; Warner Commc'ns, 742 F.2d at 1165. Because the Court looks beyond 2017, the question necessarily becomes whether Aetna will compete in the 17 complaint counties in 2018 and later years. After thoroughly reviewing the evidence, the Court concludes that Aetna withdrew from the public exchanges in the 17 complaint counties to evade judicial scrutiny of the proposed merger. It finds particularly persuasive the contemporaneous emails that reveal Aetna's treatment of the 17 complaint counties as distinct from other locations where Aetna was considering withdrawal. Therefore, the Court gives that decision little weight as evidence of Aetna's likely future participation in the public exchanges. See Gen. Dynamics, 415 U.S. at 504–05, 94 S.Ct. 1186. However, notwithstanding the reasons for Aetna's withdrawal, there is insufficient evidence for the Court to conclude that Aetna is likely to compete in the complaint counties in Georgia and Missouri in the near future. This is particularly true given that the public exchanges in Georgia and Missouri were not profitable for Aetna in 2015, and were not projected to be profitable in 2016. See DX0009–002.

But the Court concludes that Aetna is likely to compete on the public exchanges in the three complaint counties in Florida after 2017. Florida's on-exchange markets were profitable for Aetna in 2015, and were projected to be in 2016. See DX0009–002. The Court finds the proposed merger is likely to cause a substantial lessening of competition in these three counties in Florida. The government presented a strong prima facie case for the anticompetitive effects of the merger based on market concentration as measured by HHI, and additional evidence of direct head-to-head competition between Aetna and Humana. Hence, the Court concludes that the proposed merger is likely to substantially ***94** lessen competition in violation of section 7 of the Clayton Act in the public exchange markets in the three complaint counties in Florida.

III. Efficiencies

Finally, Aetna and Humana seek to defend the merger on the ground that it will create substantial, procompetitive efficiencies. "Although the Supreme Court has never recognized the 'efficiencies' defense in a Section 7 case, the [D.C. Circuit] as well as the Horizontal Merger Guidelines recognize that, in some instances, efficiencies resulting from the merger may be considered in rebutting the government's prima facie case." Sysco, 113 F.Supp.3d at 81 (citing Heinz, 246 F.3d at 720); see also Guidelines § 10. The Court will therefore consider Aetna's and Humana's efficiencies defense, while keeping in mind that "the high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies." Heinz, 246 F.3d at 720; see also Guidelines § 10 ("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 consumers."). Aetna and Humana must "substantiate" their efficiency claims. H & R Block, 833 F.Supp.2d at 89 (quoting Guidelines § 10).

Efficiencies may benefit the economy insofar as they "enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." Guidelines § 10. Put differently, the companies must "demonstrate that their claimed efficiencies would benefit customers," Sysco, 113 F.Supp.3d at 82, and, more particularly, the customers in the challenged markets, see Guidelines § 10 ("[T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential harm to customers in the relevant market."); United

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States v. Phila. Nat'l Bank, 374 U.S. 321, 370, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963) ("anticompetitive effects in one market" cannot be justified by "procompetitive consequences in another."). When assessing whether efficiencies might diminish or outweigh the competitive harm resulting from a merger, courts will give weight only to efficiencies that are cognizable—i.e., "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service." Guidelines § 10. "In other words, a 'cognizable' efficiency claim 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." H & R Block, 833 F.Supp.2d at 89.

To estimate the efficiencies that would result from their merger, Aetna and Humana undertook a wide-ranging review. The review was overseen by a team of executives from both companies, called the integration management office, which "sat in the middle of all the integration activities" and directed those efforts. Tr. 2769:17–18, 2769:25–2770:6, 2770:22–24 (Horst). Much of the detailed analysis was performed by 29 "functional teams." Tr. 2768:18–19 (Horst). These teams were intended to assess how particular business functions worked at Aetna and Humana respectively, and then to estimate the efficiencies that might result from combining them. Tr. 2772:1–12 (Horst); see also DX0202–002 (listing the 29 functional teams and their leaders). At Aetna, more than 100 employees work full-time on integration, although many more have probably worked on the related analyses at various times. See Tr. 2792:10–16 (Horst); Tr. 1420:13–14 (Bertolini) ("hundreds of people" are working on evaluating efficiencies). Third-party consultants were also ***95** retained to assist with the process, particularly when the review required analysis of confidential business information. Tr. 2783:19–2784:2 (Horst).

At the "very beginning" of the efficiencies review process, the integration management office instructed the functional teams to focus only on merger-specific efficiencies. Tr. 2777:15–2778:3 (Horst). For instance, one document used in the efficiencies review includes a slide asking "What is a valid synergy?" DX0043–013. Among those savings that are "NOT a Valid Synergy Hypothesis" are savings "that would occur regardless of the merger." DX0043–013. At the conclusion of the review process, Aetna estimated that the transaction would produce $2.8 billion in annual efficiencies every year after 2020. Tr. 2819:20–23 (Horst); DX0030–003. Aetna is confident about its efficiencies estimates because of its experience with the 2013 acquisition of Coventry. Aetna's efforts to estimate and achieve efficiencies through the Coventry acquisition were a "template" for its work on the Humana transaction: "[I]t's really the same. I mean, it's the same actions. It's the same people. It's the same process." Tr. 2783:6–10 (Horst). Aetna claims to have achieved $1.1 billion in annual efficiencies through the Coventry acquisition, despite initially projecting only $400 million. Tr. 2799:6–12 (Horst).

Aetna and Humana retained an expert, Rajiv Gokhale, to assess whether the $2.8 billion in claimed efficiencies "classify as merger-specific, verifiable, and cognizable" under the Guidelines. Tr. 2851:19–23, 2858:13–18 (Gokhale). Gokhale found $2 billion in cognizable efficiencies flowing to the combined company, and another $300 million that would flow directly to the government and consumers. [49] Tr. 2852:2–12 (Gokhale); DX0577 (Gokhale Reply Report) Ex. 1–1. However, the government's expert, Christine Hammer, also evaluated the claimed efficiencies. Not surprisingly, she raises a variety of issues with Aetna's calculations and Gokhale's conclusions, finding only $73.2 million in cognizable efficiencies. Tr. 3387:23–3388:8 (Hammer).

On balance, the Court is unpersuaded that the efficiencies generated by the merger will be sufficient to mitigate the transaction's anticompetitive effects for consumers in the challenged markets. As an initial matter, testimony from Aetna's and Humana's economist indicates that, in this industry, only about 50% of reductions in marginal costs will be passed through to consumers. [50] Tr. 3109:7–21 (Orszag) (estimating a pass-through rate of just 42%). That matters because, as Orszag continued, "[w]e're focused on the effects on consumers," not "on profits of firms." Tr. 3109:24–3110:1 (Orszag). Orszag's analysis suggests that a significant amount—perhaps most—of the efficiencies generated ***96** by this merger will accrue to the merged firm rather than to consumers. It is not even clear what proportion of the efficiencies that are passed on to consumers will be shared with those in the three public exchange markets in Florida and the 364 markets for Medicare Advantage. As Gokhale acknowledges, Aetna and Humana are both national insurers with commercial, Medicare, and Medicaid businesses. DX0420 (Gokhale Report) ¶ 12. Yet, according to Hammer, and as far as the Court can tell, Gokhale did not attempt to attribute portions of his claimed efficiencies to the specific product or geographic markets at issue in this case. See Tr. 3435:14–24, 3465:1–4 (Hammer).

Aetna and Humana do not really argue otherwise.[51] Instead, they invoke an exception to the Guidelines' general rule that efficiencies should be evaluated in the context of "the relevant market." Guidelines § 10. The exception provides that the agencies may, "in their prosecutorial discretion, ... 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)." Id. § 10 n.14. These "[i]nextricably 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." Id. But that is not the situation here. As predicted by the post-merger HHI scores, the anticompetitive effects in the challenged markets are likely to be very substantial. And as a result, the companies must point to "proof of extraordinary efficiencies" in rebuttal. Heinz, 246 F.3d at 720. Footnote 14 of the Guidelines does not help them to do so.

These shortcomings alone severely diminish the force of the companies' efficiency arguments. And when the Court looks to the efficiency claims themselves, further problems emerge. Hammer has raised valid issues regarding several categories of claimed efficiencies, including those arising out of pharmacy rebate maximization, network medical cost savings, and clinical services savings. See Pls.' Proposed Findings & Conclusions at 168–70. Aetna and Humana tellingly do not attempt to defend their estimates in these areas, even after Hammer's critique.

First, consider the $202.8 million in cognizable efficiencies that Gokhale finds regarding pharmacy rebate maximization. See DX0577 (Gokhale Reply Report) Ex. 5–1. Some of these efficiencies were calculated using a "best of the two contracts" approach. Under that approach, if Aetna and Humana both contract with a manufacturer for a particular drug, then following the merger the company with the lower-rebate contract switches its purchases to the higher-rebate contract, thereby generating savings for the merged company. Tr. 2899:6–11 (Gokhale). To calculate the rebate difference between the contracts, which ultimately drives the magnitude of the savings, Gokhale looked to the rebates at a particular point in time. See Tr. 2903:10–16 (Gokhale).

But Hammer has criticized that approach. Because the rebates could vary over time, she contends, a more accurate ***97** assessment of the differential would be achieved by comparing average rebates over time, rather than rebates at any one time, which could produce results that are misleading. Tr. 3405:13–25, 3406:19–22 (Hammer). That error would be compounded, moreover, if savings based on that rebate differential are then predicted forward in perpetuity, as was done by Gokhale (and by the clean-room consultants who conducted the underlying analysis). Tr. 3403:4–10 (Hammer). Hammer supported her analysis with a series of illustrative examples that, in the Court's view, raise real concerns about the reliability of the companies' pharmacy rebate maximization efficiencies.

The Court has similar concerns regarding the claimed $258.6 million in cognizable network efficiencies. See DX0577 (Gokhale Reply Report) Ex. 1–1. Most of these efficiencies were also calculated using a best of the two contracts approach, but here the emphasis was on provider contracts, like those with hospitals. Tr. 2917:19–2918:6 (Gokhale). In the provider context, however, there are real impediments to fully implementing a best of the two contracts approach, as the providers may object to being switched from a contract with a higher reimbursement rate to one with a lower rate. To evaluate this issue, a third-party consultant, PricewaterhouseCoopers, reviewed the underlying provider contracts and interviewed a number of Aetna and Humana field managers about the prospects for switching providers from one contract to another. Tr. 3430:25–3431:5 (Hammer). Some of the field managers sounded a pessimistic note about the willingness of providers to switch. PX0192–177 ("I would be surprised if the hospitals don't initiate a terminat[ion] notice with us now that they've been through this process before."); PX0141–154 ("We've had one hospital come to us and say they would proactively terminate [contracts] if either plan tries to realize a better rate.").

These issues may not be insurmountable but Gokhale did not wrestle with them by, for instance, reviewing the underlying provider contracts. Tr. 2936:3–12 (Gokhale). Instead, he noted that PricewaterhouseCoopers "took a very large hair-cut to the total savings estimated" and, without much analysis, he concluded that the savings were verifiable. DX0420 (Gokhale Report)

¶¶ 203, 206; see also PX0562 (Hammer Reply Report) ¶¶ 205–26. The Court is less sure. Without a more robust analysis, which the companies have not provided, the Court cannot conclude that these network efficiencies are verifiable and likely to be passed on to consumers.

As a third example, Hammer has identified flaws with the $169.2 million of concurrent review efficiencies. See DX0557 (Gokhale Reply Report) Ex.6–1; see also PX0562 (Hammer Reply Report) ¶ 171. Concurrent review is a process by which insurers review patient cases in real time, and recommend against (or deny payment for) medical care above what is recommend by their clinical guidelines. Tr. 2827:8–18 (Horst). So, for instance, a treating physician might recommend that a patient be admitted to the hospital. But through the concurrent review process, and relying on its clinical guidelines, Aetna might deny payment for the hospitalization and recommend that the patient be "put into observation" instead. Tr. 2827:19–2828:2 (Horst). The companies' efficiencies analysis assumes that, where Aetna and Humana have different denial or "conversion to observation" rates, the merged firm will adopt the higher rates. Tr. 2911:12–18 (Gokhale). Gokhale found that these efficiencies were cognizable.

But as Hammer points out, this analysis does not seem rooted in a search for a shared set of best-practices regarding concurrent ***98** review. If the "efficiency" is derived entirely from an increase in denial rates, it is not clear why that increase could not have been achieved without the merger. Tr. 3428:1–3429:14 (Hammer); see also PX0562 (Hammer Reply Report) ¶¶ 184–90. Moreover, there is some tension between the claimed concurrent review efficiencies and the claimed network efficiencies. As both could take money out of providers' pockets, there are challenges inherent in implementing them at the same time in the same place. Tr. 3432:6–17, 3429:15–3430:8 (Hammer). In an attempt to resolve that tension, PricewaterhouseCoopers recommended a strategy for leading with the network efficiencies in some locations, with the concurrent review efficiencies in others, and, in still other locations, proceeding with both simultaneously. PX0147–267; see also PX0562 (Hammer Reply Report) ¶¶ 232–38. That was not adopted. Instead, in the companies' efficiency figures these complexities seem to have been dealt with through another largely unexplained "discount factor." DX0420 (Gokhale Report) ¶ 175. Once again, without more concrete analysis, the Court is unable to conclude that these efficiencies are entirely verifiable.

To conclude, the Court has some serious concerns regarding the companies' efficiencies claims. It is very likely that a significant share of the claimed efficiencies may be retained by the merged firm rather than being passed on to consumers. Moreover, because Gokhale has not attributed the claimed efficiencies to the particular markets challenged in the complaint, the Court cannot be confident that the consumers who are likely to be harmed by the merger would also share in its benefits. But even assuming that some of the claimed efficiencies would reach these consumers, many of the companies' claims are not cognizable. Hammer has identified a number of valid issues with the companies' analyses—most of which have gone entirely unanswered—that serve to further undermine the reliability of the efficiency claims.

Nor can the companies shore up their efficiency claims by comparisons to the Aetna–Coventry merger. Gokhale did not analyze whether the $1.1 billion in claimed efficiencies resulting from the Coventry merger were actually cognizable. Tr. 2985:12–18 (Gokhale). And given the considerable flaws in Aetna's current claims, the fact that the Coventry efficiencies were calculated by similar methods is of very limited comfort. No doubt Aetna and Humana have worked hard to identify efficiencies related to their proposed merger. But because they face a presumption of illegality based on very high concentration measures, they must marshal evidence of "extraordinary efficiencies" in rebuttal. Heinz, 246 F.3d at 720. In the Court's view, they have not done so. "[T]he critical question raised by the efficiencies defense is whether the projected savings from the merger are enough to overcome the evidence showing that possibly greater benefits can be achieved by the public through existing, continued competition." Sysco, 113 F.Supp.3d at 86 (alterations omitted) (quoting Cardinal Health, 12 F.Supp.2d at 63). Here, Aetna and Humana have put forward very little evidence that would tempt a consumer in one of the challenged markets to choose the merger over continued competition. For that reason, their efficiency defense fails.

CONCLUSION

In this case, the government alleged that the merger of Aetna and Humana would be likely to substantially lessen competition in markets for individual Medicare Advantage plans and health insurance sold on the public exchanges. After a 13–day trial, and based on careful consideration of ***99** the law, evidence, and arguments, the Court mostly agrees.

Most importantly, the merger would likely substantially lessen competition in the market for individual Medicare Advantage in all 364 complaint counties. This conclusion is based on identification of the proper product market, the overwhelming market concentration figures generated by the merger, and the considerable evidence of valuable head-to-head competition between Aetna and Humana, which the merger would eliminate. The companies' rebuttal arguments are unpersuasive: federal regulation would likely be insufficient to prevent the merged firm from raising prices or reducing benefits, and neither entry by new competitors nor the proposed divestiture to Molina would suffice to replace competition eliminated by the merger.

The merger would also be likely to substantially lessen competition on the public exchanges in three Florida counties. Because Aetna's withdrawal from the public exchanges in the 17 complaint counties was to avoid antitrust scrutiny, the Court gives that evidence little weight in predicting whether Aetna will continue to compete on the exchanges in the future. The Court concludes that the merger is likely to substantially lessen competition on the exchanges in the three counties in Florida where Aetna is likely to compete in the future. The Court's conclusion is again based on the level of market concentration and the evidence of substantial head-to-head competition between Aetna and Humana that would be lost. Neither of defendants' rebuttal arguments is persuasive. There is insufficient evidence to conclude that Humana's market share will decline such that the merger would not increase market concentration or that the markets are too volatile to reasonably predict the anticompetitive effects of the merger.

Finally, the Court is unpersuaded that the efficiencies generated by the merger will be sufficient to mitigate the anticompetitive effects for consumers in the challenged markets.

Therefore, for all these reasons, the proposed merger of Aetna and Humana will be enjoined. A separate Order has issued on this date.

All Citations

240 F.Supp.3d 1, 2017-1 Trade Cases P 79,877, Med & Med GD (CCH) P 305,849

Footnotes

1 Citations to the trial transcript include the witness's last name in parenthesis. Where exhibits are cited with page numbers, the page number refers to the last three digits of the exhibit-stamp page number, where available. For example, Plaintiffs' Exhibit 100 at page 1 is cited as "PX0100–001." If that pagination is not available, the last three digits of the Bates–stamp number are used. Expert reports are cited by paragraph number, where available.

2 Based on a measure of enrollment that excludes group Medicare Advantage plans sold to employers, the government's economist, Dr. Aviv Nevo, asserted that Humana was the largest individual Medicare Advantage insurer in the country. Humana's answer admits only to being the second-largest Medicare Advantage insurer, without any reference to "individual" Medicare Advantage. See Humana's Answer [ECF No. 63] ¶ 7. For present purposes, it is not necessary to resolve this discrepancy. It is enough to observe that Humana has been a very large and successful player in the individual Medicare Advantage market—whether or not it is technically the largest one.

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3 Before purchasing a MedSupp plan, some seniors may be subject medical underwriting. Depending on their answers to a health questionnaire, some seniors—like those with certain pre-existing conditions—may ultimately be denied MedSupp coverage. Tr. 106:11–17 (Frank); Tr. 429:9–17 (Cocozza). But when a senior has "guaranteed issue rights," he or she cannot be subject to medical underwriting. Seniors have "guaranteed issue rights" when they age into Medicare for the first time, if their Medicare Advantage plan recently withdrew from the market, or if they move out of the coverage area of their Medicare Advantage plan. Tr. 430:8–22 (Cocozza); Tr. 722:13–20 (Wooldridge).

4 Health maintenance organizations (HMOs) and preferred provider organizations (PPOs) are both types of limited-network plans. HMOs typically require seniors to obtain a referral from their primary care physician before seeing a specialist. This is sometimes described as the primary care physician serving as a "gatekeeper." With limited exceptions, HMOs also do not reimburse seniors for care they receive outside their provider network. PPOs are usually somewhat less restrictive. PPOs generally do not require seniors to obtain a referral before seeing a specialist and will provide partial—but generally not full—reimbursement for care received outside the provider network.

5 On the same day, the government filed a second complaint seeking to enjoin the Anthem–Cigna merger, citing alleged anticompetitive effects in markets that are mostly different than those at issue here. See Compl., Case No. 16–1493 [ECF No. 1]. Because the government filed the cases as related, both were initially assigned to this judge. The Court held a joint status conference on August 4, 2016. After concluding that the cases did not raise enough common issues to be truly related, and that the public would be better served if these complex and important cases seeking expedited relief were assigned to different judges, the Court referred the Anthem–Cigna merger for random reassignment. See Aug. 5, 2016, Order [ECF No. 39].

6 The county is the relevant geographic market because seniors may enroll only in Medicare Advantage plans offered in the county where they live. PX0551 (Nevo Report) ¶ 88; Tr. 393:25–394:10 (Cocozza)

7 Although the Guidelines are not binding, the D.C. Circuit and other courts have looked to them for guidance in previous merger cases. See, e.g., Heinz, 246 F.3d at 716 n. 9; Sysco, 113 F.Supp.3d at 38.

8 Defendants contend this provision amounts to a Congressional determination, binding on this Court, "that Original Medicare is an appropriate and adequate substitute for Medicare Advantage for every Medicare–eligible consumer." Defs.' Proposed Findings & Conclusions at 103. While the Court does not take this statutory language lightly, it does not consider the language determinative of the antitrust issues in this case.

9 Some seniors, like those with certain disabilities or chronic conditions, may be eligible for eligibility-restricted Medicare options. Because they do not face the same choice between Original Medicare and Medicare Advantage as the average senior, they have largely been excluded from the analysis in this case. When these seniors are included in the analysis, the share of seniors in Original Medicare options grows larger.

10 The place for "Other[s]" in these documents refers to other Medicare Advantage providers, not to Original Medicare or MedSupp.

11 Many of defendants' documents concerning Medicare Advantage reference a "penetration rate," which reflects the share of Medicare–eligible seniors who select Medicare Advantage over Original Medicare in a particular location. Usually, however, these references do not herald concrete competitive steps to be taken vis-à-vis some specific MedSupp plan or other Original Medicare option. As a result, in the Court's view, penetration rates are more appropriately interpreted as a statistic used to assess the size of the Medicare Advantage market.

12 The government offered expert testimony by Dr. Gary Ford, who was retained to assess the reliability of this Humana study. According to Ford, the study is reliable. Tr. 912:22–913:1 (Ford).

13 Seniors who are still employed when they turn 65 may not have to make an individualized choice between Medicare Advantage and Original Medicare. Instead, they may be offered a group plan by their employer, which falls on one

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side of the line or the other. See Tr. 116:18–24 (Frank) (describing employer-provided MedSupp plans that wrap around Original Medicare); Tr. 1119:14–20 (Cavanaugh) (describing group Medicare Advantage plans).

14 Before embarking on his economic analysis, Nevo reviewed much of the relevant evidence in this case, including the parties' ordinary course of business documents and the switching data. It is not necessary to summarize Nevo's conclusions regarding that evidence. It will suffice to note that Nevo believes that evidence also points to the existence of a market for individual Medicare Advantage plans. See Tr. 1618:13–1619:9 (Nevo).

15 The parties agree that "margin" is a somewhat fraught concept, which can vary depending on the context. As explained by several witnesses, there are important differences between economic margins, underwriting margins, and profit margins, so one must be careful about drawing quick comparisons between "margin" figures. Aware of that danger here, Orszag has not simply compared Nevo's "economic margin" estimates to the "margin" cap in the medical loss regulations and decided that Nevo's margins are too high. Instead, he has constructed an argument that the medical loss regulations imply a cap on economic margins of 15%. See Tr. 3186:2–16 (Orszag).

16 Nevo also performed his critical loss analysis using estimates derived from the academic paper that found the lowest nesting parameter. The Medicare Advantage product market also passed these iterations of the hypothetical monopolist test. See PX0551 (Nevo Report) ¶ 180 & n.251.

17 It is true that, when Nevo uses Orszag's estimates, a small number of complaint counties do not pass the hypothetical monopolist test with a Medicare Advantage market. If these iterations of Nevo's tests were the only market definition evidence in the record, the Court might conclude that the government had not proven a valid market with respect to those counties. But these iterations of the test are not the only evidence in the record. The ordinary course of business documents and Brown Shoe factors point strongly to the existence of a Medicare Advantage market. So do Nevo's preferred iterations of the hypothetical monopolist test, which are all the more persuasive given that their results are generally unchanged by the use of Orszag's estimates.

18 It would also require (somewhat counter-intuitively) grouping together as one product all the possible combinations of Original Medicare, MedSupp, and Part D plans.

19 There is some indication in the record that, given the compressed schedule in this case (adopted largely at the companies' request), CMS could not timely provide the data necessary to perform those calculations.

20 Orszag also finds no correlation between concentration and MAO margins. Although the companies refer to this conclusion several times in multiple sections of their brief, they have not persuasively explained its relevance. In the Court's view, the important part of Orszag's analysis concerns the relationship between concentration and price.

21 The government also argues that Orszag's regression is not a proper hypothetical monopolist test because it incorporates "supply side" factors like the effects of entry and the existence of regulation. Because the Court finds the government's econometric critique to be persuasive, it need not address this argument.

22 Aetna and Humana note that they each compete with a number of other Medicare Advantage organizations in Raleigh and San Antonio, not only with one another. True enough. But that does not change the fact that these markets would be highly concentrated post-merger, nor does it directly rebut the government's evidence that direct competition between them has previously driven plan improvements.

23 When Nevo performs this merger simulation using estimates derived from Orszag's nested logit model, he likewise predicts premium increases. All eight merger simulations predict premium increases of at least 9%. PX0552 (Nevo Reply Report) ¶ 84 & Ex. 12; Tr. 1630:9–17 (Nevo).

24 Even after revising the bid, the MAO could still be the subject of a CMS compliance notice. Tr. 1942:8–17 (Paprocki).

25 The meaningful difference rule does not apply to two plans of different types (for example, an HMO and a PPO) or plans offered under different contracts. See Tr. 2009:22–2012:5 (Paprocki).

26 The companies argue that they would strive to avoid creating plans with medical loss ratios less than 85%. To compensate for a plan below 85%, the merged company would need to have another plan in the same contract above 85%. That comparatively richer plan could in turn attract a high number of beneficiaries, ultimately costing the company money. See DX0014–162; Tr. 2017:15–2018:15 (Paprocki). That might be possible but, in the Court's view, is far too remote to show that the medical loss ratio regulations impose a meaningful constraint on the prices of particular plans.

27 There is some indication in the record that CMS may have the discretion to change this threshold. Tr. 1188:16–18 (Cavanaugh). But as far as the Court is aware, no such change is on the horizon.

28 Neither of Nevo's reports used Orszag's "corrected" definition, with a 5% threshold, to calculate the probability that all new entrants combined would replace the lost competition.

29 The government points out that Orszag used 2012 through 2016 data when determining the likelihood of entry, but only used 2013 through 2016 data when evaluating the success of that entry. Pls.' Proposed Findings & Conclusions at 129. The government argues that this is Orszag's attempt to present the data in a misleading manner: 2012 saw more entry than most subsequent years, and 2012 entrants failed at a significantly higher rate than entrants in subsequent years. Id.; DX0419 (Orszag Report) ¶ 128 & Table II-10 (more entrants in 2012 than in most subsequent years); Tr. 3287:5–3288:14 (Orszag) (acknowledging that he did not use 2012 data and that those entrants failed at a higher rate). But for the complaint counties, there were fewer entrants in 2012 than in subsequent years, making the effect of excluding 2012 from the data unclear. See DX0419 (Orszag Report) ¶ 128 & Table II-10. Regardless, it is not necessary to evaluate the implications of omitting 2012 data from some of Orszag's analyses.

30 This opinion uses the term "Molina" to refer to the corporate entity. The Court heard testimony from Molina's CEO, Dr. Mario Molina (Dr. Molina), and the CFO, John Molina (Mr. Molina).

31 There are some discrepancies in Molina's enrollment data, stemming from whether data for the 2015 plan year is used, or more recent but unverified data from the 2016 plan year is used. For example, Molina's 2015 annual report stated it had 3.5 million members, PX0230 at 2, while Mr. Molina testified that it currently has 4.2 million members, Tr. 956:4–6 (Mr. Molina), and Dr. Molina testified that it has 4.3 million members, Tr. 2204:19–25 (Dr. Molina). These discrepancies are not important to the analysis.

32 Again, other documents, including Molina's 2015 annual report, state that Molina offers plans in 11 states plus Puerto Rico. See PX0230 at 2.

33 The transcript also states "$3.09 million" but that is a transcription error. See Tr. 2295:8–11 (Dr. Molina).

34 Burns notes that Aetna is not offering Medicare Advantage plans in 2017 in 2 of the 364 complaint counties. See PX0559 (Burns Report) ¶ 11 n.1. This opinion continues to use the number 364, rather than 362, for clarity and consistency. Burns' reports, and some portions of the transcript, refer to 362 rather than 364 counties.

35 One document suggests that for counties where Molina already has a Medicare network through its dual-eligible plans, it would not need to submit network adequacy information in February. See PX0090–195 ("The beauty of existing states and service areas [is] we avoid the Feb Firedrill[.] we just have to deliver by bid time[.]"). In that case, Molina would have approximately 16 months, rather than 12 months, to build a network in the 15 complaint counties where it has D–SNP and MMP plans. This would not change the Court's analysis.

36 The companies, of course, also contend that Aetna's decision was not made to improve its ligation position.

37 Polygram was not asserting the "failing company" defense, which is an affirmative defense to a section 7 violation. Id. at 1164 (citing Int'l Shoe, 280 U.S. at 302, 50 S.Ct. 89).

38 The Court expresses no opinion on whether actual potential competition is a viable antitrust theory.

39 The parties spend significant pages arguing about the import of FTC v. Libbey, Inc., 211 F.Supp.2d 34 (D.D.C. 2002). That case is only marginally relevant. In Libbey, the merging parties revised their agreement after the FTC decided to seek an injunction to identify a proposed divestiture in an attempt to alleviate some of the FTC's concerns. 211 F.Supp.2d at 42 n.21. The court noted that the revisions were not an attempt "to evade FTC and judicial review," but rather to alleviate anticompetitive effects of the merger. Id. at 46. Like the proposed divestiture to Molina in this case, the parties' there attempted to alleviate the anticompetitive effects of the merger through a divestiture, and that proposed divestiture was then reviewed by the court. The Libbey court likewise noted that some parties might revise an agreement in an "unscrupulous[ ] attempt to avoid judicial review and FTC review," but did not discuss how it would approach that problem given that it did not arise. See id. at 46 n.27. Thus, Libbey provides little guidance concerning the proper approach here.

40 The Hart–Scott–Rodino Act of 1976, 15 U.S.C. § 18a, requires firms to alert the Department of Justice and the FTC before certain mergers are consummated, and allow time for the government to conduct an investigation and seek an injunction pre-consummation. See Bazaarvoice, 2014 WL 203966, at *75 (explaining effect of Act). Pre- and post-merger suits are routinely analyzed identically. See, e.g., Baker Hughes, 908 F.2d at 987 (relying on pre- and post-merger cases); H & R Block, 833 F.Supp.2d at 51–52.

41 On July 21, 2016, Humana announced that it would only offer on-exchange plans for 2017 in 11 states, rather than the 15 where it offered on-exchange plans in 2016. Humana's announcement did not affect any of the counties identified in the complaint, and there is no allegation that Humana's decision was related to this litigation.

42 At trial, Lynch explained that this statement expressed her concern that Aetna should be transparent in its decision-making process, rather than reflecting an attempt to shield its decision-making process from discovery. Tr. 1491:23–24 (Lynch). The Court does not credit this explanation.

43 Due to time constraints, Aetna believed that if it wanted to withdraw from those 17 counties, it needed to withdraw from those three states entirely, and so, the team recommended it do so. Tr. 1518:12–1519:2 (Mayhew).

44 There are other attributes of the markets that, the parties essentially agree, contributed to this costlier-than-expected pool of insurance purchasers. For example, under the "Keep What You Have Program," consumers who purchased insurance pre–ACA were able to keep it, and thus did not enter the exchange markets. These consumers were largely healthier (in part because, pre–ACA, individual insurance was only available to relatively healthy individuals). See Tr. 2674:9–2675:6 (Guertin); Tr. 1379:20–1380:10 (Bertolini); Tr. 1829:21–1830:4 (Broussard); DX0150–001. Part of this program expires at the end of 2017. Tr. 2740:25–2741:17 (Guertin); Tr. 1436:1–5 (Bertolini). Likewise, CMS adopted relaxed rules permitting consumers to purchase insurance during "special enrollment periods" outside of the annual open enrollment period. Tr. 1830:5–12 (Broussard); Tr. 1373:15–1374:16 (Bertolini); DX0302–011; DX0019–005. This functionally allowed consumers to buy plans when they were sick and cancel them when they were healthy. See Tr. 1830:5–12 (Broussard). CMS has recently tightened these rules. Tr. 1433:2–22 (Bertolini); Tr. 2650:9–2651:1 (Counihan); DX0158–002.

45 Defendants ask the Court to take notice of political uncertainty regarding potential legislative changes to the ACA. See, e.g., Exec. Order (January 20, 2017) "Minimizing The Economic Burden of the Patient Protection and Affordable Care

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Act Pending Repeal" (directing agencies to minimize regulatory burdens, but not identifying any specific legislative or executive actions to be undertaken). Although there may be political uncertainty and changes to the ACA may well be coming, it is always within Congress' power to change the law. A court has no ability to predict Congress's actions, nor is it the judiciary's place to do so. See Worth v. Jackson, 451 F.3d 854, 862 (D.C. Cir. 2006) (quoting Texas v. United States, 523 U.S. 296, 301, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)). This Court must apply the law to the facts at hand given the legal framework that exists now. Cf. United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001) (potential for technological change to upend market "does not appreciably alter our mission in assessing the alleged antitrust violations").

46 The government introduced evidence relevant to market concentration and anticompetitive effects in all 17 complaint counties. Because the Court has not found that Aetna is likely to compete in the counties in Georgia or Missouri in the near future, the Court only considers the evidence relevant to the counties in Florida.

47 Nevo also conducted a regression analysis to demonstrate the relationship between market concentration and price. He found that premiums increase as market concentration increases, and that the relationship is statistically significant. PX0551 (Nevo Report) ¶¶ 322–23, Ex. 35; Tr. 1692:18–1693:8 (Nevo). Although this analysis confirms the rationale behind using HHI, demonstrating a relationship between price and concentration is not necessary to establishing the government's prima facie case or to its ultimate burden of persuasion.

48 The government also raises other criticisms of Orszag's regression analysis and therefore his HHI calculation. Because the Court is not persuaded by this rebuttal argument, the Court does not reach those points.

49 Gokhale's opinion relates only to those efficiencies claimed from 2020 onward. The companies do not claim savings prior to that date. Tr. 2923:1–7 (Gokhale); Tr. 3399:25–3400:3 (Hammer).

50 Reductions in fixed costs are even less likely to be passed on to consumers. According to the Guidelines, "[e]fficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term." Guidelines § 10 n. 15. Moreover, efficiencies "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." Id. at § 10. The companies cite $919 million in these kinds of efficiencies, including the "efficiencies to be gained from eliminating overlapping infrastructure, like IT services, as well as eliminating overlap in procurement services and the lower costs obtained by moving the merged entity onto lower cost procurement contracts." Defs.' Proposed Findings & Conclusions at 98.

51 During Hammer's cross-examination, counsel for Aetna asked her whether Exhibit 15 to Gokhale's reply report represented an attempt to allocate efficiencies to the challenged markets. Tr. 3465:20–3466:12 (Hammer); see also DX0577 (Gokhale Reply Report) Ex. 15. Although Hammer agreed that Exhibit 15 did reflect such an attempt, Aetna and Humana make no use of this exchange or the underlying exhibit. Without further explanation of this exhibit's significance, if any, the Court cannot rely on it here.

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81 S.Ct. 1243
Supreme Court of the United States

UNITED STATES, Appellant,
v.
E. I. DU PONT DE NEMOURS AND COMPANY et al.

No. 55.
|
Argued Feb. 20, 21, 1961.
|
Decided May 22, 1961.

Synopsis
Proceeding involving remedy for violation of Clayton Act. The United States District Court for the Northern District of Illinois, 177 F.Supp. 1, entered a decree calling for a 'pass through' of voting rights whereby first corporation which had acquired stock in a second corporation would retain attributes of ownership of acquired stock except right to vote which would be passed to stockholders of first corporation, and the government appealed. The Supreme Court, Mr. Justice Brennan, held that 'pass through' of voting rights was not a remedy which under the circumstances promised elimination of acquisition offensive to the act and complete divestiture was necessary in the public interest.

Judgment of District Court vacated and case remanded for further proceedings in accordance with opinion, except to extent one paragraph thereof is affirmed.

Mr. Justice Frankfurter, Mr. Justice Whittaker, and Mr. Justice Stewart dissented.

Attorneys and Law Firms

****1246** ***317** Mr. John F. Davis, Washington, D.C., for appellant.

***318** Mr. Hugh B. Cox, New York City, for appellee, E. I. du Pont de Nemours and co.

Mr. Robert L. Stern, Chicago, Ill., for appellee, General Motors Corp.

Mr. Wilkie Bushby, New York City, for appellees, Christiana Securities Co. and Delaware Realty and Investment Co.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

The United States filed this action in 1949 in the District Court for the Northern District of Illinois. The complaint alleged that the ownership and use by appellee E. I. du Pont de Nemours & Co. of approximately 23 percent of the voting common stock of appellee General Motors Corporation was a violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. ss 1, 2, 15 U.S.C.A. ss 1, 2, and of section 7 of the Clayton Act, 15 U.S.C. s 18, 15 U.S.C.A. s 18. After trial, the District Court dismissed the complaint. D.C.N.D.Ill.1954, 126 F.Supp. 235. On the Government's appeal, we reversed. We held that du Pont's acquisition of the 23 percent of General Motors stock had led to the insulation from free competition of ***319** most of the General Motors market in automobile finishes and fabrics, with the resultant likelihood, at the time of suit, of the creation

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of a monopoly of a line of commerce, and, accordingly, that du Pont had violated s 7 of the Clayton Act. United States v. E. I. du Pont de Nemours & Co., 1957, 353 U.S. 586, 77 S.Ct. 872, 885, 1 L.Ed.2d 1057. [1] We did not, however, determine what equitable relief was necessary in the public interest. Instead, we observed that '(t)he District Courts * * * are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' International Salt Co. v. United States, 332 U.S. 392, 400—401, 68 S.Ct. 12, 17, 92 L.Ed. 20,' and remanded the cause to the District Court 'for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute.' 353 U.S. at pages 607—608, 77 S.Ct. at page 885.

On remand, the District Court invited the Government to submit a plan of relief which in its opinion would be effective to remedy the violation. The court also appointed two amici curiae to represent the interests of General Motors and du Pont shareholders, respectively, most of whom, of course, had not been made parties to this litigation. The Government submitted a proposed plan of relief. That plan included diverse forms of injunctive relief, but its principal feature was a requirement that within 10 years the du Pont company completely divest itself of its approximately 63 million General Motors shares. The Government proposed that about two-thirds of these shares be distributed pro rata to the generality of du Pont shareholders in the form of dividends over the 10-year period. The other one-third of du **1247 Pont's General Motors holdings—stock which *320 would have gone to appellees Christiana Securities Company and Delaware Realty and Investment Company, holding companies long identified with the du Pont family itself—were to go to a court-appointed trustee, to be sold gradually over the same 10-year period. Du Pont objected that the Government's plan of complete divestiture entailed harsh income-tax consequences for du Pont stockholders and, if adopted, would also threaten seriously to depress the market value of du Pont and General Motors stock. Du Pont therefore proposed its own plan designed to avoid these results. The slient feature of its plan was substitution for the Government's proposed complete divestiture of a plan for partial divestiture in the form of a so-called 'pass through' of voting rights, whereby du Pont would retain all attributes of ownership of the General Motors stock, including the right to receive dividends and a share of assets on liquidation, except the right to vote. The vote was to be 'passed through' to du Pont's shareholders proportionally to their holdings of du Pont's own shares, except that Christiana and Delaware would 'pass through' the votes allocable to them to their own shareholders. The amici curiae also proposed plans of compliance, substantially equivalent to the du Pont plan. The amicus representing the generality of du Pont shareholders proposed in addition a program of so-called 'take-downs,' by which du Pont shareholders would be allowed to exchange their du Pont common stock for a new class of du Pont 'Special Common,' plus their pro rata share of du Pont-held General Motors common stock.

The District Court held several weeks of hearings. The evidence taken at the hearings, largely of expert witnesses, fills some 3,000 pages in the record before us, and, together with the numerous financial charts and tables received as exhibits, bears mainly not on the competition-restoring effect of the several proposals, but *321 rather on which proposal would have the more, and which the less, serious tax and market consequences for the owners of the du Pont and General Motors stock. The District Court concluded that although '* * * there is no need for the Court to resolve the conflict in the evidence as to how severe those consequences would be(, t)he Court is persuaded beyond any doubt that a judgment of the kind proposed by the Government would have very serious adverse consequences.' D.C.N.D.Ill.1959, 177 F.Supp. 1, 42. The court for this reason rejected the Government's plan and adopted the du Pont proposal, with some significant modifications. The 'pass through' of voting rights, for example, was so limited that neither Christiana, Delaware, nor their officers and directors (plus resident members of the latter's families), should be able to vote any of the du Pont-held General Motors stock; General Motors shares allocable to the two companies or to their officers and directors, or to the officers and directors of du Pont, or to resident members of the families of the officers and directors of the several companies, were to be sterilized, voted by no one. Du Pont, Christiana, and Delaware were forbidden to acquire any additional General Motors stock. Du Pont and General Motors might not have any preferential or discriminatory trade relations or contracts with each other. No officer or director of du Pont, Christiana, or Delaware might also serve as an officer or director of General Motors. Nor might du Pont, Christiana, or Delaware nominate or propose any person to be a General Motors officer or director, or seek in any way to influence the choice of persons to fill those posts. The Government objected that without a provision ordering complete divestiture the decree, although otherwise satisfactory, was

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inadequate to redress the antitrust violation, and filed its appeal here under s 2 of the Expediting Act, 15 U.S.C. s 29, 15 U.S.C.A. s 29. We noted probable jurisdiction. 1960, **1248 362 U.S. 986, 80 S.Ct. 1075, 4 L.Ed.2d 1020.

*322 A threshold question—and one which, although subsidiary, is most important—concerns the scope of our review of the District Court's discharge of the duty delegated by our judgment to formulate a decree. In our former opinion we alluded to the 'large discretion' of the District Courts in matters of remedy in antitrust cases. Many opinions of the Court in such cases observe that '(t) he formulation of decrees is largely left to the discretion of the trial court * * *,' Maryland & Virginia Milk Producers Ass'n v. United States, 1960, 362 U.S. 458, 473, 80 S.Ct. 847, 856, 4 L.Ed.2d 880; '(i)n framing relief in antitrust cases, a range of discretion rests with the trial judge,' Besser Mfg. Co. v. United States, 1952, 343 U.S. 444, 449, 72 S.Ct. 838, 841, 96 L.Ed. 1063; '(t)he determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court,' United States v. United States Gypsum Co., 1950, 340 U.S. 76, 89, 71 S.Ct. 160, 169, 95 L.Ed. 89; '(t) he framing of decrees should take place in the District rather than in Appellate Courts,' International Salt Co. v. United States, 1947, 332 U.S. 392, 400, 68 S.Ct. 12, 17, 92 L.Ed. 20. The Court has on occasion said that decrees will be upheld in the absence of a showing of an abuse of discretion. See, e.g., Maryland & Virginia Milk Producers Ass'n v. United States, supra, 362 U.S. at page 473, 80 S.Ct. at page 856; United States v. W. T. Grant Co., 1953, 345 U.S. 629, 634, 73 S.Ct. 894, 898, 97 L.Ed. 1303; Timken Roller Bearing Co. v. United States, 1951, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199; [2] United States v. National Lead Co., 1947, 332 U.S. 319, 334—335, 67 S.Ct. 1634, 1640—1641, 91 L.Ed. 2077; United States v. Crescent Amusement Co., 1944, 323 U.S. 173, 185, 65 S.Ct. 254, 260, 89 L.Ed. 160. [3] These *323 expressions are not, however, to be understood to imply a narrow review here of the remedies fashioned by the District Courts in antitrust cases. On the contrary, our practice, particularly in cases of a direct appeal from the decree of a single judge, is to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violation proved. 'The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken it to make certain that justice has been done.' International Boxing Club of New York v. United States, 1959, 358 U.S. 242, 253, 79 S.Ct. 245, 252, 3 L.Ed.2d 270; see also id., at page 263, 79 S.Ct. at page 256 (dissenting opinion). We have made it clear that a decree formulated by a District Court is not 'subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree.' United States v. United States Gypsum Co., supra, 340 U.S. at page 89, 71 S.Ct. at page 169.

In sum, we assign to the District Courts the responsibility initially to fashion the remedy, but recognize that while we accord due regard and respect to the conclusion of the District Court, **1249 we have a duty ourselves to be sure that a decree is fashioned which will effectively redress proved violations of the antitrust laws. The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. 'A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes *324 less than that, the Government has won a lawsuit and lost a cause.' International Salt Co. v. United States, supra, 332 U.S. at page 401, 68 S.Ct. at page 17.

Our practice reflects the situation created by the congressional authorization, under s 2 of the Expediting Act, [4] of a direct appeal to this Court from the judgment of relief fashioned by a single judge. Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. [5] This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, '* * * it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching *325 importance to the judgment

of a single judge, without review of the relief granted or denied by him,' Hartford-Empire Co. v. United States, 1945, 324 U.S. 570, 571, 65 S.Ct. 815, 817, 89 L.Ed. 1198, clarifying 1945, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322.

These principles alone would require our close examination of the District Court's action. But the necessity for that examination in this case further appears in the light of additional considerations. First of all, the decree was fashioned in obedience to the judgment which we sent down to the District Court after our reversal of that court's dismissal of the Government's complaint. We have plenary power to determine whether our judgment was scrupulously and fully carried out. Chief Justice Taft, speaking for the Court, said in Continental Ins. Co. v. United States, 1922, 259 U.S. 156, 166, 42 S.Ct. 540, 543, 66 L.Ed. 871, 'We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power, where the compliance **1250 has been attempted and the decree in any proper way is brought to our attention, to see that it follows our opinion.'[6] Secondly, the record is concerned mainly with the alleged adverse tax and market effects of the Government's proposal for complete divestiture. But the primary focus of inquiry, as we shall show, is upon the question of the relief required effectively to eliminate the tendency of the acquisition condemned by s 7. For it will be remembered that the violation was not actual monopoly but only a tendency towards *326 monopoly. The required relief therefore is a remedy which reasonably assures the elimination of that tendency. Does partial divestiture in the form of the 'pass through' of voting power, together with the ancillary relief, give an effective remedy, or is complete divestiture necessary to assure effective relief? Little in the record or in the District Court's opinion is concerned with that crucial question. The findings of possible harsh consequences relied upon to justify rejection of complete divestiture are thus hardly of material assistance in reaching judgment on the central issue. If our examination persuades us that the remedy decreed leaves the public interest in the elimination of the tendency inadequately protected, we should be derelict in our duty if we did not correct the error.

Before we examine the adequacy of the relief allowed by the District Court, it is appropriate to review some general considerations concerning that most drastic, but most effective, of antitrust remedies—divestiture. The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest. In United States v. Crescent Amusement Co., supra, where we sustained divestiture provisions against an attack similar to that successfully made below, we said, at page 189 of 323 U.S., at page 262 of 65 S.Ct.: 'It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive. * * * Those who violate the Act may not reap *327 the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience.'[7]

If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; **1251 it is deeply rooted in antitrust law and has never been successfully challenged.[8] The criteria were announced in one of the earliest cases. In United States v. American Tobacco Co., 1911, 221 U.S. 106, 185, 31 S.Ct. 632, 650, 55 L.Ed. 663, we said:

'In considering the subject * * * three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest *328 of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.'

The Court concluded in that case that, despite the alleged hardship which would be involved, only dissolution of the combination would be effective, and therefore ordered dissolution. Plainly, if the relief is not effective, there is no occasion to consider the third criterion.

Thus, in this case, the adverse tax and market consequences which the District Court found would be concomitants of complete divestiture cannot save the remedy of partial divestiture through the 'pass through' of voting rights if, though less harsh, partial divestiture is not an effective remedy. We do not think that the 'pass through' is an effective remedy and believe that the Government is entitled to a decree directing complete divestiture.

It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate s 7.[9] That statute is specific and 'narrowly ***329** directed,'[10] Standard Oil Co. of California and Standard Stations v. United States, 1949, 337 U.S. 293, 312, 69 S.Ct. 1051, 1061, 93 L.Ed. 1371, and it outlaws a particular form of economic control—stock acquisitions which tend to create a monopoly of any line of commerce. The very words of s 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control,[11] and it is reasonable ***330** to ****1252** think immediately of the same remedy when s 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated[12] s 7 cases which have been reported, most decreed divestiture as a matter of course.[13] Divestiture ***331** has been called the most important of antitrust remedies.[14] It is simple, relatively easy to administer, and sure. It should always ****1253** be in the forefront of a court's mind when a violation of s 7 has been found.

The divestiture only of voting rights does not seem to us to be a remedy adequate to promise elimination of the tendency of du Pont's acquisition offensive to s 7. Under the decree, two-thirds of du Pont's holdings of General Motors stock will be voted by du Pont shareholders—upwards of 40 million shares. Common sense tells us that under this arrangement there can be little assurance of the dissolution of the intercorporate community of interest which we found to violate the law. The du Pont shareholders will ipso facto also be General Motors voters. It will be in their interest to vote in such a way as to induce General Motors to favor du Pont, the very result which we found illegal on the first appeal. It may be true, as appellees insist, that these shareholders will not exercise as much influence on General Motors as did du Pont when it held and voted the shares as a block. And it is true that there is no showing in this record that the du Pont shareholders will combine to vote together, or that their information about General Motors' activities will be detailed enough to enable them to vote their shares as strategically as du Pont itself has done. But these arguments misconceive the nature of this proceeding. The burden is not on the Government to show de novo that a 'pass through' of the General Motors vote, like du Pont's ownership of General Motors stock, would violate s 7. United States v. Aluminum Co. of America, D.C.S.D.N.Y.1950, 91 F.Supp. 333, 346. It need only appear that the decree entered leaves a substantial likelihood that the tendency towards monopoly of the acquisition condemned by s 7 has not ***332** been satisfactorily eliminated. We are not required to assume, contrary to all human experience, that du Pont's shareholders will not vote in their own self-interest. Moreover, the General Motors management, which over the years has become accustomed to du Pont's special relationship,[15] would know that the relationship continues to a substantial degree, and might well act accordingly. The same is true of du Pont's competitors. They might not try so vigorously to break du Pont's hold on General Motors' business, as if complete divestiture were ordered. And finally, the influence of the du Pont company itself would not be completely dissipated. For under the decree du Pont would have the power to sell its General Motors shares; the District Court expressly held that '(t)here would be nothing in the decree to prevent such dispositions.' 177 F.Supp. at page 41. Such a sale would presumably restore the vote separated from the sold stock while du Pont owned it. This power to transfer the vote could conceivably be used to induce General Motors to favor du Pont products. In sum, the 'pass through' of the vote does not promise elimination of the violation offensive to s 7. What was said of the Sherman Act in United States v. Union Pacific R. Co., 1913, 226 U.S. 470, 477, 33 S.Ct. 162, 165, 57 L.Ed. 306, applies here: 'So far as is consistent with this purpose a court of equity, dealing with such combinations, should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed, and no form of dissolution be permitted that, in substance or effect, amounts to restoring the ***333** combination which it was the purpose of the decree to terminate.'

Du Pont replies, inter alia, that it would be willing for all of its General Motors stock to be disenfranchised, if ****1254** that would satisfy the requirement for effective relief. This suggestion, not presented to the District Court, is distinctly an afterthought. If the suggestion is disenfranchisement only while du Pont retains the stock, it would not avoid the hazards inherent in du Pont's power to transfer the vote. If the suggestion is permanent loss of the vote, it would create a large and permanent separation of corporate ownership from control, which would not only run directly counter to accepted principles of corporate democracy, but also reduce substantially the number of voting General Motors shares, thereby making it easier for the owner of a block of shares far below an absolute majority to obtain working control, perhaps creating new antitrust problems for both General Motors and the Department of Justice in the future. And finally, we should be reluctant to effect such a drastic change in General Motors' capital structure, established under state corporation law.

Appellees argue further that the injunctive provisions of the decree supplementary to the 'pass through' of voting rights adequately remove any objections to the effectiveness of the 'pass through.' Du Pont is enjoined, for example, from in any way influencing the choice of General Motors' officers and directors, and from entering into any preferential trade relations with General Motors. And, under IX of the decree, the Government may reapply in the future should this injunctive relief prove inadequate. Presumably this provision could be used to prevent the exercise of the power to transfer the vote. But the public interest should not in this case be required to depend upon the often cumbersome and ***334** time-consuming injunctive remedy. Should a violation of one of the prohibitions be thought to occur, the Government would have the burden of initiating contempt proceedings and of proving by a preponderance of the evidence that a violation had indeed been committed. [16] Such a remedy would, judging from the history of this litigation, take years to obtain. Moreover, an injunction can hardly be detailed enough to cover in advance all the many fashions in which improper influence might manifest itself. And the policing of an injunction would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture. [17] We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor. [18]

We therefore direct complete divestiture. Since the District Court's decree was framed around the provision directing only partial divestiture, and since General Motors, Christiana, and Delaware acquiesced in its provisions only on that basis, we shall not pass upon the ****1255** provisions for ancillary relief but shall vacate the decree ***335** in its entirety except as to the provisions of VI enjoining du Pont itself from exercising voting rights in respect of its General Motors stock. In this way the District Court will be free to fashion a new decree consistent with this opinion at a new hearing at which all parties may be heard. General Motors, Christiana, and Delaware will thus be able to renew, for the District Court's decision in the first instance, any objections they may have to the power of the Court to grant relief against them.

We believe, however, that this already protracted litigation should be concluded as soon as possible. To that end we direct the District Court on receipt of our judgment to enter an order requiring du Pont to file within 60 days a proposed judgment providing for complete divestiture of its General Motors stock, to commence within 90 days, and to be completed within not to exceed 10 years, of the effective date of the District Court's judgment, and requiring the Government to file, within 30 days after service upon it of du Pont's proposed judgment, either proposed specific amendments to such du Pont judgment or a proposed alternative judgment of divestiture. The District Court shall give precedence to this cause on its calendar.

The judgment of the District Court, except to the extent VI is affirmed, is vacated and remanded for further proceedings consistent with this opinion. It is so ordered.

Judgment, except to the extent VI is affirmed, vacated and case remanded for further proceedings.

Mr. Justice CLARK and Mr. Justice HARLAN took no part in the consideration or decision of this case.

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Mr. Justice FRANKFURTER, whom Mr. Justice WHITTAKER and Mr. Justice STEWART join, dissenting.

In United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057, the Court held that the acquisition and continued ownership by E. I. du Pont de Nemours & Co. ***336** of twenty-three percent of the stock of the General Motors Corporation constituted a violation of s 7 of the Clayton Act.[1] The question now before us is the adequacy of the terms of the enforcement of that judgment by the United States District Court for the Northern District of Illinois, 177 F.Supp. 1. In order to determine whether the district judge satisfactorily discharged the duties assigned him, it is necessary to be clear about these underlying elements of the question for decision: (1) What did this Court hold and say in finding that du Pont had violated s 7? (2) What considerations guided the district judge in fashioning his decree? (3) What principles has this Court laid down for the formulation of decrees by District Courts, particularly under the antitrust laws, and for review of those decrees here?

I.

As the Court described it, the 'primary issue' in the Government's suit against du Pont, General Motors, and related parties was 'whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce.' ****1256** 353 U.S. at pages 588—589, 77 S.Ct. at page 875. The question was asked in the context of these facts.

The transaction out of which the case arose was the acquisition by du Pont, during the period 1917—1919, of ***337** a twenty-three percent stock interest in General Motors. That 'colossus of the giant automobile industry' absorbed 'upwards of two-fifths of the total sales of automotive vehicles in the Nation' over the period from 1938 to 1955. In 1955 it ranked first in sales and second in assets among all United States industrial corporations. Purchases of automotive fabrics and finishes by General Motors from du Pont ran into millions of dollars annually in the years immediately preceding the institution of the Government's suit in 1949. Du Pont supplied sixty-seven percent of General Motors' requirements for finishes in 1946 and sixty-eight percent in 1947. The figures for fabrics supplied to General Motors by du Pont in those years are fifty-two and three-tenths percent and thirty-eight and five-tenths percent respectively.

Du Pont's 'commanding position as a General Motors supplier' was not achieved until after its acquisition of a substantial fraction of General Motors' stock. At the time of this purchase, du Pont was actively seeking markets for its nitrocellulose, artificial leather, celluloid, rubber-coated goods, and paints and varnishes used by automobile manufacturers. Leading du Pont executives in 1917 and 1918 indicated that the acquisition of General Motors stock was due in part to a belief that it would secure for du Pont an important market for its automotive products.
'This background of the acquisition, particularly the plain implications of the contemporaneous documents, destroys any basis for a conclusion that the purchase was made 'solely for investment.' Moreover, immediately after the acquisition, du Pont's influence growing out of it was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes.' 353 U.S. at page 602, 77 S.Ct. at page 882.

***338** A former du Pont official became a General Motors vice president and set about maximizing du Pont's share of the General Motors market. Lines of communications were established between the two companies and several du Pont Products were actively promoted. Within a few years various du Pont manufactured items were filling the entire requirements of from four to seven of General Motors' eight operating divisions. The Fisher Body division, long controlled by the Fisher brothers under a voting trust even though General Motors owned a majority of its stock, followed an independent course for many years, but by 1947 and 1948 'resistance had collapsed' and its purchases from du Pont 'compared favorably' with purchases by other

General Motors divisions. Competitors came to receive higher percentages of General Motors business in later years, but it is 'likely' that this trend stemmed 'at least in part' from the needs of General Motors outstripping du Pont's capacity.
'The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.' 353 U.S. at page 605, 77 S.Ct. at page 883.

This Court agreed with the trial court 'that considerations of price, quality and service were not overlooked by either du Pont or General Motors.' 353 U.S. at page 606, 77 S.Ct. at page 884. However, it determined that neither this factor, ****1257** nor 'the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors,' ***339** 353 U.S. at page 607, 77 S.Ct. at page 884, outweighed the Government's claim for relief. This claim, as submitted to the District Court and dismissed by it, 126 F.Supp. 235, alleged violation not only of s 7 of the Clayton Act, but also of ss 1 and 2 of the Sherman Act.[2] The latter provisions proscribe any contract, combination, or conspiracy in restraint of interstate or foreign trade, and monopolization of, or attempts, combinations, or conspiracies to monopolize, such trade. However, this Court put to one side without consideration the Government's appeal from the dismissal of its Sherman Act allegations.[3] It rested its decision solely on s 7, which reads in pertinent part:
'(N)o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
'This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition * * *.'

The purpose of this provision was thus explained in the Court's opinion:
'Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or ***340** any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. * * *' 353 U.S. at page 589, 77 S.Ct. at page 875.

Thus, a finding of conspiracy to restrain trade or attempt to monopolize was excluded from the Court's decision. Indeed, as already noted, the Court proceeded on the assumption that the executives involved in the dealings between du Pont and General Motors acted 'honorably and fairly' and exercised their business judgment only to serve what they deemed the best interests of their own companies. This, however, did not bar finding that du Pont had become preeminent as a supplier of automotive fabrics and finishes to General Motors; that these products constituted a 'line of commerce' within the meaning of the Clayton Act; that General Motors' share of the market for these products was substantial; and that competition for this share of the market was endangered by the financial relationship between the two concerns:
'The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from ****1258** an acquisition of his customer's stock likely to have the effects condemned by the statute. We repeat, that the test of a violation of s 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result

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in the condemned restraints. The conclusion upon this record is inescapable that such ***341** likelihood was proved as to this acquisition. * * *' 353 U.S. at page 607, 77 S.Ct. at page 884.

On the basis of the findings which led to this conclusion, the Court remanded the case to the District Court to determine the appropriate relief. The sole guidance given the Court for discharging the task committed to it was this:
'The judgment must therefore be reversed and the cause remanded to the District Court for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' International Salt Co. v. United States, 332 U.S. 392, 400—401, 68 S.Ct. 12, 17, 92 L.Ed. 20.' 353 U.S. at pages 607—608, 77 S.Ct. at page 885.

This brings us to the course of the proceedings in the District Court.

II.

This Court's judgment was filed in the District Court on July 18, 1957. The first pretrial conference—held to appoint amici curiae to represent the interests of the stockholders of du Pont and General Motors and to consider the procedure to be followed in the subsequent hearings—took place on September 25, 1957. At the outset, the Government's spokesman explained that counsel for the Government and for du Pont had already held preliminary discussions with a view to arriving at a relief plan that both sides could recommend to the court. Du Pont, he said, had proposed disenfranchisement of its General Motors stock along with other restrictions on the du Pont-General Motors relationship. The Government, deeming these suggestions inadequate, had urged ***342** that any judgment include divestiture of du Pont's shares of General Motors. Counsel for the Government invited du Pont's views on this proposal before recommending a specific program, but stated that if the court desired, or if counsel for du Pont thought further discussion would not be profitable, the Government was prepared to submit a plan within thirty days.

Counsel for du Pont indicated a preference for the submission of detailed plans by both sides at an early date. No previous antitrust case, he said, had involved interests of such magnitude or presented such complex problems of relief. The submission of detailed plans would place the issues before the court more readily than would discussion of divestiture or disenfranchisement in the abstract. The Court adopted this procedure with an appropriate time schedule for carrying it out.

The Government submitted its proposed decree on October 25, 1957. The plan called for divestiture by du Pont of its 63,000,000 shares of General Motors stock by equal annual distributions to its stockholders, as a dividend, over a period of ten years. Christiana Securities Company and Delaware Realty & Investment Company, major stockholders in du Pont, and the stockholders of Delaware were dealt with specially by provisions requiring the annual sale by a trustee, again over a ten-year period, of du Pont's General Motors stock allocable to them, as well as any General Motors stock which Christiana and Delaware owned outright. If, in the trustee's judgment, 'reasonable market conditions' did not prevail during any given year, he was to be allowed to ****1259** petition the court for an extension of time within the ten-year period. In addition, the right to vote the General Motors stock held by du Pont was to be vested in du Pont's stockholders, other than Christiana and Delaware and the stockholders of Delaware; du Pont, Christiana, and Delaware were to be enjoined from acquiring ***343** stock in or exercising control over General Motors; du Pont, Christiana, and Delaware were to be prohibited to have any director or officer in common with General Motors, and vice versa; and General Motors and du Pont were to be ordered to terminate any agreement that provided for the purchase by General Motors of any specified percentage of its requirements of any du Pont manufactured product, or for the grant of exclusive patent rights, or for a grant by General Motors to du Pont of a preferential right to make or sell any chemical discovery of General Motors, or for the maintenance of any joint commercial enterprise by the two companies.

On motion of the amici curiae, the court directed that a ruling be obtained from the Commissioner of Internal Revenue as to the federal income tax consequences of the Government's plan. On May 9, 1958, the Commissioner announced his rulings.

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The annual dividends paid to du Pont stockholders in shares of General Motors stock would be taxable as ordinary income to the extent of du Pont's earnings and profits. The measure, for federal income tax purposes, of the dividend to individual stockholders would be the fair market value of the shares at the time of each annual distribution. In the case of taxpaying corporate stockholders, the measure would be the lesser of the fair market value of the shares or du Pont's tax basis for them, which is approximately $2.09 per share. The forced sale of the General Motors stock owned by or allocable to Christiana, Delaware, and the stockholders of Delaware, and deposited with the trustee, would result in a tax to those parties at the capital gains rate.

Du Pont's counterproposal was filed on May 14, 1958. Under its plan du Pont would retain its General Motors shares but be required to pass on to its stockholders the right to vote those shares. Christiana and Delaware would, in turn, be required to pass on the voting rights to the General Motors shares allocable to them to their own ***344** stockholders. Du Pont would be enjoined from having as a director, officer, or employee anyone who was simultaneously an officer or employee of General Motors, and no director, officer, or employee of du Pont could serve as a director of General Motors without court approval. Du Pont would be denied the right to acquire any additional General Motors stock except through General Motors' distributions of stock or subscription rights to its stockholders.

On June 6, 1958, General Motors submitted its objections to the Government's proposal. It argued, inter alia, that a divestiture order would severely depress the market value of the stock of both General Motors and du Pont, with consequent serious loss and hardship to hundreds of thousands of innocent investors, among them thousands of small trusts and charitable institutions; that there would be a similar decline in the market values of other automotive and chemical stocks, with similar losses to the stockholders of those companies; that the tremendous volume of General Motors stock hanging over the market for ten years would hamper the efforts of General Motors and other automobile manufacturers to raise equity capital; and that all this would have a serious adverse effect on the entire stock market and on general business activity. General Motors comprehensively contended that the Government plan would not be ‘in the public interest’ as required by the mandate of this Court.

The decrees proposed by the amici curiae were filed in August of 1958. These plans, like du Pont's, contained provisions for passing the vote on du ****1260** Pont's General Motors shares on to the ultimate stockholders of du Pont, Christiana, and Delaware, except that officers and directors of the three companies, their spouses, and other people living in their households, as well as other specified ***345** persons, were to be totally disenfranchised. Both plans also prohibited common directors, officers, or employees between du Pont, Christiana, and Delaware, on the one hand, and General Motors on the other. Further, both plans placed restrictions on trade relations between du Pont and General Motors. Amicus Dallstream, representing the du Pont stockholders, proposed in addition a program termed a ‘takedown,’ by which du Pont would create a new class of stock, ‘du Pont Special Common,’ which would have no rights in du Pont's General Motors stock and which du Pont stockholders could obtain, along with their allocable portion of the General Motors shares owned by du Pont, at times suitable to them, in exchange for their present du Pont common. This proposal would have different, and in several respects more favorable, tax consequences than those of the Government's plan. [4]

In a memorandum filed on September 26, 1958, the Government, on the assumption that divestiture was required under the Clayton Act, suggested various ways in which its decree might be modified to ameliorate its harsh tax consequences. The Government stated that it would have no objections to the modifications discussed in the memorandum but it did not submit amendments to its original proposal.

On the same day, the Government filed a motion for a preliminary injunction, seeking to restrain du Pont, Christiana, and Delaware from exercising their voting rights in General Motors stock, to prevent du Pont, Christiana, and Delaware from having any director, officer, or employee in common with General Motors or nominating any such person to serve in General Motors, ***346** and to prohibit further acquisitions of General Motors stock by the three corporations. The Government urged that since all parties were in substantial agreement on these measures as the minimum appropriate relief, the court should adopt them without delay. The court denied the motion on November 3, 1958, on the ground that the Government had failed to show a likelihood of irreparable injury in the absence of immediate relief and that, with final determination of the case not far distant, it would be undesirable to begin deciding issues piecemeal at that late date.

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After further preliminaries which need not be recounted, the trial of the issues on the appropriate relief commenced on February 16, 1959, and continued to a conclusion on April 9, 1959. The Government presented its evidence on twelve hearing days; the defendants and amici also presented evidence on twelve days; and the Government took four more hearing days for the presentation of rebuttal evidence. Briefs were filed and the case was submitted to the court in June 1959. The court's decision was announced on October 2, 1959.

The printed record of the proceedings below covers 3,340 pages. Of this, trial of the issues pertaining to the terms of the decree fills 2,380 pages. An additional 543 pages contain exhibits. In the course of the trial twenty-nine witnesses were called by the Government and thirty-two by the defendants and amici. The printed exhibits number 193 submitted by the Government, thirty-two by du Pont, thirty by General Motors, nine by Christiana and Delaware, and one by amicus Dallstream. The bulk of this mass of evidence bore principally upon disputes over the market and tax consequences of divestiture of du Pont's General Motors stock and upon the requirement of resort ****1261** to this remedy for the effective enforcement of s 7.

***347** On occasion the Government objected to the attention that was being focused on the details of its proposed decree. The Government insisted that its ultimate aim was not to further a specific plan but to obtain any reasonable order of divestiture. However, late in the trial the Government indicated that its original divestiture proposal stood before the court unamended in any detail.
'Mr. Reycraft (chief counsel for the Government): * * *.

'I might also add that it is rather an obvious thought that the judgment which we did file was approved by not only the Assistant Attorney General but the Attorney General, and that while I am authorized here to represent the Government, I have no authority to change the decisions they make.

'The Court: It is my understanding then that you are standing on the decree that you proposed before this hearing started?

'Mr. Reycraft: That is right, sir.

'Mr. Cox (counsel for du Pont): * * *.

'* * * I understand Mr. Reycraft's position now to be that he stands on the judgment that was filed. But if the Government should come in on its brief with a brand new proposal sometime, may it please the Court, we may find outselves in a position where we will have to come into Court and ask for some kind of an opportunity to have a look at that.

'The Court: That will depend entirely on the extent or the character of the deviation from the original proposal.

'Mr. Cox: I would assume that would be true.

***348** 'The Court: From what Mr. Reycraft has said, I am assuming that that is the decree, with probably minor changes.

'Mr. Reycraft: I have nothing further, your Honor.'[5] (Emphasis added throughout.)

Thus it appears that the Government stood on its original proposal, rather than on alternative suggestions.

And so one comes to consider how the court dealt with the issues presented by the parties.

III.

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After disposing of two preliminary questions—ruling in favor of the amenability of General Motors, Christiana, and Delaware, as parties not condemned as violators of s 7, to the enforcing power of the court, and against the amenability to direct enforcement of holders of both du Pont and Delaware stock who were not parties to the suit—the court thus defined the central issue before it: 'Under the mandate of the Supreme Court it is the responsibility of this Court to frame a judgment which will eliminate the effects of du Pont's acquisition of stock of General Motors which are offensive to the statute. The effect of the acquisition which the Supreme Court found to be offensive to the statute was the 'reasonable probability' that the acquisition might result in restraint or monopolization of the market for automotive fabrics and finishes. 353 U.S. 586, 595, 607, 77 S.Ct. 872, 1 L.Ed.2d 1057. Accordingly, the problem before this Court is one of devising a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist.' 177 F.Supp. at pages 12—13.

****1262** ***349** In discharging its duty under this mandate, particularly since relevant circumstances might offer a choice between effective alternatives, the court deemed it appropriate not to exclude from consideration the vast multiform interests at stake—both the hundreds of thousands of truly innocent stockholders and the bearing on the national economy of the nature of the disposition of du Pont's General Motors holdings.
'This does not mean that the private interests of the stockholders can outweigh the public interest in a judgment that will effectively dissipate the effects of the acquisition found to be unlawful. But it does mean that in the opinion of this Court the primary public purpose should be achieved so far as possible without inflicting unnecessary injury upon innocent stockholders in the various corporations involved. The purpose of the judgment should be remedial and not punitive. Hartford-Empire Co. v. United States, 323 U.S. 386, 409, 65 S.Ct. 373, 89 L.Ed. 322; United States v. National Lead Co., 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077. No harsh and oppressive consequences should be visited upon the stockholders unless it can be shown on the facts that these results are inescapable if a decree is to be framed that will comply with the mandate of the Supreme Court. The cases leave no doubt that these are considerations which the Court should weigh in the framing of its final judgment. United States v. American Tobacco Co., 221 U.S. 106, 185, 31 S.Ct. 632, 55 L.Ed. 663. Compare Timken Roller Bearing Co. v. United States, 341 U.S. 593, 604, 71 S.Ct. 971, 95 L.Ed. 1199.' 177 F.Supp. at pages 13—14.

The Government's first major contention—that by the terms of the Clayton Act the court had no choice but ***350** to order total divestiture—was rejected on the basis of an analysis of the statute and this Court's reaffirmation of the 'large discretion' possessed by the District Courts 'to model their judgments to fit the exigencies of the particular case.' The court proceeded to a consideration of the evidence introduced by the parties. The first subject was the tax impact of the Government's proposed decree. Extensive expert evidence (much of which was derived from a statistical survey found by the court to have been soundly and objectively conducted) indicated that individual stockholders of du Pont would pay income taxes at a rate of fifty percent to sixty percent under the Government's plant, and that the taxes payable by such persons could amount to $1,000,000,000 if the value of the General Motors shares were $50 per share, and approximately $770,000,000 if $40 per share. The capital gains tax on the sale of the General Motors stock allocable to Christiana and Delaware would be perhaps as much as $200,000,000. The court determined that variations of the Government's plan would also result in vast tax levies. If found, for example, that if a single distribution were employed to dispose of the 63,000,000 General Motors shares, at an assumed market value of $45 per share the total tax cost would be $588,044,000.

A second economic consequence of the Government's divestiture scheme would be its impact on the market value of the securities involved. The Government relied on three types of evidence to show that its plan would have little influence on the market prices of General Motors and du Pont stock. The first type was expert testimony that there was a regular flow of investment money coming into the market. However, upon detailed review of the testimony of a dozen witnesses, the court concluded that 'there was no convincing evidence in this category that any substantial portion of this investment ***351** money

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would be directed to buying General Motors stock at the true value of the stock, if the Government decree were in effect.' 177 F.Supp. at page 22.

****1263** The Government's second type of evidence relating to the market consequences of its decree was the statistical testimony of academic and professional analysts. The court noted that it was shown no charts or statistics relating to a situation 'remotely approaching' the forced sale of 2,000,000 shares of General Motors stock each year for ten years, attended by additional sales of both General Motors and du Pont stock for tax and other purposes. Further, it found that one Government expert admitted he would defer to the judgment of investment bankers in the matter of the price for which the General Motors stock could be sold; another testified that in the past an increase in stock supply of twenty percent had been associated with price declines of between ten and fifteen percent; the testimony of another Government witness was based on inadequately drawn statistical tables, and his demeanor on the witness stand deprived his evidence of credibility; a fourth witness' opinions had no foundation in factual evidence.

The Government's third type of evidence related to securities offerings in the recent past. The court determined that the circumstances of these offerings—i.e., their background, magnitude, timing and duration—made them dissimilar to a divestiture of du Pont's interest in General Motors. In any event most of these offerings did have a depressing effect on the market value of the stock involved. None of this evidence, the court found, gave assurance that the Government proposal would not cause serious loss on the sale of General Motors and du Pont stock during the divestiture period.

The defendants countered the Government's case with a variety of evidence. Two experienced underwriters testified that the Government's ten-year divestiture ***352** plan would result in a decline in the value of General Motors stock of from twenty percent to thirty percent; that heavy tax sales of du Pont would lower its price at least twenty-five percent; that distribution of General Motors stock in lieu of cash dividends would be even worse from this standpoint; that even an extension of the divestiture period to twenty years would not prevent declines in the neighborhood of fifteen percent; that a further loss estimated at from $1.50 to $2 per share sold in underwriting expense would be incurred by Christiana and Delaware; and, finally, that the trustee could never make the sales during the divestiture period anyway, since he could not realize a price, in the words of the Government's proposed final judgment, 'sufficiently high to reflect the fair value and true worth of the stock.'

Several trust management executives testified that because of the tax consequences of the Government's decree and the difficulties of allocating equitably the General Motors shares received as dividends by the trusts, they, and presumably others in their position throughout the country, would be forced to make mass sales of du Pont stock. Executives of several insurance companies and an investment trust company predicted declines in the value of General Motors stock and expressed an intention to buy it for their concerns only at considerably reduced prices. Many witnesses concurred in the view that the Government's decree would render future financing by General Motors highly uneconomic and very difficult to accomplish.

The court then appraised the evidence bearing on possible voting control of General Motors, under a decree of less than total divestiture, by corporations or individuals affiliated with du Pont. It determined that the Government's broadest grouping—individuals who were stockholders of Delaware, additional individuals named du Pont, and certain corporations in which both groups ***353** (sixty-five persons in all) own stock or on whose boards they sit—would, under the du Pont plan's 'pass-through' of voting rights, aggregate the vote of about eight percent of the total vote of General Motors. It was unclear to the court either ****1264** that this combination had a reasonable basis in fact or that, even if it did represent a cohesive block of votes, it was a large enough block to exercise any real control over General Motors. However, the court deemed it unnecessary to resolve these questions, since it intended to frame a decree to guarantee that concerted action by these stockholders would be precluded.

On the basis of its appraisal of the evidence, the court reached its essential conclusions. The first question was what provision to make with respect to du Pont's 63,000,000 shares of General Motors. It determined that a careful and detailed plan for a 'pass-through' of the votes of these shares to du Pont's stockholders and an injunction to prevent du Pont and General Motors from sharing common officers, directors, and employees were necessary. The court then considered whether title to the stock, stripped of these vital incidents of ownership, must also be taken from du Pont, 'in order to remove and to guard against the probability of restraint or monopolization of trade which was the consequence the Supreme Court found to be offensive to

the statute.' 177 F.Supp. at page 40. 'There is no evidence,' it concluded, 'on which the Court could make such a finding.' 177 F.Supp. at page 40.

'In essence, therefore, what would be left in du Pont would be the most sterile kind of an investment. The Court notes in this connection that Section 7 of the Clayton Act expressly excludes from its operation 'corporations purchasing such stock solely for investment and not using the same by voting or otherwise' to bring about anti-competitive effects. There would thus appear to be a recognition on the ***354** part of Congress that the holding of stock does not in all instances carry with it the power to bring about consequences offensive to the statute. The Court recognizes that the Supreme Court has held that in the past du Pont has not held its stock in General Motors solely for investment. This Court is of the opinion, however, that the divestiture and ancillary injunctive provisions referred to hereafter will be effective to assure that hereafter General Motors stock will be held by du Pont solely for investment.

'In the circumstances, therefore, the Court finds that there is nothing in the record made in the hearing on relief or in the record in the trial in chief which would support, even by inference, the conclusion that du Pont's possession of the bare legal title to General Motors stock, stripped of its right to vote and of its right to representation on the Board of General Motors, would create any possibility that the stock would have any influence on the practices and policies of General Motors or could be used in any way that would be inconsistent with the mandate of the Supreme Court.' 177 F.Supp. at page 41.

What was on the other side of the ledger? The evidence indicated that divestiture of legal title would visit upon thousands of innocent investors adverse tax and market consequences, always severe even if varying in detail depending on the variation of the Government's plan. The court concluded that any plan for divestiture of legal title to du Pont's interest in General Motors would either impair the value of the property interests involved or impose severe tax consequences on du Pont's stockholders. Moreover, any plan that produced as a by-product the accumulation of vast amounts of cash by du Pont would have the undesirable result ***355** of enhancing greatly du Pont's economic power and position. All this led the court to hold that total divestiture, while unnecessary to remove the anticompetitive consequences of du Pont's ownership of the General Motors stock, would impose unfair injury on the stockholders of those companies.

****1265** The court dealt with the Government's two objections to its result. The fear that block voting of the passed-through votes on the General Motors shares by investors who were related by blood or business interest would leave control of General Motors in the hands of du Pont's close associates was met by precluding the stockholders of Christiana and Delaware, as well as other specified persons, from voting their allocable shares of du Pont's General Motors stock. The objection that retention by du Pont of any financial stake in General Motors, even on behalf of its stockholders, would provide incentive to intercorporate favoritism between the two, while deemed merely a 'naked suggestion,' was answered by providing specific relief against preferential trade relations between du Pont and General Motors. In light of the proof and of these precautionary prohibitions, the court concluded that to order divestiture of du Pont's title to the General Motors stock would 'constitute a serious abuse of discretion.' 177 F.Supp. at page 49. [6]

***356** IV.

The questions presented by this appeal must be considered in the setting of the proceedings, summarized above, that led ****1266** to the District Court's conclusions in formulating its decree. Since the Court rejects the Government's ***357** claim that total divestiture is statutorily required upon a finding of a violation of s 7 of the Clayton Act, I need say no more about it.

If a District Court is not subject to any statutory requirement to order divestiture in a s 7 case, is it left without guidance or direction in fashioning an appropriate decree as a court of equity? Of course not. There is a body of authority, both procedural and substantive, by which it is to be guided. It is, however, well to remember that the wise admonition that general principles do not decide concrete cases has sharp applicability to equity decrees. Any apparently applicable policy or rule, abstractly stated,

must be related to the specific circumstances of a particular case in which it is invoked and applied. Care must be taken to consider phrases used in relation to the particular facts of the cases relied on.

One principle has comprehensive application. It is that courts of equity, as this Court advised the District Court in remanding the case to it to fashion the appropriate relief, 'are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.'' 353 U.S. at pages 607—608, 77 S.Ct. at page 885. This is a common-place, [7] but one of compelling importance. To forget it is to forget equity's special function and historic significance. The transcendence of this doctrine derives from the recognition ***358** that without it the effort to dispense equal justice under law would all too often be frustrated. The landmark sentences of Hecht Co. v. Bowles, 321 U.S. 321, 329—330, 64 S.Ct. 587, 591, 88 L.Ed. 754, express the principles that must guide the chancellor:

'We are dealing here with the requirements of equity practice with a background of several hundred years of history * * * The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims * * *'

If, indeed, equity's characteristic flexibility is deeply rooted in history, the administration of justice makes greater demands upon it now than ever before. As business transactions become increasingly complex, they multiply and complicate the issues presented to courts even in litigation of ordinary dimensions. How much more is this true of a suit of the magnitude and reach of the one before us, with inevitable impact far beyond the interests of the immediate parties. In such a case we need to be specially mindful that the purpose of equity jurisdiction is to adapt familiar principles of law to intricate, elusive, and unfamiliar facts. As one member of this Court recently put it: 'Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case.' United Steelworkers of America v. United States, 361 U.S. 39, 62, 71, 80 S.Ct. 1, 9, 4 L.Ed.2d 12 (dissenting opinion). [8]

****1267** ***359** The District Court was duty bound to exercise discretion—which means to weigh contending considerations and conflicting evidence as a matter of judgment—in framing a decree to meet the needs of the case. It could not escape exercising discretion—that is, exercising its judgment within an area of allowable choice—which this Court committed to it. Discretion precludes whimsy or caprice. Discretion means the judicial discretion of a court of equity. Where precedent or judicial tradition has established limitations on the chancellor's range of choice, he must respect them. What limitations confined the court below? Consideration of the relevant authorities on the formulation of antitrust decrees becomes necessary.

First, what was open to consideration in the District Court? Its overriding concern had to be for the protection of the public interest. It was its duty to hear all the evidence bearing on that question and in any conflict with private interests decisively to resolve doubts in favor of the general welfare. The account of the District Court's procedures, and of the considerations on which it reached its reflective conclusions, in Parts II and III of this opinion establishes, I submit, that it fully conformed to this essential requirement. Although it considered the Government's case on the likelihood of block voting of the votes of the General Motors shares passed through to Delaware and Christiana of doubtful ***360** strength, it sterilized those shares to prevent their being voted at all. Again, although it found no proof in the record to support the Government's 'naked suggestion' concerning the probability of future preferential trade relations between General Motors and du Pont, it constructed a set of prohibitions against such dealing between the two enterprises. As already noted, the court fashioned its decree in deference to its conception of its 'primary duty' to devise a judgment 'that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist.' 177 F.Supp. at page 13.

Did the District Court fail in its duty because it deemed relevant for consideration as one factor in striking the balance involved in its conclusion the consequences of divestiture to thousands upon thousands of blameless stockholders and other so-called private interests? The decisions of this Court gave full warrant to the District Court that it did not exceed its discretionary

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powers in doing so. The weighty words of United States v. American Tobacco Co., 221 U.S. 106, 185, 31 S.Ct. 632, 650, 55 L.Ed. 663, are apposite:

> 'In considering the subject * * * three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership ****1268** or otherwise, of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. * * *'

And in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 78, 31 S.Ct. 502, 523, 55 L.Ed. 619, the Court admonished that 'the fact must not be ***361** overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.' The importance of these considerations was reiterated in Continental Ins. Co. v. United States, 259 U.S. 156, 42 S.Ct. 540, 66 L.Ed. 871, with the Government actively championing their propriety, and suggesting that "it seemed wise not to amputate any more than was necessary to secure the great policy of the Sherman law." 259 U.S. at page 169, 42 S.Ct. at page 544. In United States v. United Shoe Machinery Co., 247 U.S. 32, 46, 38 S.Ct. 473, 478, 62 L.Ed. 968, the Court labeled dissolution a remedy 'extreme, even in its mildest demands' and counseled 'If there be need for this the difficulties of achievement should not deter; but the difficulties may admonish against the need * * *.' This holds for divestiture. [9]

This Court's decisions leave no doubt that it was proper for the District Court to attend to the likelihood of danger to the public welfare that might arise from the serious adverse market consequences of divestiture and to the likelihood of extensive loss to innocent investors through both market decline and tax levy. It is apparent that the Department of Justice recognized the relevance of the tax impact. In a statement on proposed legislation to alleviate the tax burden of divestiture decrees, Robert A. Bicks, then Acting Assistant Attorney General in charge of the Antitrust Division of the Justice Department, said:
'Bear in mind, the 1890 Sherman and the 1914 Clayton Acts, the basic antitrust statutes, became law before the income tax was a reality. And the landmark ***362** antitrust cases—dissolving illegal trusts and monopolies via divestiture—were largely a product of an era marked by no income tax or much lower tax rates. Indeed, there is real basis for concluding that some benchmark antitrust divestiture cases * * * might well not have been decreed had today's tax rates prevailed.' Bicks, Statement on H.R. 7361 and H.R. 8126 before the House Committee on Ways and Means, July 20, 1959, 4 Antitrust Bulletin 557 (1959).

It is obvious from the context of these remarks that their immediate objective was to smooth the way toward obtaining divestiture in this very case. [10]

In a case such as du Pont, in which the challenged transaction occurred approximately thirty years prior to the initiation of suit, the force of these considerations ****1269** is greatly enhanced. The relationship between General Motors and du Pont stood uncondemned by the Government through successive administrations throughout that period. This is not remotely to hint any form of estoppel against resort to divestiture as relief for the illegality, however belatedly established, were it otherwise the required means for correction of past misconduct or its future avoidance. I do maintain that, as this Court has recognized, it was altogether proper for the District Court—even incumbent upon it—to take 'account of what was done during that time —the many millions of dollars spent, the developments made, and the ***363** enterprises undertaken, the investments by the

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public that have been invited and are not to be ignored.' United States v. United States Steel Corp., 251 U.S. 417, 453, 40 S.Ct. 293, 299, 64 L.Ed. 343.

In short, the factors that influenced the District Court were fit considerations for judicial scrutiny. But we still have to inquire what criteria were open to the District Court for appraising the relevant variables and how that court's determinations are to be reviewed by this Court.

The very foundation for judgment in reviewing a District Court's decree in a case like this is the inherent nature of its task in adjudicating claims arising under the antitrust laws. The sweeping generality of the antitrust laws differentiates them from ordinary statutes. 'As a charter of freedom,' wrote Mr. Chief Justice Hughes for the Court, 'the (Sherman) Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.' Appalachian Coals, Inc., v. United States, 288 U.S. 344, 359—360, 53 S.Ct. 471, 474, 77 L.Ed. 825. This is no less true of the Clayton Act's prohibition 'where the effect * * * may be to substantially lessen competition.' 38 Stat. 730, 731. Correspondingly broad is the area within which a District Court must move to fit the remedy to the range of the outlawry. Far-reaching responsibility is vested in the court charged with fashioning a decree and the decree it fashions must be judged on review in light of this responsibility.
'In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. * * * They would not have been given, or allowed to keep, such authority in the anti-trust field, and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the surgical ruthlessness that ***364** might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.' United States v. United Shoe Machinery Corp., D.C., 110 F.Supp. 295, 348 (a decision affirmed by this Court without opinion, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910).

Partly on the basis of these views, the Attorney General's National Committee to Study the Antitrust Laws recommended that divestiture 'not be decreed as a penalty,' that it 'not be invoked where less drastic remedies will accomplish the purpose of the litigation,' and that possible disruption of industry and markets as well as effect on the public, investors, customers, and employees be taken into account. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 355—356. This statement fairly reflects the views of this Court, to the effect that a decree must not 'impose penalties in the guise of preventing future violations,' Hartford-Empire Co. v. United States, 323 U.S. 386, 409, 65 S.Ct. 373, 385, 89 L.Ed. 322; that the least harsh of available measures should be adopted when the Court is satisfied that they will be effective, e.g., ****1270** Timken Roller Bearing Co. v. United States, 341 U.S. 593, 603, 71 S.Ct. 971, 977, 95 L.Ed. 1199 (concurring opinion); and that injunctive relief may well be an adequate sanction against continued wrongdoing, id., 341 U.S. at page 604, 71 S.Ct. at page 977 (concurring opinion), and Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 77, 31 S.Ct. 502, 522, 55 L.Ed. 619. Add to this that we have recognized a sound basis in reason for distinguishing palpably illegal activity from conduct that was arguably permissible, and for dealing with the latter less severely than the former. See Federal Trade Comm. v. National Lead Co., 352 U.S. 419, 429, 77 S.Ct. 502, 509, 1 L.Ed.2d 438; United States v. United States Gypsum Co., 340 U.S. 76, 89—90, 71 S.Ct. 160, 169—170, 95 L.Ed. 89.

***365** The principles thus pronounced by this Court were duly heeded by the District Court. The salient feature of its attitude was its disposition to favor the Government's claims on behalf of the public interest. It even rejected the defendants' argument, based on National Lead and Gypsum, supra, [11] that it should take into account that the question whether the acquisition violated the law was, to say the least, reasonably in doubt, and that therefore no blame should be imputed to the officers and directors of the defendants. 'The Court * * * approaches the problem on the assumption that the appropriate relief is that which is necessary to eliminate the effects of the acquisition offensive to the statute, notwithstanding that the acquisition might reasonably have been believed to be permissible when made.' 177 F.Supp. at page 14.

The Government urges, however, that divestiture is, if not the required relief, at least the normal and ordinary relief in stock acquisition cases. The contention is that, as the safest remedy, i.e., the surest of anticompetitive results, divestiture is, and has been considered to be, the preferred relief for all save a few exceptional cases. Support for this view is drawn from a long line of cases in which divestiture has been decreed. The contention calls for detailed scrutiny.

The objectives of divestiture were thus stated in Schine Chain Theatres, Inc., v. United States, 334 U.S. 110, 128—129, 68 S.Ct. 947, 957, 92 L.Ed. 1245:
'Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It ***366** deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act * * *.' [12]

This tripartite formulation summarizes the considerations that have guided this Court's rulings on divestiture. In Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, the source of modern antitrust law, the defendants were charged with combination and conspiracy to restrain trade in and monopolize interstate and foreign commerce in petroleum products, in violation of ss 1 and 2 of the Sherman Act. The lower court found both provisions offended by a combination of seven individual defendants and thirty-eight corporate defendants to lodge in the Standard Oil Co. of New Jersey substantial stock ownership of and control over many subsidiary corporations in the ****1271** petroleum industry and to cause Standard Oil to manage their affairs so as to throttle competition, findings sustained here. Coming to the problem of remedy, while acknowledging that 'ordinarily' injunctive relief would be adequate to restrain repetition of the illegal activity, the Court found that the situation presented by the Standard Oil aggrandizement called for stiffer measures: 'But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies.' 221 U.S. at page 77, 31 S.Ct. at page 523. (Emphasis added.) Recognition of this need—that intercorporate ***367** connections call for severance when persistence of the relationship in itself would constitute a violation of the antitrust laws—has been steadfastly adhered to. 'Dissolution of the combination will be ordered where the creation of the combination is itself the violation.' United States v. Crescent Amusement Co., 323 U.S. 173, 189, 65 S.Ct. 254, 262, 89 L.Ed. 160. It has been the controlling factor in the majority of the divestiture decrees in the intervening years, since most situations before the Court have similarly demanded this relief. [13]

The second element of the Schine rationale—depriving antitrust defendants 'of the benefits of their conspiracy'—is equally well established. United States v. Crescent Amusement Co., 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160, was a Sherman Act suit in which certain motion picture exhibitors were found to have used their combined buying power to obtain terms more favorable than those received by their independent competitors in licensing films, whereby independents were driven from the field and a monopoly in theater operation developed in many towns. Each corporate exhibitor was required to divest itself of its interest in any other corporate defendant or its affiliates.
'Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their ***368** unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy.' 323 U.S. at page 189, 65 S.Ct. at page 262. [14]

The third Schine objective of divestiture was 'to break up or render impotent the monopoly power which violates the Act.' The role of divestiture in meeting this need was spelled out in the Crescent case:
'Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. ****1272** If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in

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combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. * * *.' 323 U.S. at pages 189—190, 65 S.Ct. at page 262.

These, then, are the justifiable bases for compelling divestiture. They explain and define the authorities on which the Government relies. Do they, or any of them, invalidate the District Court's refusal to decree divestiture in the circumstances of this case and justify this Court in overruling that court's exercise of discretion in finding divestiture uncalled for?

The notion that the very existence of an interest by du Pont in the stock of General Motors constitutes a violation of the Act need not detain us. It cannot be questioned that, as the Court's opinion on the merits in this case makes clear, the violation condemned is the effect of the stockholding on competition, not the ***369** stockholding as such.[15] To be sure, this illegal tendency to lessen competition may be ended by termination any intercorporate relationship. But just as surely the unlawfulness of the tendentious stockholding may be ended by preventing its harmful consequences.

Nor is divestiture required as a means of depriving the defendant of the fruits of its violation. While du Pont's interest in General Motors might serve as a tool for the accomplishment of antitrust violations, it is certainly not the fruit of any such violation. The fruit—the benefit—of a violation of s 7 is the unfair competitive position of one corporation through its stock interest in another. Effective termination of this competitive advantage was precisely the design of the elaborate injunctive provisions devised by the District Court.

The final desideratum—vitiating a monopoly power—is not literally applicable to the du Pont situation, since the District Court dismissed the monopoly charge under the Sherman Act and this Court refused to review the dismissal. 353 U.S. at page 588, note 5, 77 S.Ct. at page 875. But even if this criterion were carried over into a Clayton Act setting to enforce the desirability of avoiding every potentiality of monopoly power, there is no compulsion to decree divestiture. Such ***370** argumentative power does not preclude restraints, by injunctive relief, that render it 'impotent,' to use the language of the Schine case. Nor is there in the record before us any basis in fact for the fears that have evoked the application of this principle in previous divestiture cases. There is no finding in this case, as there were in Crescent and Schine, of a deliberate conspiracy aimed at the destruction of competition. We cannot point in this case, as we have on occasion in the past, to any blatantly anticompetitive scheme. See, e.g., United States v. Reading Co., 253 U.S. 26, 59, 40 S.Ct. 425, 433, 64 L.Ed. 760. Instead we have only the finding that 'there is a reasonable ****1273** probability that the acquisition is likely to result in the condemned restraints,' 353 U.S. at page 607, 77 S.Ct. at page 884, i.e., to restrain commerce. Moreover, the Court explicitly ruled executive misconduct out of the case —'without any design to overreach anyone, including du Pont's competitors.' 353 U.S. at page 607, 77 S.Ct. at page 884.

Even in the Crescent case, the Court voiced its concern for the future only by way of support for its conclusion that the District Court's severance of the defendants could not be reversed for abuse of discretion. 323 U.S. at page 190, 65 S.Ct. at page 262. The Court sustained, rather than overturned, the lower court's judgment. To infer that the Court would have found an abuse of discretion had the District Court in Crescent limited itself to a decree of injunctive relief is an unwarranted assumption. But the Government in effect draws such an inference for the purpose of this case, even though the facts of du Pont's violation do not faintly resemble the offense of the movie exhibitors in Crescent. When the powerful interests of James J. Hill and J. Pierpont Morgan coalesce to place in one controlling parent the stock of the Great Northern and Northern Pacific Railways, Northern Securities Co. v. United States, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679; when the Standard Oil Co. or the American Tobacco Co. obtain monopoly positions in their vast industrial empires, see ***371** Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, and United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663; when the rail carriers controlling the means of transportation of anthracite coal combine to destroy a potential competitor, United States v. Reading Co., 226 U.S. 324, 33 S.Ct. 90, 57 L.Ed. 243, the facts demand the major surgery of divestiture—destruction of the offending combinations. But to hold that the treatment of these conscious conspiracies to restrain trade and

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to achieve monopoly power is compelling precedent for determining the relief necessary and appropriate to remedy the only wrong judicially found by this Court under s 7, is to treat situations flagrantly different as though they were the same. Surely there is merit to the notion of shaping the punishment to fit the crime, even beyond the precincts of the Mikado's palace.

The grounds thus canvassed furnish the relevant considerations for this Court's review of the District Court's decree. The obvious must be restated. We do not sit to draft antitrust decrees de novo. This is a court of appeal, not a trial court. We do not see the witnesses, sift the evidence in detail, or appraise the course of extended argument, session after session, day after day. (A review of Part III of this opinion abundantly shows the extent to which the District Court's appraisal of the credibility of witnesses, analysis of expert testimony, and reconciliation of the claims of counsel entered into the painstaking process that led to the court's views on complicated issues and ultimately to the formulation of its decree.) In short, this Court does not partake of the procedure and is not charged with the responsibility demanded of the court entrusted with the task of devising the details of a decree appropriate for the governance of a vastly complicated situation arising out of unique circumstances. By its nature, this Court, as an appellate tribunal, lacks the means—the procedural facilities—to evolve a decree in a case like this. For these reasons this ***372** Court sent this case back to the District Court, quoting in part (353 U.S. at page 608, 77 S.Ct. at page 885), without specific limitation, the comprehensively general guidelines of an earlier case:
‘The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case.’ ****1274** International Salt Co. v. United States, 332 U.S. 392, 400—401, 68 S.Ct. 12, 17, 92 L.Ed. 20. [16]

To tell a trial judge that he has discretion in certain matters is to tell him that there is a range of choices available to him. It is to tell him that the responsibility is his, and that he will not be reversed except for straying outside the permissible range of choice, i.e., for abuse of discretion. See, e.g., United States v. Crescent Amusement Co., 323 U.S. 173, 189, 65 S.Ct. 254, 262, 89 L.Ed. 160; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 600—601, 71 S.Ct. 971, 975—976, 95 L.Ed. 1199. In sustaining the judgment in Lorain Journal Co. v. United States, 342 U.S. 143, 156, 72 S.Ct. 181, 188, 96 L.Ed. 162, the Court stated its standard for upholding the trial court's decree as simply that ‘The decree is reasonably consistent with the requirements of the case and remains within the control of the court below.’ (Emphasis in the original.) Certainly we ought not to reverse the carefully wrought results of a conscientious trial judge without a showing amounting almost to a demonstration that he exceeded the fair limits of judicial choice which this Court explicitly reposed in him. [17]

***373** When a district judge has failed to accord parties an adequate hearing or has been otherwise wanting in the administration of fair procedure, there is the best of reasons for this Court to secure for them the full measure of judicial consideration which they are owed but failed to receive. But when, as in this case, the comprehensiveness of the hearing, the full consideration of the issues, both through evidence and argument, the evident diligence and searching competence of the judge—reflected throughout the long hearing—and his care in expounding the reasons for his judgment demonstrate a deep awareness of the duty with which this Court charged him without any restrictions on his task except that he was entrusted ‘with large discretion,’ reversal of the lower court's result can be justified only by a showing of patent misconception of ***374** governing law or want of ****1275** conscientious regard for ‘the exigencies of the particular case.’ When judged by the relevant decisions and pronouncements of this Court, such legal defects or inadequacies are impressively disproved by this record.

It may be suggested that however faithfully the trial court abided by the other teachings of this Court, it forgot one, namely, ‘that relief, to be effective, must go beyond the narrow limits of the proven violation.’ United States v. United States Gypsum Co., 340 U.S. 76, 90, 71 S.Ct. 160, 170, 95 L.Ed. 89. See International Salt Co. v. United States, 332 U.S. 392, 400, 68 S.Ct. 12, 17, 92 L.Ed. 20. This principle is important but it carries no warrant for reversal in this case. It has already been pointed out that the District Court specifically applied this principle in significant provisions of its decree. This Court found a danger of restraint of trade only in the market for automobile fabrics and finishes. The District Court nevertheless extended the injunctive provisions of its decree to all trade relations between du Pont and General Motors, regardless of the products

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involved. This Court proceeded on the assumption that the officers and directors of the companies had acted honorably and in the best interests of their respective corporations. Yet the District Court, responsive to the Government's urging, though without substantial evidence in the record, chose to sterilize the voting power not only of du Pont's officers and directors, but also of a major block of its large shareholders, the shareholders of Christiana and Delaware. In fact, the District Court exceeded the Government's requests in several substantial respects. This is true with respect to the injunction against cooperative and preferential business practices between du Pont and General Motors, [18] the prohibition against interlocking corporate personnel, ***375** [19] and the detail of the retention of jurisdiction and reopening clauses. [20]

Moreover, the principle of extending relief beyond the narrow limits of the violation has an important limiting corollary. The trial court is not authorized to order relief which it is without findings to support. 'A full exploration of facts is usually necessary in order properly to draw such a decree.' Associated Press v. United States, 326 U.S. 1, 22, 65 S.Ct. 1416, 1426, 89 L.Ed. 2013. This Court has unhesitatingly reversed remedial action by the lower courts, both for and against the Government, when wanting in supporting findings. See Hartford-Empire Co. v. United States, 323 U.S. 386, 418, 65 S.Ct. 373, 89 L.Ed. 322; Schine Chain Theatres, Inc., v. United States, 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245; United States v. Paramount Pictures, 334 U.S. 131, 170—174, 68 S.Ct. 915, 935—937, 92 L.Ed. 1260; Hughes v. United States, 342 U.S. 353, 357—358, 72 S.Ct. 306, 308, 96 L.Ed. 394. But if findings on questions of fact, or mixed questions of law and fact, are essential to the formulation of a decree, it becomes virtually impossible to develop a basis for a divestiture order at this stage on this record. The District Court found that once all of du Pont's ties to General Motors, save its stock interest, were severed the record is barren of justification for an inference of reasonable probability of restraint of trade. Conversely, it found that the tax and market consequences of divestiture would be so onerous that, in the absence of any serious anticompetitive danger, it would have constituted an abuse of discretion to enter such a decree. These conclusions were based in significant measure on the firsthand factual analysis ****1276** that only a trial judge is in a position to make. For the Court to require divestiture, thereby overturning a trial court judgment ***376** founded on an appraisal of voluminous conflicting evidence and opinion, is in effect to displace the trial court's function as a fact-finder.

The Government suggests that possibly, in 'exceptional' cases, some remedy other than divestiture may suffice, but that this is not the 'exceptional' case. If this is not an 'exceptional' case, what would be? Is it really tenable to regard this an ordinary, a conventional, a run-of-the-mill case?

Du Pont began to acquire General Motors stock while World War I was still in progress. It owned that stock openly for three decades before this suit was instituted to challenge the validity of the acquisition. During that period the number of General Motors and du Pont stockholders expanded from a few thousand to many hundreds of thousands. The value of the General Motors stock greatly increased. The tax laws were substantially changed. The District Court has fashioned a closely knit network of provisions to prevent preferential dealings between General Motors and du Pont. So certain was it that divestiture would, on the basis of its findings, work great and unjustifiable loss on wholly innocent investors, that it considered a divestiture order beyond its discretionary power. The precedents of this Court to which the District Court could look for guidance in the discharge of its duty permitted, at the least, the inferences (1) that the framing of the decree lay within its discretion, (2) that within the scope of that discretion it was free to consider all relevant consequences, both public and private, of the plans proposed, (3) that it was under no compulsion to order divestiture, (4) that there was ample reason to avoid a harsh remedy if it were to conclude that a less severe one would be effective, (5) that both the facts and the formulated reasoning of prior divestiture cases made them distinguishable from the ***377** du Pont problem, and (6) that unless the District Court abused its discretion by disregarding this Court's guides for its decision, its judgment would stand on review. In the face of all this, it is indeed 'exceptional' for this Court to upset the lower court's judgment that its decree met the needs established in the proceeding before it.

The essential appeal of the Government's position lies in its excitation of fear of any intercorporate relationship between two such colossi as du Pont and General Motors. It is easy to calm this fear by a requirement of divestiture. Insofar as the Court yields to that fear, it is strange, indeed, that this was not obvious to the Court when it found the illegality for which it directed the District Court to evolve a corrective remedy. Not a single consideration now advanced by the Court for directing divestiture

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was not available when the case was originally here. For not one of these considerations is based on evidence elicited at the hearing before the District Court, directed by this Court, for determining the relief. Such a limitation on the discretionary decree-fashioning power, upon full hearing in the District Court, certainly could not have been in this Court's mind when it remitted that function to the District Court, otherwise it would have spoken its mind and not left it all to the 'large discretion' of the court. In any event it requires prophetic confidence to conclude that that decree is so obviously inadequate as to require reversal before it can be tried in practice. Neither the record when the case was first here nor the facts adduced at the hearing on molding the decree give warrant for this Court to set aside the trial court's finding on the improbability of future restraint of trade in view of the safeguarding terms of the decree. If the Court were to allow the District Court's maturely considered scheme for protecting the dominant public interest ***378** with less than 'surgical ruthlessness' ****1277** to proceed, time might show that the relief granted by the District Court was well based, and that this Court's willingness to give it a try properly averted reasonably founded fear of serious economic dislocation.

Reversal by way of commanding divestiture is a 'judgment from speculation,' carrying with it irreversible consequences, whereas the District Court's decree leaves the door open for 'judgment from experience,' Tanner v. Little, 240 U.S. 369, 386, 36 S.Ct. 379, 384, 60 L.Ed. 691, under its clauses retaining jurisdiction to modify the judgment in the light of changed circumstances. Resort to such safety valve clauses is an established practice in review of antitrust remedies, for they allow the courts to act on the basis of informed hindsight rather than treacherous conjecture. In International Salt Co. v. United States, 332 U.S. 392, 401, 68 S.Ct. 12, 17, 92 L.Ed. 20, the Court enunciated this principle in language pertinent here:

'The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of 'enabling any of the parties to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the judgment' and 'for the amendment, modification or termination of any of the provisions * * *.' We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us * * *.'

***379** The wisdom of this policy is reflected in many of our decisions.[21] Why should it not guide the Court's decision in this case? The Government's presentation boils down to an unsubstantiated assertion that any tie between du Pont and General Motors gravely jeopardizes the play of competitive forces. When we are asked to assume this, we are asked to assume that even after a decree fashioned with the circumspection with which this was, a 'reasonable probability' exists that the defendants will, in a wholly undefined way, combine to violate the antitrust laws. We are asked, in essence, to enter Alice's Wonderland where proof is unnecessary and the governing rule of law is 'Sentence first, verdict after.'

The District Court here concluded that the relief it devised would dispel all potential restraints upon free competition as effectively as would divestiture, while divestiture was likely to cause serious economic disturbance unwarranted by a need for that remedy. Neither in its procedures nor in its consideration of the data presented to it did the court fail to discharge the obligations placed upon it by the decisions of this Court and by the only instruction—to exercise 'large discretion'—given it by the Court in this case. In no way did the District Court abuse the discretion entrusted to it. Its judgment should therefore be affirmed.

All Citations

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Footnotes

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1 Since a holding that the Clayton Act had been violated sufficed to dispose of the case, we did not decide whether du Pont had also violated the Sherman Act. See 353 U.S. at page 588 note 6, 77 S.Ct. at page 875.

2 In this case, however, a majority of the Court substantially modified the District Court's decree, in spite of expressions of deference written into the principal opinion.

3 In Crescent Amusement the Court relied in part on the fact that the district judge had initially found the violation of law. This circumstance was said to enhance the deference owed to the district judge's determination of the measures appropriate to eliminate the violation, 323 U.S. at page 185, 65 S.Ct. at page 260. This factor is not present in the case before us.

4 32 Stat. 823, as amended, 15 U.S.C. s 29, 15 U.S.C.A. s 29. The purpose of this statute was to expedite determination of antitrust cases by allowing the Attorney General to obtain a special Circuit (now District) Court of several judges by filing a certificate of public importance under s 1 of the Act, 32 Stat. 823, as amended, 15 U.S.C. s 28, 15 U.S.C.A. s 28 (no such certificate was filed in this case), and by providing for direct appeal to the Supreme Court from the decree of the trial court, whether composed of one or several judges, such appeal to be within this Court's obligatory jurisdiction. Congress was moved by the 'far-reaching importance of the cases arising under (the) antitrust laws * * *.' 36 Cong.Rec. 1679 (remarks of Senator Fairbanks, Feb. 4, 1903). See also H.R.Rep. No. 3020, 57th Cong., 2d Sess., 2 (1903).

5 In one case this elimination of the normal review by the Court of Appeals almost prevented there being any review of the District Court at all. See United States v. Aluminum Co. of America, 1943, 320 U.S. 708, 64 S.Ct. 73, 88 L.Ed. 415 (noting the absence of a quorum in this Court to hear an Expediting Act appeal from a District Court). But Congress acted to keep such an important matter from going unreviewed, see H.R.Rep. No. 1317, 78th Cong., 2d Sess. (1944), and enacted a special statute, 58 Stat. 272, 15 U.S.C. s 29, 15 U.S.C.A. s 29, pursuant to which this Court immediately certified the case to a Circuit Court of Appeals, 1944, 322 U.S. 716, 64 S.Ct. 1281, 88 L.Ed. 1557, which proceeded to decide the appeal. 2 Cir., 1945, 148 F.2d 416. See also United States v. United States District Court, 1948, 334 U.S. 258, 68 S.Ct. 1035, 92 L.Ed. 1351.

6 Government counsel at the trial advised the District Court that he had no authority to suggest modes of divestiture different from the plan presented by the Government to the District Court. Appellees suggest that the Government is thus estopped from urging other modes of divestiture on this appeal. But plainly, under the rule of Continental Insurance, no stipulation by the Government could circumscribe this Court's power to see that its mandate is carried out.

7 Bills were introduced in the Eighty-sixth Congress to ameliorate the income-tax consequences of gain on disposition of stock pursuant to orders enforcing the antitrust laws. See Hearings on S. 200 before the Senate Committee on Finance, 86th Cong., 1st Sess. (1959); Hearings on H.R. 8126 before the House Committee on Ways and Means, 86th Cong., 1st Sess. (1959); H.R.Rep. No. 1128, 86th Cong., 1st Sess. (1959).

8 See, e.g., United States v. Crescent Amusement Co., 1944, 323 U.S. 173, 189, 65 S.Ct. 254, 262, 89 L.Ed. 160; United States v. Corn Products Refining Co., D.C.S.D.N.Y.1916, 234 F. 964, 1018, appeal dismissed on motion of appellant 1919, 249 U.S. 621, 39 S.Ct. 291, 63 L.Ed. 805; United States v. E. I. du Pont de Nemours & Co., C.C.D.Del.1911, 188 F. 127, 153, modified D.C.D.Del.1921, 273 F. 869; In re Crown Zellerbach Corp., CCH Trade Reg.Rep.1957—1958 26,923, at p. 36,462 (F.T.C.1958).

9 We reject the Government's argument that the Federal Trade Commission and other administrative agencies charged with the duty of enforcing the statute are required by s 11, of the Clayton Act to order divestiture whenever they find a violation of s 7, and that therefore courts acting under s 15 must give the same relief. Even if the administrative agencies were so limited, a question which we do not decide, Congress would not be deemed to have restricted the

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broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent. Hecht Co. v. Bowles, 1944, 321 U.S. 321, 329, 64 S.Ct. 587.

10 The words were actually used of s 3 of the Clayton Act, but they are equally applicable to s 7.

11 See Northern Securities Co. v. United States, 1904, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679; Standard Oil Co. of New Jersey v. United States, 1911, 221 U.S. 1, 31 S.Ct. 502; United States v. American Tobacco Co., 1911, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663; United States v. Union Pacific R. Co., 1912, 226 U.S. 61, 33 S.Ct. 53, 57 L.Ed. 124, modified 1913, 226 U.S. 470, 33 S.Ct. 162, 57 L.Ed. 306; United States v. Reading Co., 1912, 226 U.S. 324, 33 S.Ct. 90, 57 L.Ed. 243, modified 1913, 228 U.S. 158, 33 S.Ct. 509, 57 L.Ed. 779; United States v. Reading Co., 1920, 253 U.S. 26, 40 S.Ct. 425, 64 L.Ed. 760, modified after remand Continental Ins. Co. v. United States, 1922, 259 U.S. 156, 42 S.Ct. 540, 66 L.Ed. 871; United States v. Lehigh Valley R. Co., 1920, 254 U.S. 255, 41 S.Ct. 104, 65 L.Ed. 253; United States v. Southern Pacific Co., 1922, 259 U.S. 214, 42 S.Ct. 496, 66 L.Ed. 907; United States v. Crescent Amusement Co., 1944, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160; Hartford-Empire Co. v. United States, 1945, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322, clarified 1945, 324 U.S. 570, 65 S.Ct. 815, 89 L.Ed. 1198; United States v. National Lead Co., 1947, 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077; Schine Chain Theatres, Inc. v. United States, 1948, 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245; United States v. Paramount Pictures, Inc., 1948, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260; Besser Mfg. Co. v. United States, 1952, 343 U.S. 444, 72 S.Ct. 838, 96 L.Ed. 1063; International Boxing Club of New York v. United States, 1959, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270; United States v. E. I. du Pont de Nemours & Co., C.C.D.Del.1911, 188 F. 127, modified D.C.D.Del.1921, 273 F. 869; United States v. Lake Shore & M.S.R. Co., D.C.S.D.Ohio 1912, 203 F. 295, modified D.C.S.D.Ohio 1916, 281 F. 1007; United States v. International Harvester Co., D.C.D.Minn.1914, 214 F. 987, modification denied D.C.D.Minn.1926, 10 F.2d 827 affirmed 1927, 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302; United States v. Eastman Kodak Co., D.C.W.D.N.Y.1915, 226 F. 62, decree entered D.C.W.D.N.Y.1916, 230 F. 522, appeal dismissed on motion of appellant 1921, 255 U.S. 578, 41 S.Ct. 321, 65 L.Ed. 795; United States v. Corn Products Refining Co., D.C.S.D.N.Y.1916, 234 F. 964, appeal dismissed on motion of appellant 1919, 249 U.S. 621, 39 S.Ct. 291, 63 L.Ed. 805; United States v. Minnesota Mining & Mfg. Co., D.C.D.Mass.1950, 92 F.Supp. 947, modified D.C.D.Mass.1951, 96 F.Supp. 356; United States v. Imperial Chemical Indus., Ltd., D.C.S.D.N.Y.1951, 100 F.Supp. 504, decree entered D.C.S.D.N.Y.1952, 105 F.Supp. 215.

In many of these cases the courts referred to 'dissolution' or 'divorcement' instead of 'divestiture.' These terms have traditionally been treated as to a large degree interchangeable, and we so regard them. See Hale and Hale, Market Power: Size and Shape Under the Sherman Act 370 (1958); Adams, Dissolution, Divorcement, Divestiture: the Pyrrhic Victories of Antitrust, 27 Ind.L.J. 1, note 1 (1951).

12 Appellees rely on several Clayton Act consent decrees granting relief short of divestiture, but the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context.

13 See, e.g., Maryland & Virginia Milk Producers Ass'n v. United States, 1960, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880; Aluminum Co. of America v. Federal Trade Comm., 3 Cir., 1922, 284 F. 401, certiorari denied 1923, 261 U.S. 616, 43 S.Ct. 362, 67 L.Ed. 828, modification denied, 3 Cir., 1924, 299 F. 361. United States v. New England Fish Exchange, D.C.D.Mass.1919, 258 F. 732, modification denied D.C.D.Mass.1923, 292 F. 511, on which appellees place great reliance, is not a clear exception. It is true that defendants there were allowed to retain the asserts (not the stock) of one of the eight corporations whose stock they had acquired in violation of s 7. But probably acquisition of only one

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of those corporations' stock would not have been illegal. The only clear exception in the courts is American Crystal Sugar Co. v. Cuban-American Sugar Co., D.C.S.D.N.Y.1957, 152 F.Supp. 387, affirmed on the defendant's appeal, 2 Cir., 1958, 259 F.2d 524. But the authority of that case is somewhat diminished by the fact that it was brought not by the Government but by a private plaintiff, and by the absence of any discussion in the opinion of the issue of divestiture vel non. See 152 F.Supp. at pages 400—401 and note 16.

14 See Hale and Hale, op cit., supra, note 11, at 370.

15 For the significance of such long habit, see North American Co. v. Securities & Exchange Comm., 1946, 327 U.S. 686, 693, 66 S.Ct. 785, 790, 90 L.Ed. 945; United States v. Imperial Chemical Indus., Ltd., D.C.S.D.N.Y.1952, 105 F.Supp. 215, 236—237; Douglas, Democracy and Finance 33 (1940).

16 United States v. Corn Products Refinding Co., D.C.S.D.N.Y.1916, 234 F. 964, 1018, appeal dismissed on motion of appellant 1919, 249 U.S. 621, 39 S.Ct. 291, 63 L.Ed. 805; 12 Ala.L.Rev. 214, 220—221 (1959); Note, 56 Col.L.Rev. 420, 430 (1956) ('contempt citations are a poor method of restoring competition * * *'); Berge, Some Problems in the Enforcement of the Antitrust Laws, 38 Mich.L.Rev. 462, 469 (1940).

17 See Hale and Hale, op. cit., supra, note 11, at 379.

18 United States v. Bausch & Lomb Optical Co., 1944, 321 U.S. 707, 726, 64 S.Ct. 805, 815, 88 L.Ed. 1024; Local 167 of International Brotherhood of Teamsters, etc. v. United States, 1934, 291 U.S. 293, 299, 54 S.Ct. 396, 399, 78 L.Ed. 804. Cf. William R. Warner & Co. v. Eli Lilly & Co., 1924, 265 U.S. 526, 532, 44 S.Ct. 615, 618, 68 L.Ed. 1161 (same principle applied to private litigation).

1 38 Stat. 731, 15 U.S.C. (1946 ed.) s 18, 15 U.S.C.A. s 18. The suit was brought prior to the enactment in 1950 of amendments to the Act which, by their terms, are inapplicable to previous acquisitions. 64 Stat. 1125, 15 U.S.C. s 18, 15 U.S.C.A. s 18.

2 26 Stat. 209, as amended, 50 Stat. 693, 15 U.S.C. ss 1, 2, 15 U.S.C.A. ss 1, 2.

3 See 353 U.S. at page 588, 77 S.Ct. at page 875, note 5.

4 For a discussion of amicus Dallstream's recommendations, see the opinion of the District Court, 177 F.Supp. at pages 9—10.

5 Transcript of Proceedings, March 31, 1959.

6 A summary of the detailed provisions of the decree carrying out the direction and purposes of the court's opinion follows.

Du Pont, Christiana, and Delaware were enjoined from acquiring additional General Motors stock except as stock or rights might be distributed to them as stockholders by General Motors.

Du Pont, Christiana, and Delaware, on the one hand, and General Motors, on the other, were prohibited to have common officers, directors, or employees. The former three were also restrained from nominating any person to be an officer or director of General Motors.

Du Pont and General Motors were compelled to terminate, for as long as du Pont, Christiana, or Delaware own any General Motors stock, any agreement between them which (1) requires General Motors to purchase from du Pont a

specified percentage of its requirements of any product (with certain time provisos), or (2) grants to either concern exclusive patent rights, or grants to du Pont preferential rights to make or sell any chemical discovery of General Motors.

Du Pont, Christiana, and Delaware were restrained, for the same period, from entering into any joint business venture with General Motors and from knowingly holding stock in any business enterprise in which General Motors holds stock. The same restrictions were applied to General Motors.

Du Pont was enjoined, again for the stock-holding period, from dealing with General Motors with respect to du Pont products on terms more favorable than those on which it is willing to deal with General Motors' competitors. The same restriction was placed upon General Motors in its dealings with du Pont.

Du Pont, Christiana, and Delaware, and their directors and officers, and the members of the families of their directors and officers who reside in the same household with them, were enjoined from exercising their voting rights in General Motors stock owned by them or allocable to them under the decree, and from attempting to influence anyone voting General Motors stock.

The vote on the General Motors shares owned by du Pont was ordered 'passed through' to the stockholders of du Pont (subject to the prohibitions of the preceding paragraph), and the notification and proxy machinery necessary to effectuate this provision was outlined. Provision was made for the appointment of a monitor of these voting procedures.

A procedure was established whereby du Pont and Christiana might sell or otherwise dispose of their General Motors stock.

Two separate provisions preserved the right of any party to apply to the court for modification of the decree in the event of a change of circumstances (such as the advent of legislative tax relief) and for further orders necessary for carrying out the judgment.

Du Pont, Christiana, and Delaware were directed to obtain from their officers and directors, and their families, written consents to be bound by the voting restrictions of the judgment.

For the purpose of securing compliance with the judgment, the Department of Justice was authorized to conduct reasonable inspections of the records and interviews with the employees of du Pont, Christiana, and Delaware and to apply to the court for similar privileges as to General Motors upon a showing of good cause.

7 See, e.g., United States v. Crescent Amusement Co., 323 U.S. 173, 185, 65 S.Ct. 254, 260, 89 L.Ed. 160; International Salt Co. v. United States, 332 U.S. 392, 400—401, 68 S.Ct. 12, 17, 92 L.Ed. 20; Besser Mfg. Co. v. United States, 343 U.S. 444, 449—450, 72 S.Ct. 838, 841—842, 96 L.Ed. 1063; International Boxing Club of New York, Inc., v. United States, 358 U.S. 242, 253, 79 S.Ct. 245, 251, 3 L.Ed.2d 270.

8 In addition, see, for example, McClintock, Equity (2d ed. 1948), s 30:

'A court of equity may frame its decree so as to protect to the greatest extent possible the conflicting interests of the parties; to accomplish this it may require the performance of conditions, may experiment to determine how best to accomplish its purpose, and may use either the negative or the positive form of decree.'

Pomeroy, Equity Jurisprudence (5th ed. 1941), s 109:

'Equitable remedies * * * are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.'

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9 See also United States v. Terminal R. Ass'n, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810; United States v. American Can Co., D.C., 234 F. 1019; United States v. Great Lakes Towing Co., D.C., 208 F. 733; D.C., 217 F. 656.

10 The Bicks statement itself makes repeated reference to the pending du Pont case. See 4 Antitrust Bulletin, at 561, n. 7, 562, n. 8, 567, n. 13. And the Committee Report and Hearings recur again and again to the serious tax problem engendered by the case. See H.R.Rep. No. 1128, 86th Cong., 1st Sess.; Hearings on H.R. 8126 before the House Committee on Ways and Means, 86th Cong., 1st Sess.; Hearings on S. 200 before the Senate Committee on Finance, 86th Cong., 1st Sess.

11 And see United States v. United Shoe Machinery Corp., D.C., 110 F.Supp. 295, 348.

12 For a similar statement see United States v. Minnesota Mining & Mfg. Co., D.C., 96 F.Supp. 356, 357.

'In general the object of the remedies under the anti-trust laws is to prevent the continuance of wrongful conduct, and to deprive the wrongdoers of the fruits of their unlawful conduct, and to prevent the creation anew of restraint forbidden by law * * *.'

13 In the Crescent case, 323 U.S., at page 189, 65 S.Ct. at page 262, the Court placed in this category Northern Securities Co. v. United States, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679; Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619; United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663; United States v. Union Pacific R. Co., 226 U.S. 61, 33 S.Ct. 53, 57 L.Ed. 124; United States v. Reading Co., 253 U.S. 26, 40 S.Ct. 425, 64 L.Ed. 760; United States v. Lehigh Valley R. Co., 254 U.S. 255, 41 S.Ct. 104, 65 L.Ed. 253; and United States v. Southern Pacific Co., 259 U.S. 214, 42 S.Ct. 496, 66 L.Ed. 907. Our survey of these cases sustains this classification. To this list may be added International Boxing Club v. United States, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270, in which the Court accepted the District Court's finding that "The great evil" in the case "was the combination that Wirtz and Norris caused and created by joining up with Madison Square Garden." 358 U.S. at page 256, 79 S.Ct. at page 253.

14 See additionally, International Boxing Club v. United States, 358 U.S. 242, 253, 79 S.Ct. 245, 251, 3 L.Ed.2d 270.

15 This construction of the statute had long been settled. See International Shoe Co. v. Federal Trade Comm., 280 U.S. 291, 297—298, 50 S.Ct. 89, 91, 74 L.Ed. 431.

'Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition * * *.

'Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree * * * that is to say, to such a degree as will injuriously affect the public * * *.'

16 To the same effect, see Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013; Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162; International Boxing Club v. United States, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270; Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880.

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17 The Court should not allow itself to be led to a contrary conclusion by the language of United States v. United States Gypsum Co., 340 U.S. 76, 71 S.Ct. 160, 95 L.Ed. 89; or Hartford-Empire Co. v. United States, 324 U.S. 570, 65 S.Ct. 815, 89 L.Ed. 1198. The Gypsum case says only that the District Court's conclusions should not be subject to reversal merely for gross abuse of discretion, and that this Court must intervene when the provisions of the decree are 'inappropriate.' I could not agree more, either with these views or with those expressed in the remarks that formed their preface:

'The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court.' 340 U.S. at page 89, 71 S.Ct. at page 169.

In Hartford-Empire the opinion of the Court says 'it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him.' 324 U.S. at page 571, 65 S.Ct. at page 817. These words, if given the reading they seem most readily to bear, are certainly objectionable, for our power to review the antitrust relief determinations of trial judges is not in doubt. If this language is to be read to authorize de novo consideration here of all the details of a lower court's decree, then it marks a real aberration in this branch of the law. Whatever respect such a view might once have deserved, it deserves none now, for our recent decisions have uniformly adopted the principle of appellate deference to trial court discretion. See cases cited in notes 7 and 16, supra.

18 Compare the Government's proposed Article IX with Section V of the final judgment.

19 Compare the Government's proposed Article X with Section IV of the final judgment.

20 Compare the Government's proposed Article XIII with Sections IX and XII of the final judgment.

21 See Associated Press v. United States, 326 U.S. 1, 22—23, 65 S.Ct. 1416, 1425—1426, 89 L.Ed. 2013; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 604, 71 S.Ct. 971, 977, 95 L.Ed. 1199 (opinion of Mr. Justice Reed); Lorain Journal Co. v. United States, 342 U.S. 143, 157, 72 S.Ct. 181, 188, 96 L.Ed. 162; Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 473, 80 S.Ct. 847, 857, 4 L.Ed.2d 880.

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83 S.Ct. 1715
Supreme Court of the United States

UNITED STATES, Appellant,
v.
The PHILADELPHIA NATIONAL BANK et al.

No. 83
|
Argued Feb. 20, 1963.
|
Decided June 17, 1963.

Synopsis
Civil action brought by the United States under the Sherman Act and the Clayton Act to enjoin a proposed merger of two Philadelphia banks. The United States District Court for the Eastern District of Pennsylvania, 201 F.Supp. 348, rendered judgment for defendants after trial, and the plaintiff appealed. The Supreme Court, Mr. Justice Brennan, held that the merger was forbidden by the Clayton Act and was required to be enjoined.

Reversed and remanded with direction.

Mr. Justice Harlan and Mr. Justice Stewart dissented.

Attorneys and Law Firms

****1719** ***322** Lee Loevinger, Washington, D.C., for appellant.

***323** Philip Price, Philadelphia, Pa., for appellees.

Opinion

****1720** Mr. Justice BRENNAN delivered the opinion of the Court.

The United States, appellant here, brought this civil action in the United States District Court for the Eastern District of Pennsylvania under s 4 of the Sherman Act, 15 U.S.C. s 4, and s 15 of the Clayton Act, 15 U.S.C. s 25, to enjoin a proposed merger of The Philadelphia National Bank (PNB) and Girard Trust Corn Exchange Bank (Girard), appellees here. The complaint charged violations of s 1 of the Sherman Act, 15 U.S.C. s 1, and s 7 of the Clayton Act, 15 U.S.C. s 18. [1] From a judgment for appellees after trial, see D.C., 201 F.Supp. 348, the United States appealed to this Court under s 2 of the Expediting Act, 15 U.S.C. s 29. Probable jurisdiction was noted. 369 U.S. 883, 82 S.Ct. 1156, 8 L.Ed.2d 285. We reverse the judgment of the District Court. We hold that the merger of appellees is forbidden by s 7 of the ***324** Clayton Act and so must be enjoined; we need not, and therefore do not, reach the further question of alleged violation of s 1 of the Sherman Act.

I. THE FACTS AND PROCEEDINGS BELOW.

A. The Background: Commercial Banking in the United States.

Because this is the first case which has required this Court to consider the application of the antitrust laws to the commercial banking industry, and because aspects of the industry and of the degree of governmental regulation of it will recur throughout our discussion, we deem it appropriate to begin with a brief background description. [2]

****1721** ***325** Commercial banking in this country is primarily unit banking. That is, control of commercial banking is diffused throughout a very large number of independent, local banks—13,460 of them in 1960—rather than concentrated in a handful of nationwide banks, as, for example, in England and Germany. There are, to be sure, in addition to the independent banks, some 10,000 branch banks; but branching, which is controlled largely by state law—and prohibited altogether by some States—enables a bank to extend itself only to state lines and often not that far. [3] It is also the case, of course, that many banks place loans and solicit deposits outside their home area. But with these qualifications, it remains true that ours is essentially a decentralized system of community banks. Recent years, however, have witnessed a definite trend toward concentration. Thus, during the decade ending in 1960 the number of commercial banks in the United ***326** States declined by 714, despite the chartering of 887 new banks and a very substantial increase in the Nation's credit needs during the period. Of the 1,601 independent banks which thus disappeared, 1,503, with combined total resources of well over $25,000,000,000, disappeared as the result of mergers.

Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. For banks do not merely deal in but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply. [4] Furthermore, the power to accept demand deposits makes banks the intermediaries in most financial transactions (since transfers of substantial moneys are almost always by check rather than by cash) and, concomitantly, the repositories of very substantial individual and corporate funds. The banks' use of these funds is conditioned by the fact that their working capital consists very largely of demand deposits, which makes liquidity the guiding principle of bank lending and investing policies; thus it is that banks are the chief source of the country's short-term business credit.

Banking operations are varied and complex; ‘commercial banking’ describes a congeries of services and credit devices. [5] But among them the creation of additional ***327** money and credit, the management ****1722** of the checking-account system, and the furnishing of short-term business loans would appear to be the most important. For the proper discharge of these functions is indispensable to a healthy national economy, as the role of bank failures in depression periods attests. It is therefore not surprising that commercial banking in the United States is subject to a variety of governmental controls, state and federal. Federal regulation is the more extensive, and our focus will be upon it. It extends not only to the national banks, i.e., banks chartered under federal law and supervised by the Comptroller of the Currency, see 12 U.S.C. s 21 et seq. For many state banks, see 12 U.S.C. s 321, as well as virtually all the national banks. 12 U.S.C. s 222, are members of the Federal Reserve System (FRS), and more than 95% of all banks, see 12 U.S.C. s 1815, are insured by the Federal Deposit Insurance Corporation (FDIC). State member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks.

The governmental controls of American banking are manifold. First, the Federal Reserve System, through its open-market operations, see 12 U.S.C. ss 263(c), 353—359, control of the rediscount rate, see 12 u.s.c. s 357, and modifications of reserve requirements, see ***328** 12 U.S.C. ss 462, 462b, regulates the supply of money and credit in the economy and thereby indirectly regulates the interest rates of bank loans. This is not, however, rate regulation. The Reserve System's activities are only designed to influence the prime, i.e., minimum, bank interest rate. There is no federal control of the maximum, although all banks, state and national, are subject to state usury laws where applicable. See 12 U.S.C. s 85. In the range between the maximum fixed by state usury laws and the practical minimum set by federal fiscal policies (there is no law against undercutting the prime rate but bankers seldom do), bankers are free to price their loans as they choose. Moreover, charges for other banking services, such as service charges for checking privileges, are free of governmental regulation, state or federal.

Entry, branching, and acquisitions are covered by a network of state and federal statutes. A charter for a new bank, state or national, will not be granted unless the invested capital and management of the applicant, and its prospects for doing sufficient

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business to operate at a reasonable profit, give adequate protection against undue competition and possible failure. See, e.g., 12 U.S.C. ss 26, 27, 51; 12 CFR s 4.1(b); Pa.Stat.Ann., Tit. 7, s 819—306. Failure to meet these standards may cause the FDIC to refuse an application for insurance, 12 U.S.C. ss 1815, 1816, and may cause the FDIC, Federal Reserve Board (FRB), and Comptroller to refuse permission to branch to insured, member, and national banks, respectively. 12 U.S.C. ss 36, 321, 1828(d). Permission to merge, consolidate, acquire assets, or assume liabilities may be refused by the agencies on the same grounds. 12 U.S.C. (1958 ed., Supp. IV) s 1828(c), note 8, infra. Furthermore, national banks appear to be subject to state geographical limitations on branching. See 12 U.S.C. s 36(c).

***329** Banks are also subject to a number of specific provisions aimed at ensuring sound banking practices. For example, member banks of the Federal Reserve ****1723** System may not pay interest on demand deposits, 12 U.S.C. s 371a, may not invest in common stocks or hold for their own account investment securities of any one obligor in excess of 10% of the bank's unimpaired capital and surplus, see 12 U.S.C. ss 24 Seventh, 335, and may not pay interest on time or savings deposits above the rate fixed by the FRB, 12 U.S.C. s 371b. The payment of interest on deposits by nonmember insured banks is also federally regulated. 12 U.S.C. (1958 ed., Supp. IV) s 1828(g); 12 CFR, 1962 Supp., Part 329. In the case of national banks, the 10% limit on the obligations of a single obligor includes loans as well as investment securities. See 12 U.S.C. s 84. Pennsylvania imposes the same limitation upon banks chartered under its laws, such as Girard. Pa.Stat.Ann. (1961 Supp.), Tit. 7, s 819—1006.

But perhaps the most effective weapon of federal regulation of banking is the broad visitorial power of federal bank examiners. Whenever the agencies deem it necessary, they may order 'a thorough examination of all the affairs of the bank,' whether it be a member of the FRS or a nonmember insured bank. 12 U.S.C. ss 325, 481, 483, 1820(b); 12 CFR s 4.2. Such examinations are frequent and intensive. In addition, the banks are required to furnish detailed periodic reports of their operations to the supervisory agencies. 12 U.S.C. ss 161, 324, 1820(e). In this way the agencies maintain virtually a day-to-day surveillance of the American banking system. And should they discover unsound banking practices, they are equipped with a formidable array of sanctions. If in the judgment of the FRB a member bank is making 'undue use of bank credit,' the Board may suspend the bank from the use of the credit facilities of the FRS. 12 U.S.C. s 301. The FDIC has an even more formidable ***330** power. If it finds 'unsafe or unsound practices' in the conduct of the business of any insured bank, it may terminate the bank's insured status. 12 U.S.C. s 1818(a). Such involuntary termination severs the bank's membership in the FRS, if it is a state bank, and throws it into receivership if it is a national bank. 12 U.S.C. s 1818(b). Lesser, but nevertheless drastic, sanctions include publication of the results of bank examinations. 12 U.S.C. ss 481, 1828(f). As a result of the existence of this panoply of sanctions, recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings. 1 Davis, Administrative Law (1958), s 4.04.

Federal supervision of banking has been called '(p)robably the outstanding example in the federal government of regulation of an entire industry through methods of supervision. * * * The system may be one of the most successful (systems of economic regulation), if not the most successful.' Id., s 4.04, at 247. To the efficacy of this system we may owe, in part, the virtual disapperance of bank failures from the American economic scene. [6]

B. The Proposed Merger of PNB and Girard.

The Philadelphia National Bank and Girard Trust Corn Exchange Bank are, respectively, the second and third largest of the 42 commercial banks with head offices in the Philadelphia metropolitan area, which consists of the City of Philadelphia and its three contiguous counties in Pennsylvania. The home county of both banks is the ***331** city itself; Pennsylvania law, however, permits branching ****1724** into the counties contiguous to the home county, Pa.Stat.Ann. (1961 Supp.), Tit. 7, s 819—204.1, and both banks have offices throughout the four-county area. PNB, a national bank, has assets of over $1,000,000,000, making

it (as of 1959) the twenty-first largest bank in the Nation. Girard a state bank is a member of the FRS and is insured by the FDIC; it has assets of about $750,000,000. Were the proposed merger to be consummated, the resulting bank would be the largest in the four-county area, with (approximately) 36% of the area banks' total assets, 36% of deposits, and 34% of net loans. It and the second largest (First Pennsylvania Bank and Trust Company, now the largest) would have between them 59% of the total assets, 58% of deposits, and 58% of the net loans, while after the merger the four largest banks in the area would have 78% of total assets, 77% of deposits, and 78% of net loans.

The present size of both PNB and Girard is in part the result of mergers. Indeed, the trend toward concentration is noticeable in the Philadelphia area generally, in which the number of commercial banks has declined from 108 in 1947 to the present 42. Since 1950, PNB has acquired nine formerly independent banks and Girard six; and these acquisitions have accounted for 59% and 85% of the respective banks' asset growth during the period, 63% and 91% of their deposit growth, and 12% and 37% of their loan growth. During this period, the seven largest banks in the area increased their combined share of the area's total commercial bank resources from about 61% to about 90%.

In November 1960 the boards of directors of the two banks approved a proposed agreement for their consolidation under the PNB charter. By the terms of the agreement, PNB's stockholders were to retain their share certificates, which would be deemed to represent an equal ***332** number of shares in the consolidated bank, while Girard's stockholders would surrender their shares in exchange for shares in the consolidated bank, receiving 1.2875 such shares for each Girard share. Such a consolidation is authorized, subject to the approval of the Comptroller of the Currency, by 12 U.S.C. (1958 ed., Supp. IV) s 215 [7] But under the Bank Merger Act of 1960, 12 U.S.C. (1963 ed., Supp. IV) s 1828(c), the Comptroller may not give his approval until he has received reports from the other two banking agencies and the Attorney General respecting the probable effects of the proposed transaction on competition. [8] All three reports ****1725** advised that the proposed ***333** merger would have substantial anticompetitive effects in the Philadelphia metropolitan area. However, on February 24, 1961, the Comptroller approved the merger. No opinion was rendered at that time. But as required by s 1828(c), the Comptroller explained the basis for his decision to approve the merger in a statement to be included in his annual report to Congress. As to effect upon competition, he reasoned that '(s)ince there will remain an adequate number of alternative sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition it was concluded that the over-all effect upon competition would not be unfavorable.' He also stated that the consolidated bank 'would be far better able to serve the convenience and needs of its community by being of material assistance to its city and state in their efforts to attract new industry and to retain existing industry.' The day after the Comptroller approved the ***334** merger, the United States commenced the present action. No steps have been taken to consummate the merger pending the outcome of this litigation.

C. The Trial and the District Court's Decision.

The Government's case in the District Court relied chiefly on statistical evidence bearing upon market structure and on testimony by economists and bankers to the effect that, notwithstanding the intensive governmental regulation of banking, there was a substantial area for the free play of competitive forces; that concentration of commercial banking, which the proposed merger would increase, was inimical to that free play; that the principal anticompetitive effect of the merger would be felt in the area in which the banks had their offices, thus making the four-county metropolitan area the relevant geographical market; and that commercial banking was the relevant product market. The defendants, in addition to offering contrary evidence on these points, attempted to show business justifications for the merger. They conceded that both banks were economically strong and had sound management, but offered the testimony of bankers to show that the resulting bank, with its greater prestige and increased lending limit, [9] would be better able to compete with large out-of-state ****1726** (particularly New York) banks, would attract new business to Philadelphia, and in general would promote the economic development of the metropolitan area. [10]

***335** Upon this record, the District Court held that: (1) the passage of the Bank Merger Act of 1960 did not repeal by implication the antitrust laws insofar as they may apply to bank mergers; (2) s 7 of the Clayton Act is inapplicable to bank mergers because

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banks are not corporations 'subject to the jurisdiction of the Federal Trade Commission'; (3) but assuming that s 7 is applicable, the four-county Philadelphia metropolitan area is not the relevant geographical market because PNB and Girard actively compete with other banks for bank business throughout the greater part of the northeastern United States; (4) but even assuming that s 7 is applicable and that the four-county area is the relevant market, there is no reasonable probability that competition among commercial banks in the area will be substantially lessened as the result of the merger; (5) since the merger does not violate s 7 of the Clayton Act, a fortiori it does not violate s 1 of the Sherman Act; (6) the merger will benefit the Philadelphia metropolitan area economically. The District Court also ruled that for the purposes of s 7, commercial banking is a line of

commerce; the appellees do not contest this ruling. II. THE APPLICABILITY OF SECTION 7 OF THE CLAYTON ACT TO BANK MERGERS.

A. The Original Section and the 1950 Amendment.

By its terms, the present s 7 reaches acquisitions of corporate stock or share capital by any corporation engaged ***336** in commerce, but it reaches acquisitions of corporate assets only by corporations 'subject to the jurisdiction of the Federal Trade Commission.' The FTC, under s 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. s 45(a)(6).[11] Therefore, ****1727** if the proposed merger be deemed an assets acquisition, it is not within s 7.[12] Appellant argues vigorously that a merger is crucially different from a pure assets acquisition,[13] and ***337** appellees argue with equal vigor that it is crucially different from a pure stock acquisition.[14] Both positions, we think, have merit; a merger fits neither category neatly. Since the literal terms of s 7 thus do not dispose of our question, we must determine whether a congressional design to embrace bank mergers is revealed in the history of the statute. The question appears to be one of first impression; we have been directed to no previous case in which a merger or consolidation was challenged under s 7 of the Clayton Act, as amended, where the acquiring corporation was not subject to the FTC's jurisdiction.

When it was first enacted in 1914, s 7 referred only to corporate acquisitions of stock and share capital; it was silent as to assets acquisitions and as to mergers and consolidations. ***338** Act of October 15, 1914, c. 323, s 7, 38 Stat. 731—732, note 18, infra. It is true that the omission may not have been an oversight. Congress' principal concern was with the activities of holding companies, and specifically with the practice whereby corporations secretly acquired control of their competitors by purchasing the stock of those companies. Although assets acquisitions and mergers were known forms of corporate amalgamation at the time, their no less dangerously anticompetitive effects may not have been fully apparent to the Congress.[15] Still, the statutory language, read in the light of the overriding congressional purpose to ****1728** control corporate concentrations tending to monopoly, lent itself to a construction whereby s 7 would have reached at least mergers and consolidations. It would hardly have done violence to the language so to have interpreted the vague term 'share capital,' see 30 Geo.Wash.L.Rev. 1024, 1027—1028 (1962), or to have adopted the view that: 'where the assets are exchanged for the stock of the purchasing company, assuming that the two companies were previously in competition, it is apparent that the seller has acquired stock in a competing company * * * (and) therefore that in effecting the merger section 7 was violated and hence the distribution of the stock received by the selling company to its shareholders and its subsequent dissolution are no bar to proceedings by the government to set aside the purchase.' Handler, Industrial Mergers and the Anti-Trust Laws, 32 Col.L.Rev. 179, 266 (1932).[16]

But the courts found mergers to be beyond the reach of s 7, even when the merger technique had supplanted ***339** stock acquisitions as the prevalent mode of corporate amalgamation. United States v. Celanese Corp. of America, 91 F.Supp. 14 (D.C.S.D.N.Y.1950); see Thatcher Mfg. Co. v. Federal Trade Comm'n and Swift & Co. v. Federal Trade Comm'n, decided together with Federal Trade Comm'n v. Western Meat Co., 272 U.S. 554, 47 S.Ct. 175, 71 L.Ed. 405; Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, 291 U.S. 587, 54 S.Ct. 532, 78 L.Ed. 1007.[17] As a result, s 7 ****1729** became largely ***340** a dead letter. Comment, 68 Yale L.J. 1627, 1629—1630 (1959); see Federal Trade Commission, The Merger Movement: A Summary Report (1948), 1, 3—6; Henderson, The Federal Trade Commission (1924), 40. Meanwhile, this Court's decision

in United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533, stirred concern whether the Sherman Act alone was a check against corporate acquisitions. Note, 52 Col.L.Rev. 766, 768 (1952).

It was against this background that Congress in 1950 amended s 7 to include an assets-acquisition provision. Act of December 29, 1950 (Celler-Kefauver Antimerger Act), c. 1184, 64 Stat. 1125—1126, 15 U.S.C. s 18.[18] ***341** The legislative history is silent on the specific questions why the amendment made no explicit reference to mergers, why assets acquisitions by corporations not subject to FTC jurisdiction were not included, and what these omissions signify. Nevertheless, the basic congressional design clearly emerges and from that design the answers to these questions may be inferred. Congress primarily sought to bring mergers within s 7 and thereby close what it regarded as a loophole in the section.[19] But, in addition, it sought ****1730** to reach transactions such as that involved in Columbia Steel, which was a simple purchase ***342** of assets and not a merger.[20] In other words, Congress contemplated that the 1950 amendment would give s 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of s 7. Thus, the stock-acquisition and assets-acquisition provisions, read together, reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the spectrum. See pp. 1726—1727, and notes 13, 14, supra. So construed, the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of s 7 only assets acquisitions by such corporations when not accomplished by merger.

***343** This construction is supported by a number of specific considerations.
First. Any other construction would be illogical and disrespectful of the plain congressional purpose in amending s 7, because it would create a large loophole in a statute designed to close a loophole. It is unquestioned that the stock-acquisition provision of s 7 embraces every corporation engaged in commerce, including banks. And it is plain that Congress, in amending s 7, considered a distinction for antitrust purposes between acquisition of corporate control by purchase of stock and acquisition by merger unsupportable in reason, and sought to overrule the decisions of this Court which had recognized such a distinction.[21] If, therefore, mergers in industries outside ***344** the FTC's ****1731** jurisdiction were deemed beyond the reach of s 7, the result would be precisely that difference in treatment which Congress rejected. On the other hand, excluding from the section assets acquisitions not by merger in those industries does not appear to create a lacuna of practical importance.[22]

***345** Second. The Congress which debated the bill to amend s 7 was fully aware of the important differences between a ****1732** merger and a pure purchase of assets. For example, Senator Kilgore, remarked:
'When you talk about mergers, you are talking about a stock transaction. * * *

'* * * (A)ctually what you do is merge the stockholdings of both corporations, and instead of that—I am thinking in practical terms—you merge the corporate entities of the two corporations and you get one corporation out of it, and you issue stock in the one corporation in lieu of the stock in the other corporation, whereupon the stock of the corporation which had been merged is canceled by the new corporation, and you have one corporation handling the operation of two. So it really is a stock transaction in the final wind-up, regardless of what you call it. But what I call a purchase of assets is where you purchase physical assets, things upon which you could lay your hand, either in the records or on the ground * * *.' Hearings before a Subcommittee of ***346** the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 176; to the same effect, see, e.g., id., at 100, 139, 320—325.

Plainly, acquisition of 'assets' as used in amended s 7 was not meant to be a simple equivalent of acquisition by merger, but was intended rather to ensure against the blunting of the antimerger thrust of the section by evasive transactions such as had rendered the original section ineffectual. Thus, the stock-acquisition provision of s 7, though reenacted in haec verba by the 1950 amendment, must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer. And see note 22, supra. This seems to be the point of Congressman Patman's

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remark, typical of many, that: 'What this bill does is to put all corporate mergers on the same footing, whether the result of the acquisitions of stock or the acquisition of physical assets.' Hearings, supra, at 126. To the same effect is the House Report on the bill to amend s 7: 'The bill retains language of the present statute which is broad enough to prevent evasion of the central purpose. It covers not only purchase of assets or stock but also any other method of acquisition * * *. It forbids not only direct acquisitions but also indirect acquisitions * * *.' H.R.Rep.No.1191, 81st Cong., 1st Sess. 8—9.

Third. The legislative history shows that the objective of including the phrase 'corporation subject to the jurisdiction of the Federal Trade Commission' in s 7 was not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section. The predominant focus of the hearings, ***347** debates, and committee reports was upon the powers of the FTC. The decisions of this Court which had uncovered the loophole in the original s 7—Thatcher, Swift, and Arrow-Hart—had not rested directly upon the substantive coverage of s 7, but rather upon the limited scope of the FTC's divestiture powers under s 11. See note 17, supra. There were intimations that the courts' power to enforce s 7 might be far greater. See Thatcher Mfg. Co. v. Federal Trade Comm'n, supra, 272 U.S., at 561, 47 S.Ct, at 178, 71 L.Ed. 405; Swift & Co. v. Federal Trade Comm'n, supra, 272 U.S., at 563, 47 S.Ct., at 178—179, 71 L.Ed. 405; Federal Trade Comm'n v. Eastman Kodak Co., 274 U.S. 619, 624, 47 S.Ct. 688, 689—690, 71 L.Ed. 1238; Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, supra, 291 U.S., at 598—599, 54 S.Ct., at 537, 78 L.Ed. 1007; Irvine, The Uncertainties of Section 7 of the Clayton Act, 14 Cornell L.Q. 28 (1928). Thus, ****1733** the loophole was sometimes viewed as primarily a gap in the FTC's jurisdiction.[23] Furthermore, although the Clayton Act has always provided for dual enforcement by court and agency, see 15 U.S.C. s 25; United States v. W. T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303; United States Alkali Export Assn. v. United States, 325 U.S. 196, 208, 65 S.Ct. 1120, 1127, 89 L.Ed. 1554, prior to the 1950 amendment enforcement of s 7 was left largely to the FTC. Martin, Mergers and the Clayton Act (1959), 205, 219; Montague, The Celler Anti-Merger Act: An Administrative Problem in an Economic Crisis, ***348** 37 A.B.A.J. 253 (1951). And the impetus to amend s 7 came in large part from the FTC. See, e.g., Martin, supra, 187—194; Federal Trade Commission, Annual Reports, 1928, pp. 18—19; 1940, pp. 12—13; 1948, pp. 11—22; The Merger Movement: A Summary Report (1948). Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction. Congress' choice of this means of underscoring the FTC's role in enforcing s 7 provides no basis for a construction which would undercut the dominant congressional purpose of eliminating the difference in treatment accorded stock acquisitions and mergers by the original s 7 as construed.

Fourth. It is settled law that '(i)mmunity from the antitrust laws is not lightly implied.' People of State of California v. Federal Power Comm'n, 369 U.S. 482, 485, 82 S.Ct. 901, 903—904, 8 L.Ed.2d 54. Cf. United States v. Borden Co., 308 U.S. 188, 198—199, 60 S.Ct. 182, 188—189, 84 L.Ed. 181; United States v. Southern Pac. Co., 259 U.S. 214, 239—240, 42 S.Ct. 496, 501—502, 66 L.Ed. 907. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of s 7 that Congress wished to confer a special dispensation upon the banking industry; if Congress had so wished, moreover, surely it would have exempted the industry from the stock-acquisition as well as the assets-acquisition provision.

Of course, our construction of the amended s 7 is not foreclosed because, after the passage of the amendment, some members of Congress, and for a time the Justice Department, voiced the view that bank mergers were still beyond the reach of the section.[24] '(T)he views of a subsequent ***349** Congress form a hazardous basis for inferring the intent of an earlier one.' United States v. Price, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334; see ****1734** Rainwater v. United States, 356 U.S. 590, 593, 78 S.Ct. 946, 2 L.Ed.2d 996; United States v. United Mine Workers, 330 U.S. 258, 282, 67 S.Ct. 677, 91 L.Ed. 884; cf. United States v. E. I. Du Pont De Nemours & Co., 353 U.S. 586, 590, 77 S.Ct. 872, 875—876, 1 L.Ed.2d 1057. This holds true even though misunderstanding of the scope of s 7 may have played some part in the passage of the Bank Merger Act of 1960.[25] There is a question, to which we shall shortly turn, whether there exists such inconsistency between the Bank

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Merger Act and s 7, as we now construe it, as to require a holding that s 7 must be deemed repealed pro tanto; but that is a different question from whether misunderstanding of the scope of s 7 is relevant to our task of defining what scope Congress gave the section in 1950. When Congress enacted the Bank Merger Act, the applicability of s 7 to bank mergers was still to be authoritatively determined; it was a subject of speculation. Thus, this is not a case in which our 'earlier decisions are part of the arch on which the new structure rests, (and) we (must) refrain from disturbing them lest we change the design that Congress fashioned.' State Board of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 458, 82 S.Ct. 1380, 1385, 8 L.Ed.2d 620. Cf. note 17, supra. The design fashioned in the Bank Merger Act was predicated upon uncertainty as to the scope of s 7, and we do no violence to that design by dispelling the uncertainty.

***350** B. The Effect of the Bank Merger Act of 1960.

Appellees contended below that the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, 12 U.S.C. (1958 ed., Supp. IV) s 1828(c), note 8, supra, immunizes approved mergers from challenge under the federal antitrust laws.[26] We think the District Court was correct in rejecting this contention. No express immunity is conferred by the Act.[27] Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored,[28] and ***351** have only been found ****1735** in cases of plain repugnancy between the antitrust and regulatory provisions.[29] Two recent cases, Pan American World Airways v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325, and People of State of California v. Federal Power Comm'n, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54, illustrate this principle. In Pan American, the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers; in contrast, the banking agencies have authority neither to enforce the antitrust laws against mergers, cf. note 22, supra, nor to grant immunity from those laws.

In the California case, on the other hand, the Court held that the FPC's approval of a merger did not confer immunity from s 7 of the Clayton Act, even though, as in the instant case, the agency had taken the competitive factor into account in passing upon the merger application. See 369 U.S., at 484—485, 487—488, 82 S.Ct., at 903—904, 905, 8 L.Ed.2d 54. We think California is controlling here. Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision.[30] Plainly, the ***352** range and scope of administrative powers under the Bank Merger Act bear little resemblance to those involved in Pan American.

Nor die Congress, in passing the Bank Merger Act, embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure. On the contrary, the legislative history of the Act seems clearly to refute any suggestion that applicability of the antitrust laws was to be affected. Both the House and Senate Committee Reports stated that the Act would not affect in any way the applicability of the antitrust laws to bank acquisitions. H.R.Rep. No. 1416, 86th Cong., 2d Sess. 9; S.Rep. No. 196, 86th Cong., 1st Sess. 3. See also, e.g., 105 Cong.Rec. 8131 (remarks of Senator Rebertson, the Act's sponsor). Moreover, bank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject. Rate regulation in the banking industry is limited and largely indirect, see p. 1722, supra; banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business —place loans and solicit deposits—where ****1736** they please. The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition. Indeed, that there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of

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competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws. Cf. Kaysen and Turner, Antitrust Policy (1959), 206.

***353** We note, finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. See Far East Conference v. United States, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576; Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv.L.Rev. 436, 464 (1954).[31] Court jurisdiction is not thereby ousted, but only postponed. See General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433, 60 S.Ct. 325, 331, 84 L.Ed. 361; Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 498—499, 78 S.Ct. 851, 861—862, 2 L.Ed.2d 926; 3 Davis, Administrative Law (1958), 1—55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies,[32] the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced. Cf. United States v. Western Pac. R. Co., 352 U.S. 59, 69, 77 S.Ct. 161, 167—168, 1 L.Ed.2d 126; Retail Clerks Int'l Assn. v. Schermerhorn, 373 U.S. 746, 756, 83 S.Ct. 1461, 1467. We recognize that the practical effect of applying the doctrine of primary ***354** jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision, see Federal Maritime Bd. v. Isbrandtsen Co., supra; cf. D. L. Piazza Co. v. West Coast Line, Inc., 210 F.2d 947 (C.A.2d Cir., 1954), or even to preclude such enforcement entirely if the agency has the power to approve the challenged activities, see United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408; cf. United States v. Railway Express Agency, 101 F.Supp. 1008 (D.C.D.Del.1951); but see Federal Maritime Bd. v. Isbrandtsen Co., supra. But here there may be no power of judicial review of the administrative decision approving the merger, and such approval does not in any event confer immunity from the antitrust laws, see pp. 1734—1736, supra. Furthermore, the considerations that militate against finding a repeal of the antitrust laws by implication from the existence of a regulatory scheme also argue persuasively against attenuating, by postponing, the courts' jurisdiction to enforce those laws.

****1737** It should be unnecessary to add that in holding as we do that the Bank Merger Act of 1960 does not preclude application of s 7 of the Clayton Act to bank mergers, we deprive the later statute of none of its intended force. Congress plainly did not intend the 1960 Act to extinguish other sources of federal restraint of bank acquisitions having anticompetitive effects. For example, Congress certainly knew that bank mergers would continue subject to the Sherman Act, see p. 1735, supra, as well as that pure stock acquisitions by banks would continue subject to s 7 of the Clayton Act. If, in addition, bank mergers are subject to s 7, we do not see how the objectives of the 1960 Act are thereby thwarted. It is not as if the Clayton and Sherman Acts embodied approaches to antitrust policy inconsistent with or unrelated to each other. The Sherman Act, of course, forbids mergers effecting an unreasonable restraint of trade. See, e.g., ***355** Northern Securities Co. v. United States, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679; United States v. Union Pac. R. Co., 226 U.S. 61, 33 S.Ct. 53, 57 L.Ed. 124; indeed, there is presently pending before this Court a challenge to a bank merger predicated solely on the Sherman Act. United States v. First Nat. Bank & Trust Co. of Lexington, 374 U.S. 824, 83 S.Ct. 1864. And the tests of illegality under the Sherman and Clayton Acts are complementary. '(T)he public policy announced by s 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets * * * violates the prohibitions of the Sherman Act against unreasonable restraints.' United States v. Columbia Steel Co., 334 U.S. 495, 507, n. 7, 68 S.Ct. 1107, 1114, 92 L.Ed. 1533; see Note, 52 Col.L.Rev. 766, 768, n. 10 (1952). To be sure, not every violation of s 7, as amended, would necessarily be a violation of the Sherman Act; our point is simply that since Congress passed the 1960 Act with no intention of displacing the enforcement of the Sherman Act against bank mergers—or even of s 7 against pure stock acquisitions by banks—continued application of s 7 to bank mergers cannot be repugnant to the design of the 1960 Act. It would be anomalous to conclude that Congress, while intending the Sherman Act to remain fully applicable to bank mergers, and s 7 of the Clayton Act to remain fully applicable to pure stock acquisitions by banks, nevertheless intended s 7 to be completely inapplicable to bank mergers.

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III. THE LAWFULNESS OF THE PROPOSED MERGER UNDER SECTION 7.

The statutory test is whether the effect of the merger 'may be substantially to lessen competition' 'in any line of commerce in any section of the country.' We analyzed the test in detail in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510, and that analysis need not be repeated or extended here, for the instant case presents only a straightforward problem of application to particular facts.

***356** We have no difficulty in determining the 'line of commerce' (relevant product or services market) and 'section of the country' (relevant geographical market) in which to appraise the probable competitive effects of appellees' proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking,' see note 5, supra, composes a distinct line of commerce. Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies' rates are ****1738** invariably much higher than the banks', in part, it seems, because the companies' working capital consists in substantial part of bank loans. [33] Finally, there are banking facilities which, ***357** although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits. [34] In sum, it is clear that commercial banking is a market 'sufficiently inclusive to be meaningful in terms of trade realities.' Crown Zellerbach Corp. v. Federal Trade Comm'n, 296 F.2d 800, 811 (C.A.9th Cir., 1961).

We part company with the District Court on the determination of the appropriate 'section of the country.' The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. See Bock, Mergers and Markets (1960), 42. This depends upon 'the geographic structure of supplier-customer relations.' Kaysen and Turner, Anti-trust ***358** Policy (1959), 102. In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance. [35] See ****1739** Transamerica Corp. v. Board of Govs. of Fed. Res. Sys., 206 F.2d 163, 169 (C.A.3d Cir., 1953). The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries. See, eG., ***359** American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387, 398 (D.C.S.D.N.Y.1957), aff'd, 259 F.2d 524 (C.A.2d Cir., 1958). Therefore, since, as we recently said in a related context, the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.' Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (emphasis supplied); see Standard Oil Co. of Cal. & Standard Stations v. United States, 337 U.S. 293, 299 and 300, n. 5, 69 S.Ct. 1051, 1055—1056, 93 L.Ed. 1371, the four-county area in which appellees' offices are located would seem to be the relevant geographical market. Cf. Brown Shoe Co., supra, 370 U.S., at 338—339, 82 S.Ct., at 1531—1532, 8 L.Ed.2d 510. In fact, the vast bulk of appellees' business originates in the four-county area. [36] Theoretically, we should be concerned with the possibility that bank offices on the perimeter of the area may be in ***360** effective competition with bank offices within; actually, this seems to be a factor of little significance. [37]

We recognize that the area in which appellees have their offices does not ****1740** delineate with perfect accuracy an appropriate 'section of the country' in which to appraise the effect of the merger upon competition. Large borrowers and large depositors, the record shows, may find it practical to do a large part of their banking business outside their home community; very small

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borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers ***361** of intermediate size, it would appear, deal with banks within an area intermediate between these extremes. See notes 35—37, supra. So also, some banking services are evidently more local in nature than others. But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered. We think that the four-County Philadelphia metropolitan area, which state law apparently recognizes as a meaningful banking community in allowing Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate 'section of the country' in which to appraise the instant merger than any larger or smaller or different area. Cf. Hale and Hale, Market Power: Size and Shape Under the Sherman Act (1958), 119. We are helped to this conclusion by the fact that the three federal banking agencies regard the area in which banks have their offices as an 'area of effective competition.' Not only did the FDIC and FRB, in the reports they submitted to the Comptroller of the Currency in connection with appellees' application for permission to merge, so hold, but the Comptroller, in his statement approving the merger, agreed: 'With respect to the effect upon competition, there are three separate levels and effective areas of competition involved. These are the national level for national ***362** accounts, the regional or sectional area, and the local area of the City of Philadelphia and the immediately surrounding area.'

****1741** Having determined the relevant market, we come to the ultimate question under s 7: whether the effect of the merger 'may be substantially to lessen competition' in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended s 7 was intended to arrest anticompetitive tendencies in their 'incipiency.' See Brown Shoe Co., supra, 370 U.S., at 317, 322, 82 S.Ct., at 1519—1520, 1522, 8 L.Ed.2d 510. Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. See generally Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv.L.Rev. 226 (1960). And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. See Crown Zellerbach Corp. v. Federal Trade Comm'n, 296 F.2d 800, 826—827 (C.A.9th Cir., 1961). So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. Standard Oil Co. of Cal. & Standard Stations v. United States, 337 U.S. 293, 313, 69 S.Ct. 1051, 1062, 93 L.Ed. 1371. And so in any case in which it is possible, without doing violence to the congressional objective embodied in s 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration. See Union Carbide Corp., Trade Reg. Rep., FTC Complaints and Orders, 1961—1963, 15503, at 20375—20376 (concurring opinion). This is such a case.

We noted in Brown Shoe Co., supra, 370 U.S., at 315, 82 S.Ct., at 1518, 8 L.Ed.2d 510, that '(t)he dominant theme pervading congressional consideration of ***363** the 1950 amendments (to s 7) was a fear of what was considered to be a rising tide of economic concentration in the American economy.' This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. See United States v. Koppers Co., 202 F.Supp. 437 (D.C.W.D.Pa.1962).

Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in s 7 to prevent undue concentration. Furthermore, the test is fully consonant with economic theory.[38] That '(c)ompetition is likely to be greatest when there are many sellers, none of which has any significant market share,'[39]

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is common ground among most economists, and was undoubtedly a premise ****1742** of congressional reasoning about the antimerger statute.

***364** The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area.[40] 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.[41] ***365** Further, whereas presently the two largest banks in the area (First Pennsylvania and PNB) control between them approximately 44% of the area's commercial banking business, the two largest after the merger (PNB-Girard and First Pennsylvania) will control 59%. Plainly, we think, this increase of more than 33% in concentration must be regarded as significant.[42]

Our conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one, although neither the terms of s 7 nor the legislative history suggests that any particular percentage share was deemed critical. The House Report states that the tests of illegality under amended s 7 'are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.' H.R.Rep.No.1191, 81st Cong., 1st Sess. 8. Accordingly, we ****1743** have relied upon decisions under these other sections in applying s 7. See Brown Shoe Co., supra, passim; cf. United States v. E. I. Du Pont De Nemours & Co., 353 U.S. 586, 595, and n. 15, 77 S.Ct. 872, 878, 1 L.Ed.2d 1057. In Standard Oil Co. of Cal. & Standard Stations v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371, cited in S.Rep.No.1775, 81st Cong., 2d Sess. 6, this Court held violative of s 3 of the Clayton Act exclusive contracts ***366** whereby the defendant company, which accounted for 23% of the sales in the relevant market and, together with six other firms, accounted for 65% of such sales, maintained control over outlets through which approximately 7% of the sales were made. In Federal Trade Comm'n v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426, we held unlawful, under s 1 of the Sherman Act and s 5 of the Federal Trade Commission Act, rather than under s 3 of the Clayton Act, exclusive arrangements whereby the four major firms in the industry had foreclosed 75% of the relevant market; the respondent's market share, evidently, was 20%. Kessler and Stern, Competition, Contract, and Vertical Integration, 69 Yale L.J. 1, 53 n. 231 (1959). In the instant case, by way of comparison, the four largest banks after the merger will foreclose 78% of the relevant market. P. 1724, supra. And in Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653, the Court held violative of s 3 a series of exclusive contracts whereby a single manufacturer controlled 40% of the industry's retail outlets. Doubtless these cases turned to some extent upon whether 'by the nature of the market there is room for newcomers.' Federal Trade Comm'n v. Motion Picture Adv. Serv. Co., supra, 344 U.S., at 395, 73 S.Ct., at 363, 97 L.Ed. 426. But they remain highly suggestive in the present context, for as we noted in Brown Shoe Co., supra, 370 U.S., at 332, n. 55, 82 S.Ct., at 1522, 8 L.Ed.2d 510, integration by merger is more suspect than integration by contract, because of the greater permanence of the former. The market share and market concentration figures in the contract-integration cases, taken together with scholarly opinion, see notes 41 and 42, supra, support, we believe, the inference we draw in the instant case from the figures disclosed by the record.

There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages. There was, to be sure, testimony by bank officers to the effect that competition among banks in ***367** Philadelphia was vigorous and would continue to be vigorous after the merger. We think, however, that the District Court's reliance on such evidence was misplaced. This lay evidence on so complex an economic-legal problem as the substantiality of the effect of this merger upon competition was entitled to little weight, in view of the witnesses' failure to give concrete reasons for their conclusions.[43]

Of equally little value, we think, are the assurances offered by appellees' witnesses that customers dissatisfied with the services of the resulting ****1744** bank may readily turn to the 40 other banks in the Philadelphia area. In every case short of outright monopoly, the disgruntled customer has alternatives; even in tightly oligopolistic markets, there may be small firms operating. A fundamental purpose of amending s 7 was to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10,

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or 20, or 30 more Philadelphia banks were absorbed. This is not a fanciful eventuality, in view of the strong trend toward mergers evident in the area, see p. 1724, supra; and we might note also that entry of new competitors into the banking field is far from easy.[44]

***368** So also, we reject the position that commercial banking, because it is subject to a high degree of governmental regulation, or because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, is somehow immune from the anticompetitive effects of undue concentration. Competition among banks exists at every level —price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services—and it is keen; on this appellees' own witnesses were emphatic.[45] ***369** There is no reason to ****1745** think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical. For example, banks compete to fill the credit needs of businessmen. Small businessman especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. See note 35, supra. If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish. ***370** At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage vis-a -vis larger businesses with which he competes. In this fashion, concentration in banking accelerates concentration generally.

We turn now to three affirmative justifications which appellees offer for the proposed merger. The first is that only through mergers can banks follow their customers to the suburbs and retain their business. This justification does not seem particularly related to the instant merger, but in any event it has no merit. There is an alternative to the merger route: the opening of new branches in the areas to which the customers have moved—so-called de novo branching. Appellees do not contend that they are unable to expand thus, by opening new offices rather than acquiring existing ones, and surely one premise of an antimerger statute such as s 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition.

Second, it is suggested that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state bank, particularly the New York banks, for very large loans. We reject this application of the concept of 'countervailing power.' Cf. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219. If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating s 7, embark on a series of mergers that would make it in the end as large as the industry leader. For if all the commercial banks in the Philadelphia area merged into one, it would be smaller than the largest bank in New York City. This is not a case, plainly, where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that ***371** market. Nor is it a case in which lack of adequate banking facilities is causing hardships to individuals or businesses in the community. The present two largest banks in Philadelphia have lending limits of $8,000,000 each. The only business located in the Philadelphia area which find such limits inadequate are large enough readily to obtain bank credit in other cities.

This brings us to appellees' final contention, that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development. See p. 1725 and note 10, supra. We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended s 7. Congress determined to preserve our traditionally competitive economy. ****1746** It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

In holding as we do that the merger of appellees would violate s 7 and must therefore be enjoined, we rejct appellees' pervasive suggestion that application of the procompetitive policy of s 7 to the banking industry will have dire, although unspecified, consequences for the national economy. Concededly, PNB and Girard are healthy and strong; they are not undercapitalized or overloaned; they have no management problems; the Philadelphia area is not overbanked; ruinous competition is not in

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the offing. Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or ***372** solvency, if to avert them a merger is necessary.[46] It does require, however, that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry. The fact that banking is a highly regulated industry critical to the Nation's welfare markes the play of competition not less important but more so. At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation. Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy. Cf. Northern Pac. R. Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517—518, 2 L.Ed.2d 545. There is no warrant for declining to enforce it in the instant case.

The judgment of the District Court is reversed and the case remanded with direction to enter judgment enjoining the proposed merger. It is so ordered.

Reversed and remanded with direction.

Mr. Justice WHITE took no part in the consideration or decision of this case.

***373** Mr. Justice HARLAN, whom Mr. Justice STEWART joins, dissenting.

I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court.

In response to an apparently accelerating trend toward concentration in the commercial banking system in this country, a trend which existing laws were evidently ill-suited to control, numerous bills were introduced in Congress from 1955 to 1960.[1] During this period, the Department of Justice and the federal banking agencies[2] advocated divergent methods of dealing with the competitive aspects of bank mergers, the former urging ****1747** the extension of s 7 of the Clayton Act to cover such mergers and the latter supporting a regulatory scheme under which the effect of a bank merger on competition would be only one of the factors to be considered in determining whether the merger would be in the public interest. The Justice Department's proposals were repeatedly rejected by Congress, and the regulatory approach of the banking agencies was adopted in the Bank Merger Act of 1960. See infra, pp. 1749—1752.

Sweeping aside the 'design fashioned in the Bank Merger Act' as 'predicated upon uncertainty as to the scope of s 7' of the Clayton Act (ante, p. 1734), the Court today holds s 7 to be applicable to bank mergers and concludes that it has been violated in this case. I respectfully submit that this holding, which sanctions a remedy ***374** regarded by Congress as inimical to the best interests of the banking industry and the public, and which will in large measure serve to frustrate the objectives of the Bank Merger Act, finds no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute.

I.

The key to this case is found in the special position occupied by commercial banking in the economy of this country. With respect to both the nature of the operations performed and the degree of governmental supervision involved, it is fundamentally different from ordinary manufacturing and mercantile businesses.

The unique powers of commercial banks to accept demand deposits, provide checking account services, and lend against fractional reserves permit the banking system as a whole to create a supply of 'money,' a function which is indispensable to

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the maintenance of the structure of our national economy. And the amount of the funds held by commercial banks is very large indeed; demand deposits alone represent approximately three-fourths of the money supply in the United States. [3] Since a bank's assets must be sufficiently liquid to accommodate demand withdrawals, short-term commercial and industrial loans are the major element in bank portfolios, thus making commercial banks the principal source of short-term business credit. Many other services are also provided by banks, but in these more or less collateral areas they receive more active competition from other financial institutions. [4]

***375** Deposit banking operations affect not only the volume of money and credit, but also the value of the dollar and the stability of the currency system. In this field, considerations other than simply the preservation of competition are relevant. Moreover, commercial banks are entrusted with the safekeeping of large amounts of funds belonging to individuals and corporations. Unlike the ordinary investor, these depositors do not regard their funds as subject to a risk of loss and, at least in the case of demand depositors, they do not receive a return for taking such a risk. A bank failure is a community disaster; its impact first strikes the bank's depositors most heavily, and then spreads throughout the economic life of the community. [5] Safety and soundness of banking practices are thus critical factors in any banking system.

****1748** The extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition, reflects these factors. Since the Court's opinion describes, at some length, aspects of the supervision exercised by the federal banking agencies (ante, pp. 1722—1723), I do no more here than point out that, in my opinion, such regulation evidences a plain design grounded on solid economic considerations to deal with banking as a specialized field.

This view is confirmed by the Bank Merger Act of 1960 and its history.

Federal legislation dealing with bank mergers [6] dates from 1918, when Congress provided that, subject to the ***376** approval of the Comptroller of the Currency, two or more national banks could consolidate to form a new national bank; [7] similar provision was made in 1927 for the consolidation of a state and a national bank resulting in a national bank. [8] In 1952 mergers of national and state banks into national banks were authorized, also conditioned on approval by the Comptroller of the Currency. [9] In 1950 Congress authorized the theretofore prohibited [10] merger or consolidation of a national bank with a state bank when the assuming or resulting bank would be a state bank. [11] In addition, the Federal Deposit Insurance Act was amended to require the approval of the FDIC for all mergers and consolidations between insured and noninsured banks, and of specified federal banking agencies for conversions of insured banks into insured state banks if the conversion would result in the capital stock or surplus of the newly formed bank being less than that of the converting bank. [12] The Act further required insured banks merging with insured state banks to secure the approval of the Comptroller of the Currency if the assuming bank would be a national bank, and the ***377** approval of the Board of Governors of the Federal Reserve System and the FDIC, respectively, if the assuming or resulting bank would be a state member bank or nonmember insured bank. [13]

None of this legislation prescribed standards by which the appropriate federal banking agencies were to be guided in determining the significance to be attributed to the anticompetitive effects of a proposed merger. As previously noted (supra, p. 1746), Congress became increasingly concerned with this problem in the 1950's. The antitrust laws apparently provided no solution; in only one case prior to 1960, United States v. First-america Corp., Civil No. 38139, N.D.Cal., March 30, 1959, settled by consent decree, had either theSherman or Clayton Act been invoked to attack a commercial bank merger.

****1749** Indeed the inapplicability to bank mergers of s 7 of the Clayton Act, even after it was amended in 1950, was, for a time, an explicit premise on which the Department of Justice performed its antitrust duties. In passing upon an application for informal clearance of a bank merger in 1955, the Department stated:
'After a complete consideration of this matter, we have concluded that this Department would not have jurisdiction to proceed under section 7 of the Clayton Act. For this reason this Department does not presently plan to take any action on this matter.'
Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 3, p. 2141 (1955).

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***378** And in testifying before the Senate Committee on Banking and Currency in 1957 Attorney General Brownell, speaking of bank mergers, noted:
'On the basis of these provisions the Department of Justice has concluded, and all apparently agree, that asset acquisitions by banks are not covered by section 7 (of the Clayton Act) as amended in 1950.' Hearings on the Financial Institutions Act of 1957 before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 1st Sess., pt. 2, p. 1030 (1957).

Similar statements were repeatedly made to Congress by Justice Department representatives in the years prior to the enactment of the Bank Merger Act. [14]

The inapplicability of s 7 to bank mergers was also an explicit basis on which Congress acted in passing the Bank Merger Act of 1960. The Senate Report on S. 1062, the bill that was finally enacted, stated:
'Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from section 7 of the Clayton Act. (Stock acquisitions by bank holding companies, as distinguished from mergers and consolidations, are subject to both the Bank Holding Company Act of 1956 and sec. 7 of the Clayton Act.)' S.Rep. No. 196, 86th Cong., 1st Sess. 1—2 (1959).

'In 1950 (64 Stat. 1125) section 7 of the Clayton Act was amended to correct these deficiencies. Acquisitions of assets were included within the section, ***379** in addition to stock acquisitions, but only in the case of corporations subject to the jurisdiction of the Federal Trade Commission (banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of section 11 of that act, were not affected).' Id., at 5. [15]

During the floor debates Representative Spence, the Chairman of the House Committee on Banking and Currency, recognized the same difficulty: 'The Clayton Act is ineffective as to bank mergers because ****1750** in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way.' 106 Cong.Rec. 7257 (1960). [16]

But instead of extending the scope of s 7 to cover bank mergers, as numerous proposed amendments to that section were designed to accomplish, [17] Congress made the ***380** deliberate policy judgment that 'it is impossible to subject bank mergers to the simple rule of section 7 of the Clayton Act. Under that act, a merger would be barred if it might tend substantially to lessen competition, regardless of the effects on the public interest.' 105 Cong.Rec. 8076 (1959) (remarks of Senator Robertson, a sponsor of S. 1062). Because of the peculiar nature of the commercial banking industry, its crucial role in the economy, and its intimate connection with the fiscal and monetary operations of the Government, Congress rejected the notion that the general economic and business premises of the Clayton Act should be the only considerations applicable to this field. Unrestricted bank competition was thought to have been a major cause of the panic of 1907 and of the bank failures of the 1930's, [18] and was regarded as a highly undesirable condition to impose on banks in the future:

'Banking is too important to depositors, to borrowers, to the Government, and the public generally, to permit unregulated and unrestricted competition in that field.

***381** 'The antitrust laws have reflected an awareness of the difference between banking and other regulated industries on the one hand, and ordinary unregulated industries and commercial enterprises on the other hand.' 106 Cong.Rec. 9711 (1960) (remarks of Senator Fulbright, a sponsor of S. 1062).

'It is this distinction between banking and other businesses which justifies different treatment for bank mergers and other mergers. It was this distinction that led the Senate to reject the flat prohibition of the Clayton Act test which applies to other mergers.' Id., at 9712. [19]

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Thus the Committee on Banking and Currency recommended 'continuance of the existing exemption from section 7 **1751 of the Clayton Act.' 105 Cong.Rec. 8076 (1959). Congress accepted this recommendation; it decided to handle the problem of concentration in commercial banking 'through banking laws, specially framed to fit the particular needs of the field * * *.' S.Rep. No. 196, 86th Cong., 1st Sess. 18 (1959). As finally enacted in 1960, (the Bank Merger Act embodies the regulatory approach advocated by the banking agencies, vesting in them responsibility for its administration and placing the scheme within the framework of existing banking laws as an amendment to s 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. (Supp. IV, 1963), s 1828(c). [20] It maintains the latter Act's requirement of advance approval by the appropriate federal agency for mergers between insured banks and between insured and noninsured *382 banks (supra, pp. 1747—1749), but establishes that such approval is necessary in every merger of this type. To aid the respective agencies in determining whether to approve a merger, and in 'the interests of uniform standards' (12 U.S.C. (Supp. IV, 1963) s 1828(c)), the Act requires the two agencies not making the particular decision and the Attorney General to submit to the immediately responsible agency reports on the competitive factors involved. It further provides that in addition to considering the banking factors examined by the FDIC in connection with applications to become an insured bank, which focus primarily on matters of safety and soundness, [21] the approving agency 'shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest.' 12 U.S.C. (Supp. IV, 1963) s 1828(c).

The congressional purpose clearly emerges from the terms of the statute and from the committee reports, hearings, and floor debates on the bills. Time and again it was repeated that effect on competition was not to be the controlling factor in determining whether to approve a bank merger, that a merger could be approved as being in the public interest even though it would cause a substantial lessening of competition. The folowing statement is typical:
'The committee wants to make crystal clear its intention that the various banking factors in any particular *383 case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision. And, of course, the banking agencies are not bound in their consideration of the competitive factors by the report of the Attorney General.' S.Rep. No. 196, 86th Cong., 1st Sess. 24 (1959); id., at 19, 21. [22]

**1752 The foregoing statement also shows that it was the congressional intention to place the responsibility for approval squarely on the banking agencies; the report of the Attorney General on the competitive aspects of a merger was to be advisory only. [23] And there was deliberately omitted any attempt to specify or restrict the kinds of circumstances in which the agencies might properly determine that a proposed merger would be in the public interest notwithstanding its adverse effect on competition. [24]

*384 What Congress has chosen to do about mergers and their effect on competition in the highly specialized field of commercial banking could not be more 'crystal clear.' (Supra, p. 1751.) But in the face of overwhelming evidence to the contrary, the Court, with perfect equanimity, finds 'uncertainty' in the foundations of the Bank Merger Act (ante, p. 1734) and on this premise puts it aside as irrelevant to the task of construing the scope of s 7 of the Clayton Act.

I am unable to conceive of a more inappropriate case in which to overturn the considered opinion of all concerned as to the reach of prior legislation. [25] For 10 years everyone—the department responsible for antitrust law enforcement, the banking industry, the Congress, and the bar proceeded on the assumption that the 1950 amendment of the Clayton Act did not affect bank mergers. This assumption provided a major impetus to the enactment of remedial legislation, and Congress, when it finally settled on what it thought was the solution to the problem at hand, emphatically rejected the remedy now brought to life by the Court.

The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy. As the present case illustrates, the Attorney General's report to the designated banking agency is no longer truly advisory, for if the agency's decision is not *385 satisfactory a s 7 suit may be commenced

immediately.[26] The bank merger's legality will then be judged solely from its competitive aspects, unencumbered by any considerations peculiar ****1753** to banking.[27] And if such a suit were deemed to lie after a bank merger has been consummated, there would then be introduced into this field, for the first time to any significant extent, the threat of divestiture of assets and all the complexities and disruption attendant upon the use of that sanction.[28] The only vestige of the Bank Merger Act which remains is that the banking agencies will have an initial veto.[29]

***386** This frustration of a manifest congressional design is, in my view, a most unwarranted intrusion upon the legislative domain. I submit that whatever may have been the congressional purpose in 1950, Congress has now so plainly pronounced its current judgment that bank mergers are not within the reach of s 7 that this Court is duty bound to effectuate its choice.

But I need not rest on this proposition, for, as will now be shown, there is nothing in the 1950 amendment to s 7 or its legislative history to support the conclusion that Congress even then intended to subject bank mergers to this provision of the Clayton Act.

II.

Prior to 1950, s 7 of the Clayton Act read, in pertinent part, as follows:
'That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of ***387** such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, ****1754** or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.'

In 1950 this section was amended to read (the major amendments being indicated in italics):
'That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'

If Congress did intend the 1950 amendment to reach bank mergers, it certainly went at the matter in a very peculiar way. While prohibiting asset acquisitions having the anticompetitive effects described in s 7, it limited the applicability of that provision to corporations subject to the jurisdiction of the Federal Trade Commission, which does not include banks. And it reenacted the stock-acquisition provision in the very same language which—as it was fully aware—had been interpreted not to reach the type of merger customarily used in the banking industry. See infra, pp. 1755—1757. In the past this Court has drawn the normal inference that such a reenactment indicates congressional adoption of the prior judicial statutory construction. E.g., United States v. Dixon, 347 U.S. 381, 74 S.Ct. 566, 98 L.Ed. 785; Overstreet v. North Shore Corp., 318 U.S. 125, 131—132, 63 S.Ct. 494, 498—499, 87 L.Ed. 656.

***388** In this instance, however, the Court holds that the stock-acquisition provision underwent an expansive metamorphosis, so that it now embraces all mergers or consolidations involving an exchange of stock. Since bank mergers usually, if not always, do involve exchanges of stock, the effect of this construction is to rob the Federal Trade Commission provision relating to asset acquisitions of all force as a substantive limitation upon the scope of s 7; according to the Court the purpose of that provision was merely to ensure the Commission's role in the enforcement of s 7. Ante, pp. 1732—1733. In short, under this reasoning bank mergers to all intents and purposes are fully within the reach of s 7.

A more circumspect look at the 1950 amendment of s 7 and its background will show that this construction is not tenable.

The language of the stock-acquisition provision itself is hardly congenial to the Court's interpretation. The PNB-Girard merger is technically a consolidation, governed by s 20 of the national banking laws, 12 U.S.C. (Supp. IV, 1963) s 215. Under that section, the corporate existence of both PNB and Girard, all of their rights, franchises, assets, and liabilities, would be automatically

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vested in the resulting bank, which would operate under the PNB charter. PNB itself would acquire nothing. Rather, the two banks would be creating a new entity by the amalgamation of their properties, and the subsequent conversion of Girard stock (which would then represent ownership in a nonfunctioning entity) into stock of the resulting bank would simply be part of the mechanics by which ownership in the new entity would be reflected. Clearly this is not a case of a corporation acquiring the stock of another functioning corporation, which is the only situation where 'the effect of * * * (a stock) acquisition may be substantially to lessen competition.' (Emphasis added.)

***389** There are further crucial differences between a merger and a stock acquisition. A merger normally requires public ****1755** notice and the approval of the holders of two-thirds of the outstanding shares of each corporation, and dissenting shareholders have the right to receive in cash the appraised value of their shares. [30] A purchase of stock may be done privately, and the only approval involved is that of the individual parties to the transaction. Unlike a merged company, a corporation whose stock is acquired usually remains in business as a subsidiary of the acquiring corporation. [31]

The Government, however, contends that a merger more closely resembles a stock acquisition than an asset acquisition because of one similarity of central importance: the acquisition by one corporation of an immediate voice in the management of the business of another corporation. But this is obviously true a fortiori of asset acquisitions of sufficient magnitude to fall within the prohibition of s 7; if a corporation buys the plants, equipment, inventory, etc., of another corporation, it acquires absolute control over, not merely a voice in the management of, another business.

The legislative history of the 1950 amendment also unquestionably negates any inference that Congress intended ***390** to reach bank mergers. It is true that the purpose was 'to plug a loophole' in s 7 (95 Cong.Rec. 11485 (1949) (remarks of Representative Celler)). But simply to state this board proposition does not answer the precise questions presented here: what was the nature of the loophole sought to be closed; what were the means chosen to close it?

The answer to the latter question is unmistakably indicated by the relationship between the 1950 amendment and previous judicial decisions. In Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, 291 U.S. 587, 54 S.Ct. 532, 78 L.Ed. 1007, this Court, by a divided vote, ruled on the scope of the Federal Trade Commission's remedial powers under the original Clayton Act. After the Commission had issued a s 7 complaint against a holding company which had been formed by the stockholders of two manufacturing corporations, steps were taken to avoid the Commission's jurisdiction. Two new holding companies were formed, each acquired all the common stock of one of the manufacturing companies, and each issued its stock directly to the stockholders of the original holding company. This company then dissolved and the two new holding companies and their respective manufacturing subsidiaries merged into one corporation. This Court held that the Commission had no authority, after the merger, to order the resulting corporation to divest itself of assets. An essential part of this holding was that the merger in question, which was technically a consolidation similar to that here planned by PNB and Girard, was not a stock acquisition within the prohibitions of s 7: 'If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any anti-trust law, as to which we express no opinion, it was necessarily a ****1756** violation of statutory prohibitions other ***391** than those found in the Clayton Act.' 291 U.S., at 599, 54 S.Ct., at 537, 78 L.Ed. 1007; see id., 291 U.S., at 595, 54 S.Ct., at 536, 78 L.Ed. 1007. [32]

This decision, along with two others earlier handed down by this Court (Thatcher Mfg. Co. v. Federal Trade Comm'n and Swift & Co. v. Federal Trade Comm'n, decided together with Federal Trade Comm'n v. Western Meat Co., 272 U.S. 554, 47 S.Ct. 175, 71 L.Ed. 405), perhaps provided more of a spur to enactment of the 'assets' amendment to s 7 than any other single factor. These decisions were universally regarded as opening the unfortunate loophole whereby s 7 could be evaded through the use of an asset acquisition. Representative Celler expressed the view of Congress in this fashion:
'The result of these decisions has so weakened sections 7 and 11 * * * as to give to the Federal Trade Commission and the Department of Justice merely a paper sword to prevent improper mergers.' 95 Cong.Rec. 11485 (1949). [33]

***392** Since this Court's decisions were cast in terms of the scope of the Federal Trade Commission's jurisdiction, Congress, in amending s 7 so as to close that gap, emphasized its expectation—made plain in the committee reports, hearings, and debates—that the Commission would assume the principal role in enforcing the section.[34] Implicit here is that no change in the enforcement powers of the other agencies named in s 11 was contemplated.[35] Of more importance, the legislative history demonstrates that it was the asset-acquisition provision that was designed to plug the loophole created by Thatcher, Swift, and Arrow. Although Arrow, unlike Thatcher and Swift, involved a consolidation of the same type as the PNB-Girard merger, the members of Congress drew no distinction among these cases, invariably discussing all three of them in the same breath as examples of asset acquisitions.[36] Indeed, the House report stated that

'the Supreme Court * * * held (in Arrow) that if an acquiring corporation secured title to the physical assets of a corporation whose stock it had acquired before the Federal Trade Commission issues its final order, the Commission lacks power to direct divestiture of the physical ****1757** assets * * *.' H.R.Rep.No.1191, 81st Cong., 1st Sess. 5 (1949). (Emphasis added.)

And on the Senate floor it was pointed out that 'the method by which * * * (the merger in Arrow) had been ***393** accomplished was an innocent one * * *.' 96 Cong.Rec. 16505 (1950). (Emphasis added.) Clearly the understanding of Congress was that a consolidation of two corporations was an acquisition of assets.[37]

Nor did Congress act inadvertently or without purpose in limiting the asset-acquisition provision to corporations subject to the jurisdiction of the Federal Trade Commission, thereby excluding bank mergers. The reports, hearings, and debates on the 1950 amendment reveal that Congress was then concerned with the rising tide of industrial concentration—i.e., 'the external expansion * * * through mergers, acquisitions, and consolidations'[38] of corporations engaged in manufacturing, mining, merchandising, and of other kindred commercial endeavors. Specialized areas of the economy such as banking were not even considered. Thus the Federal Trade Commission's 1948 report on mergers recounted the statistics on concentration in a multitude of industries—e.g., steel, cement, electrical equipment, food and dairy products, tobacco, textiles, paper, chemicals, rubber—but included not one figure on banking concentration.[39] This report was repeatedly cited and heavily relied on by members of Congress and others to demonstrate the magnitude ***394** of the merger movement and the economic dangers it presented.[40] In the committee hearings the focus was exclusively upon amalgamation in the ordinary commercial fields,[41] and similarly the Senate and House reports spoke solely of industrial concentration as the evil to be remedied.[42] On the floor of the House, Representative Celler indicated the extent of concentration of industrial power:

'Four companies now have 64 percent of the steel business, four have 82 percent of the copper business, two have 90 percent of the aluminum ****1758** business, three have 85 percent of the automobile business, two have 80 percent of the electric lamp business, four have 75 percent of the electric refrigerator business, two have 80 percent of the glass business, four have 90 percent of the cigarette business, and so forth.

'The antitrust laws are a complete bust unless we pass this bill.' 95 Cong.Rec. 11485 (1949).

The legislatory history is thus singularly devoid of any evidence that Congress sought to deal with the special problem of banking concentration.

I do not mean to suggest, of course, that s 7 of the Clayton Act is thereby rendered applicable only to ordinary commercial and industrial corporations and not to firms in any 'regulated' sector of the economy. The ***395** point is that when Congress included in s 7 asset acquisitions by corporations subject to the Federal Trade Commission's jurisdiction, and at the same time continued in s 11 the Federal Reserve Board's jurisdiction over banks, it was not acting irrationally. Rather, the absence of any mention of banks in the legislative history of the 1950 amendment, viewed in light of the prior congressional treatment of

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banking as a distinctive area with special characteristics and needs, compels the conclusion that bank mergers were simply not then regarded as part of the loophole to be plugged. [43]

This conclusion is confirmed by a number of additional considerations. It was not until after the passage of the 1950 amendment of s 7 that Representative Celler, its co-sponsor, requested the staff of the Antitrust Subcommittee of the House Committee on the Judiciary 'to prepare a report indicating the concentration existing in our banking system.' Staff of Subcommittee No. 5, House Committee on the Judiciary, 82d Cong., 2d Sess., Report on Bank Mergers and Concentration of Banking Facilities III (1952). The introduction to the report reveals that:
'On March 21, 1945, the Board of Governors of the Federal Reserve System wrote to the chairman of the Committee on the Judiciary requesting that the provisions of H.R. 2357, Seventy-ninth Congress, first session, one of the early predecessors of the Celler Antimerger Act, be extended so as to include corporations subject to the jurisdiction of the Federal Reserve Board under section 11 of the Clayton Act. Because of the revisions made in subsequent versions of antimerger bills, however, it became impracticable ***396** to include within the scope of the act corporations other than those subject to regulation by the Federal Trade Commission. Banks, which are placed squarely within the authority of the Federal Reserve Board by section 11 of the Clayton Act, are therefore circumscribed insofar as mergers are concerned only by the old provisions of section 7, and certain additional statutes which do not presently concern themselves substantively with the question of competition in the field of banking.' Id., at VII.

It is also worth noting that in 1956 Representative Celler himself introduced another amendment to s 7, explaining that 'all the bill (H.R. 5948) does is plug a loophole in the present law dealing with bank mergers. * * * This loophole exists because section 7 of the Clayton Act prohibits bank mergers * * * only if such mergers are accomplished by ****1759** stock acquisition.' 102 Cong.Rec. 2109 (1956). The bill read in pertinent part: '(N)o bank * * * shall acquire * * * the whole or any part of the assets of another corporation engaged also in commerce * * *.' Ibid. The amendment passed the House but was defeated in the Senate.

For all these reasons, I think the conclusion is inescapable that s 7 of the Clayton Act does not apply to the PNB-Girard merger. The Court's contrary conclusion seems to me little better than a tour de force. [44]

Memorandum of Mr. Justice GOLDBERG.

I agree fully with my Brother HARLAN that s 7 of the Clayton Act has no application to bank mergers of the type involved here, and I therefore join in the conclusions expressed in his opinion on that point. However, while I ***397** thus dissent from the Court's holding with repect to the applicability of the Clayton Act to this merger, I wish to make clear that I do not necessarily dissent from its judgment invalidating the merger. To do so would require me to conclude in addition that on the record as it stands the Government has failed to prove a violation of the Sherman Act, which is fully applicable to the commercial banking business. In my opinion there is a substantial Sherman Act issue in this case, but since the Court does not reach it and since my views relative thereto would be superfluous in light of today's disposition of the case, I express no ultimate conclusion concerning it. Compare Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 585, 67 S.Ct. 1409, 1427—1428, 91 L.Ed. 1666 (Murphy, J., dissenting); Poe v. Ullman, 367 U.S. 497, 555, 81 S.Ct. 1752, 1783, 6 L.Ed.2d 989 (Stewart, J., dissenting).

All Citations

374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915

Footnotes

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1 Section 1 of the Sherman Act provides in pertinent part: 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.' Section 7 of the Clayton Act, as amended in 1950 by the Celler-Kefauver Antimerger Act, provides in pertinent part: 'No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'

2 The discussion in this portion of the opinion draws upon undisputed evidence of record in the case, supplemented by pertinent reference materials. See Board of Govs. of the Fed. Res. System, Financing Small Business (Comm. print 1958); The Federal Reserve System (3d ed. 1954); Concentration of Banking in the United States (Comm. print 1952); Bogen, The Competitive Position of Commercial Banks (1959); Commission on Money and Credit, Money and Credit (1961); Freeman, The Problems of Adequate Bank Capital (1952); Hart, Money, Debt, and Economic Activity (2d ed. 1953); Lent, The Changing Structure of Commercial Banking (1960); Sayers, Modern Banking (5th ed. 1960); Staff of House Select Comm. on Small Business, 86th Cong., 2d Sess., Banking Concentration and Small Business (1960); U.S. Attorney General's Comm. on Administrative Procedure, Federal Control of Banking (S. Doc. No. 186, 76th Cong., 3d Sess., 1940); Fox, Supervision of Banking by the Comptroller of the Currency, in Public Administration and Policy Formation (Redford ed. 1956), 117; Stokes, Public Convenience and Advantage in Applications for New Banks and Branches, 74 Banking L.J. 921 (1957). For materials which focus specifically on the question of competition in the banking industry, see also Alhadeff, Monopoly and Competition in Banking (1954); Chapman, Concentration of Banking (1934); Horvitz, Concentration and Competition in New England Banking (1958); Lawrence, Banking Concentration in the United States (1930); Berle, Banking Under the Anti-Trust Laws, 49 Col.L.Rev. 589 (1949); Chandler, Monopolistic Elements in Commercial Banking, 46 J.Pol.Econ. 1 (1938); Gruis, Antitrust Laws and Their Application to Banking, 24 Geo.Wash.L.Rev. 89 (1955); Funk, Antitrust Legislation Affecting Bank Mergers, 12 Bus.Law 496 (1957); Klebaner, Federal Control of Commercial Bank Mergers, 37 Ind.L.J. 287 (1962); Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus.Law. 994 (1961); Comment, Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated, 71 Yale L.J. 502 (1962); Note, Federal Regulation of Bank Mergers: The Opposing Views of the Federal Banking Agencies and the Department of Justice, 75 Harv.L.Rev. 756 (1962).

3 In addition, there is a certain amount of bank holding company activity. The Bank Holding Company Act of 1956, 12 U.S.C. ss 1841—1848, brought bank holding companies under stringent federal regulation. As of 1958, the 43 registered bank holding companies controlled 5.7% of all banking offices and 7.4% of all deposits. Lent, The Changing Structure of Commercial Banking (1960), 19. See also Comment, supra, note 2, 71 Yale L.J., at 516—522.

4 Such creation is not, to be sure, pure sleight of hand. A bank may not make a loan without adequate reserves. Nevertheless, the element of bank money creation is real. E.g., Samuelson, Economics (5th ed. 1961), 331—343.

5 The principal banking 'products' are of course various types of credit, for example: unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds. Banking services include: acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety-deposit boxes; account reconciliation services; foreign department services (acceptances and letters of credit); correspondent services; investment advice. It should be noted that many other institutions are in the business of supplying credit, and so more or less in competition with commercial banks (see further, pp. 1737—1738, infra), for example: mutual savings banks, savings and loan associations, credit unions, personal-finance companies, sales-finance companies, private businessmen (through the furnishing of trade credit), factors, direct-lending government agencies, the Post Office, Small Business Investment Corporations, life insurance companies.

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6 In 1957, for example, there were three bank suspensions in the entire country by reason of financial difficulties; in 1960, two; and in 1961, nine. Of these nine, four involved state banks which were neither members of the FRS nor insured by the FDIC. 1961 Annual Report of the Comptroller of the Currency 286. In a typical year in the 1920's, roughly 600 banks failed throughout the country, about 100 of them national banks. See S.Rep.No. 196, Regulation of Bank Mergers, 86th Cong., 1st Sess. 17—18.

7 The proposed 'merger' of appellees is technically a consolidation, since the resulting bank will be a different entity from either of the constituent banks, whereas if the transaction were a merger, Girard would disappear into PNB and PNB would survive. However, the proposed transaction resembles a merger very closely, in that PNB's shareholders are not to surrender their present share certificates and the resulting bank is to operate under PNB's charter. In any event, the statute treats mergers and consolidations essentially alike, compare 12 U.S.C. (1958 ed., Supp. IV) s 215 with s 215a, and it is not suggested that the legal question of the instant case would be affected by whether the transaction is technically a merger or a consolidation. Therefore, throughout this opinion we use the term 'merger.'

8 Section 1828(c) provides in pertinent part:

> 'No insured (by FDIC) bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District (of Columbia) bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the (Federal Deposit Insurance) Corporation if the acquiring, assuming, or resulting bank is to be a non-member insured bank (except a District bank). * * * In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection * * *. The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report, along with the following information: * * * a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval.'

9 See 12 U.S.C. s 84, p. 1723, supra. The resulting bank would have a lending limit of $15,000,000, of which $1,000,000 would not be attributable to the merger but to unrelated accounting factors.

10 There was evidence that Philadelphia, although it ranks fourth or fifth among the Nation's urban areas in terms of general commercial activity, ranks only ninth in terms of the size of its largest bank, and that some large business firms which have their head offices in Philadelphia must seek elsewhere to satisfy their banking needs because of the inadequate

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lending limits of Philadelphia's banks; First Pennsylvania and PNB, currently the two largest banks in Philadelphia, each have a lending limit of $8,000,000. Girard's is $6,000,000.

Appellees offered testimony that the merger would enable certain economies of scale, specifically, that it would enable the formation of a more elaborate foreign department than either bank is presently able to maintain. But this attempted justification, which was not mentioned by the District Court in its opinion and has not been developed with any fullness before this Court, we consider abandoned.

11 We reject the argument that s 11 of the Clayton Act, as amended, 15 U.S.C. s 21, confers jurisdiction over banks upon the FTC. That section provides in pertinent part: 'Authority to enforce compliance with sections 13, 14, 18, and 19 of this title (ss 2, 3, 7, and 8 of the Clayton Act, as amended) by the persons respectively subject thereto is vested * * * in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce * * *.' The argument is that since the FRB has no authority to enforce the Clayton Act against bank mergers, see note 22, infra, bank mergers must fall into the residual category of 'all other character of commerce' and so be subject to the FTC. However, there is no intimation in the legislative history of the 1950 amendment to ss 7 and 11 that the FTC's traditional lack of jurisdiction over banks was to be disturbed. Moreover, it is clear from the language of s 11 that 'banks, banking associations, and trust companies' are meant to comprise a distinct 'character of commerce,' and so cannot be part of the 'other character of commerce' reserved to the FTC.

The exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that banks were already subject to extensive federal administrative controls. See T. C. Hurst & Son v. Federal Trade Comm'n, 268 F. 874, 877 (D.C.E.D.Va.1920).

12 No argument is made in this case that banking is not commerce, and therefore that s 7 is inapplicable; plainly, such an argument would have no merit. See Transamerica Corp. v. Board of Govs. of Fed. Res. Sys., 206 F.2d 163, 166 (C.A.3d Cir., 1953); cf. United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440.

13 'A merger necessarily involves the complete disappearance of one of the merging corporations. A sale of assets, on the other hand, may involve no more than a substitution of cash for some part of the selling company's properties, with no change in corporate structure and no change in stockholder interests. Shareholders of merging corporations surrender their interests in those corporations in exchange for their very different rights in the resulting corporation. In an asset acquisition, however, the shareholders of the selling corporation obtain no interest in the purchasing corporation and retain no interest in the assets transferred. In a merger, unlike an asset acquisition, the resulting firm automatically acquires all the rights, powers, franchises, liabilities, and fiduciary rights and obligations of the merging firms. In a merger, but not in an asset acquisition, there is the likelihood of a continuity of management and other personnel. Finally, a merger, like a stock acquisition, necessarily involves the acquisition by one corporation of an immediate voice in the management of the business of another corporation; no voice in the decisions of another corporation is acquired by purchase of some part of its assets.' Brief for the United States, 75—76.

14 '(A) merger such as appellees' may be effected upon the affirmative vote of the holders of only two-thirds of the outstanding stock of each bank * * * but if PNB were acquiring all of the Girard stock each Girard shareholder could decide for himself whether to transfer his shares. A merger requires public notice whereas stock can be acquired privately. A shareholder dissenting from a merger has the right to receive the appraised value of his shares * * * whereas no shareholder has a comparable right in an acquisition of stock. Furthermore the corporate existence of a merged company is terminated by a merger, but remains unaffected by an acquisition of stock.' Brief for Appellees, 30—31.

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15 The legislative history of the 1914 Act is reviewed in Brown Shoe Co. v. United States, 370 U.S. 294, 313—314, and notes 22—24, 82 S.Ct. 1502, 1517—1518, 8 L.Ed.2d 510.

16 In the case of an acquisition like the instant one, in which shares in the acquired corporation are to be exchanged for shares in the resulting corporation, a fortiori we discern no difficulty in conceptualizing the transaction as a 'stock acquisition.' Compare note 13, supra.

17 Statements to the same effect may be found in, e.g., Brown Shoe Co., supra, 370 U.S., at 313—314, 316, 82 S.Ct., at 1517—1518, 1519, 8 L.Ed.2d 510; United States v. E. I. Du Pont De Nemours & Co., 353 U.S. 586, 592, 77 S.Ct. 872, 876—877, 1 L.Ed.2d 1057; United States v. Columbia Steel Co., 334 U.S. 495, 507 n. 7, 68 S.Ct. 1107, 1114, 92 L.Ed. 1533; United States v. Columbia Pictures Corp., 189 F.Supp. 153, 182 (D.C.S.D.N.Y.1960). See also 33 Op.Atty.Gen. 225, 241 (1922); Hernacki, Mergerism and Section 7 of the Clayton Act, 20 Geo.Wash. L.Rev. 659, 676—677 (1952); Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus.Law. 994, 999—1000 (1961); Note, Section 7 of the Clayton Act: A Legislative History, 52 Col.L.Rev. 766, 768—769 (1952).

Actually, the holdings in the three cases that reached this Court, Thatcher, Swift, and Arrow-Hart, were quite narrow. See generally Note, 26 Col.L.Rev. 594—596 (1926). They were based not on a lack of substantive power under s 7, but on the enforcement section, s 11, which limited the FTC's remedial powers to 'an order requiring such person to cease and desist from such violations (of ss 2, 3, 7, and 8 of the Clayton Act), and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act.' 38 Stat. 735. Faced with Congress' evident refusal to confer upon the FTC the ordinary powers of a court of equity, this Court held that unless the assets were acquired after the FTC's order of stock divestiture had been issued (which was the case in Federal Trade Comm'n v. Western Meat Co., supra, where the Commission was sustained), the Commission could not order a divestiture of assets. Compare Board of Govs. of Fed. Res. Sys. v. Transamerica Corp., 184 F.2d 311 (C.A.9th Cir., 1950), with Federal Trade Comm'n v. International Paper Co., 241 F.2d 372 (C.A.2d Cir., 1956). Since under this Court's decisions the FTC was powerless even where the transfer of assets was an evasive maneuver aimed at defeating the FTC's remedial jurisdiction over stock acquisitions violative of s 7, a fortiori the Commission was powerless against the typical merger. See Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, supra, 291 U.S., at 595, 598—599, 54 S.Ct., at 532, 78 L.Ed. 1007. As part of the 1950 amendments to the Clayton Act, s 11 was amended to read: 'an order requiring such person to * * * divest itself of the stock, or other share capital, or assets, held * * *.' 15 U.S.C. s 21. Whether as an original matter Thatcher, Swift and Arrow-Hart were correctly decided is no longer an open question, since they were the explicit premise of the 1950 amendment to s 7. See State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 458, 82 S.Ct. 1380, 1385, 8 L.Ed.2d 620, p. 1734, infra.

The question of the FTC's remedial powers under s 11 of the Clayton Act is to be distinguished from that of its remedial powers under s 5 of the Federal Trade Commission Act, 15 U.S.C. s 45(b). In Federal Trade Comm'n v. Eastman Kodak Co., 274 U.S. 619, 47 S.Ct. 688, 71 L.Ed. 1238, the Court, relying on Thatcher and Swift, held that the Commission had no power to order divestiture in s 5 proceedings. But cf. Gilbertville Trucking Co. v. United States, 371 U.S. 115, 129—131, 83 S.Ct. 217, 225—227, 9 L.Ed.2d 177; Pan American World Airways v. United States, 371 U.S. 296, 312, and n. 17, 83 S.Ct. 476, 486, 9 L.Ed.2d 325.

18 See note 1, supra, for text of amended s 7. The original s 7 read in pertinent part: 'no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the

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corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.'

The passage of the 1950 amendment followed many years of unsuccessful attempts to enact legislation plugging the assets-acquisition loophole. See Note, 52 Col.L.Rev. 766—767, notes 3 and 4 (1952). To be sure, the 1950 amendment was intended not only to enlarge the number of transactions covered by s 7 but also to change the test of illegality. The legislative history pertinent to the latter point is reviewed in Brown Shoe Co., supra, 370 U.S., at 315—323, 82 S.Ct., at 1518—1523, 8 L.Ed.2d 510, and is not directly relevant to the present discussion.

19 'The purpose of the proposed legislation (the 1950 amendments to s 7) is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder (sic) the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law.' S.Rep. No. 1775, 81st Cong., 2d Sess. 2, U.S.Code Congressional Service 1950, p. 4293. This theme pervaded congressional consideration of the proposed amendments. See, e.g., H.R.Rep. No. 1191, 81st Cong., 1st Sess., passim; Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, pp. 11—13, 28—29, 39, 117; Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 4—5, 15, 20, 62—63, 126—129, 139, 321; 95 Cong.Rec. 11485 (Congressman Celler, sponsor of the bill to amend s 7 in the House: 'this bill seeks to plug a loophole in the present antitrust laws. . . . It is time to stop, look, and listen and to call a halt to the merger movement that is going on in this country'), 11493—11494, 11497, 11502; 96 Cong.Rec. 16433, 16443.

20 Columbia Steel involved the cash purchase by United States Steel Corporation of the physical assets of Consolidated Steel Corporation; there was no exchange of shares and no alteration of Consolidated's corporate identity. See Transcript of Record, United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (No. 461, October Term, 1947), pp. 453—475. As a result of the purchase, in its horizontal aspect, U.S. Steel controlled about 24% of the structural steel fabricating market in an 11-state western area. This Court held that the acquisition could not be reached under s 7 of the Clayton Act, see 334 U.S., at 507, n. 7, 68 S.Ct., at 1114, 92 L.Ed. 1533, and did not violate the Sherman Act. It should be noted, however, that the Court regarded the 24% market-share figure proposed by the Government as a 'doubtful assumption' and also pointed to 'unusual conditions' tending to mitigate the anticompetitive effect of the acquisition. 334 U.S., at 529, 68 S.Ct., at 1125, 92 L.Ed. 1533. Columbia Steel was repeatedly cited by Congressmen considering the amendment of s 7 as an example of what they conceived to be the inability of the Sherman Act, as then construed, to deal with the problems of corporate concentration. See, e.g., H.R.Rep. No. 1191, 81st Cong., 1st Sess. 10—11, and n. 16; Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, pp. 28, 73; Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 24; 96 Cong.Rec. 16453 (Senator Kefauver, Senate sponsor of the bill to amend s 7: 'the Columbia Steel Co. case is a vivid illustration of the necessity for the proposed amendment of the Clayton Act'), 16503; and cf. 96 Cong.Rec. 16498—16499.

21 See note 19, supra. The congressional attitude toward this Court's Thatcher, Swift, and Arrow-Hart decisions is typified in this remark of Senator O'Conor's: 'The Court, in effect, said that the (Federal Trade) Commission was quite free to use the power which Congress had conferred upon it, so long as it confined the use of that power to ordering the divestiture of pieces of paper which happened to be worthless.' 96 Cong.Rec. 16433. Senator O'Mahoney remarked, for example, that there was 'no doubt of the fundamental fact that an innocent defect in the drafting of section 7 of the Clayton Act back in 1914 had resulted in creating a great opportunity for escape by flagrant violators of the law.' 96 Cong.Rec. 16443. After sharply criticizing this Court's decisions, the Senator continued: 'I take it the record is perfectly clear that what this bill purports to do is to correct an omission in the original Clayton Act. When the authors of the Clayton Act and the Congress which passed it enacted the bill into law they thought they were giving the Federal Trade Commission

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administrative authority to prevent monopolistic mergers * * *.' Ibid. So also, Senator Kefauver observed: 'it would have been much better for the economy of the country to have repealed sections 7 and 11 of the Clayton Act rather than let this wide-open loophole to remain. Most of the large and monopolistic mergers which have become detrimental to the free-enterprise system of our Nation have occurred by way of this plain evasion of the intent of the original Clayton Act.' 96 Cong.Rec. 16451.

22 A cash purchase of another bank's assets would not seem to be a fully effective method of corporate acquisition. In other industries, a cash purchase of plant, inventory, patents, trade secrets, and the like will often directly enhance the competitive position of the acquiring corporation, as in Columbia Steel Co. But a bank desiring to increase its share of banking business through corporate acquisition would ordinarily need to acquire the other bank's deposits and capital, not merely its assets. For more deposits mean more working capital, and additions to capital and surplus increase the lending limit. A cash purchase, in effect, only substitutes cash for cash, since bank assets consist principally of cash and very liquid securities and loans receivable, and adds nothing to the acquiring bank's capital and surplus or to its working capital. True, an exchange of its stock for assets would achieve the acquiring bank's objectives. We are clear, however, that in light of Congress' overriding purpose, in amending s 7, to close the loophole in the original section, if such an exchange (or other clearly evasive transaction) were tantamount in its effects to a merger, the exchange would not be an 'assets' acquisition within the meaning of s 7 but would be treated as a transaction subject to that section.

We have not overlooked the fact that there are corporations in other industries not subject to the FTC's jurisdiction. Chief among these are air carriers subject to the Civil Aeronautics Board and other carriers subject to the Interstate Commerce Commission. Both agencies have been given, expressly, broad powers to exempt mergers and acquisitions in whatever form from the antitrust laws. See 49 U.S.C. ss 1378, 1384; 49 U.S.C. s 5(11) and (13). Therefore, the exclusion of assets acquisitions in such industries from s 7 would seem to have little significance.

Section 11 of the Clayton Act, 15 U.S.C. s 21, vests the FRB with authority to enforce s 7 'where applicable to banks.' This provision has been in the Act since it was first passed in 1914 and was not changed by the 1950 amendments. The Bank Merger Act of 1960, assigning roles in merger applications to the FDIC and the Comptroller of the Currency as well as to the FRB, plainly supplanted, we think, whatever authority the FRB may have acquired under s 11, by virtue of the amendment of s 7, to enforce s 7 against bank mergers. Since the Bank Merger Act applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities but not to outright stock acquisitions, the FRB's authority under s 11 as it existed before the 1950 amendment of s 7 remains unaffected. See, e.g., Transamerica Corp. v. Board of Govs. of Fed. Res. Sys., 206 F.2d 163 (C.A.3d Cir., 1953).

Nothing in this opinion, of course, limits the power of the FTC, under ss 7 and 11, as amended, to reach any transaction, including mergers and consolidations, in the broad range between and including pure stock and pure assets acquisitions, where the acquiring corporation is subject to the FTC's jurisdiction, see 15 U.S.C. s 45(a)(6), and to order divestiture of the stock, share capital, or assets acquired in the transaction, see 15 U.S.C. s 21.

23 See, e.g., statement of Assistant Attorney General Bergson: 'If it (s 7) is to have any significant effect for the future, it is essential that it be amended so that the Federal Trade Commission will be in a position to deal with the merger problem as it exists today.' Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong, 1st Sess., ser. 10, p. 28. See also 96 Cong.Rec. 16437, 16452—16453; 95 Cong.Rec. 11490—11491, 11499, 11504 (Representative Byrne: 'the suggested amendment to sections 7 and 11 of the Clayton Act would merely give the (Federal Trade) Commission the same power in regard to asset acquisitions that it already possesses over acquisitions of stock. This would close the loophole and restore meaning to the statute.').

24 See, e.g., Staff of Subcommittee No. 5 of House Committee on the Judiciary, 82d Cong., 2d Sess., Bank Mergers and Concentration of Banking Facilities (1952) vii; H.R. 5948, printed in 102 Cong.Rec. 2108—2109 (1956); Hearings before a Subcommittee of the Senate Committee on Banking and Currency on the Financial Institutions Act of 1957,

85th Cong., 1st Sess., pt. 2, p. 1030 (testimony of Attorney General Brownell); H.R.Rep. No. 1416, Regulation of Bank Mergers, 86th Cong., 2d Sess. 9; S.Rep. No. 196, Regulation of Bank Mergers, 86th Cong., 1st Sess. 1—2, 5.

25 See, e.g., remarks of Representative Spence: 'The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way.' 106 Cong.Rec. 7257 (1960). See also note 24, supra.

26 This contention was abandoned on appeal. We consider it, nevertheless, because it touches the proper relations of the judicial and administrative spheres. United States v. Western Pac. R. Co., 352 U.S. 59, 63, 77 S.Ct. 161, 164—165, 1 L.Ed.2d 126.

27 Contrast this with the express exemption provisions of, e.g., the Federal Aviation Act, 49 U.S.C. s 1384; Federal Communications Act, 47 U.S.C. ss 221(a), 222(c)(1); Interstate Commerce Act, 49 U.S.C. ss 5(11), 5b(9), 22; Shipping Act, 46 U.S.C. (1958 ed. Supp. III) s 814; Webb-Pomerene Act, 15 U.S.C. s 62; and the Clayton Act itself, s 7, 15 U.S.C. s 18.

28 See United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 314—315, 17 S.Ct. 540, 548—549, 41 L.Ed. 1007; United States v. Joint Traffic Assn., 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259; Northern Securities Co. v. United States, 193 U.S. 197, 343 (plurality opinion), 374—376 (dissenting opinion), 24 S.Ct. 436, 459, 476—477, 48 L.Ed. 679; United States v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87, 105, 107, 33 S.Ct. 443, 448—449, 57 L.Ed. 742; Keogh v. Chicago & N.W.R. Co., 260 U.S. 156, 161—162, 43 S.Ct. 47, 49, 67 L.Ed. 183; Central Transfer Co. v. Terminal Railroad Assn., 288 U.S. 469, 474—475, 53 S.Ct. 444, 446, 77 L.Ed. 899; Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500, 513—515, 56 S.Ct. 546, 551—552, 80 L.Ed. 827; United States v. Borden Co., 308 U.S. 188, 197—206, 60 S.Ct. 182, 187—192, 84 L.Ed. 181; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226—228, 60 S.Ct. 811, 846—847, 84 L.Ed. 1129; Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456—457, 65 S.Ct. 716, 725—726, 89 L.Ed. 1051; United States Alkali Export Assn. v. United States, 325 U.S. 196, 205—206, 65 S.Ct. 1120, 1126, 89 L.Ed. 1554; Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 809—810, 65 S.Ct. 1533, 1539—1540, 89 L.Ed. 1939; Northern Pac. R. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545; United States v. Radio Corp. of America, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354; Maryland & Va. Milk Producers Assn. v. United States, 362 U.S. 458, 464—467, 80 S.Ct. 847, 852—854, 4 L.Ed.2d 880; People of State of California v. Federal Power Comm'n, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54; Pan American World Airways v. United States, 371 U.S. 296, 304, 305, 83 S.Ct. 476, 481—482, 9 L.Ed.2d 325; Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246.

29 See, e.g., Keogh v. Chicago & N.W.R. Co., supra, 260 U.S., at 163, 43 S.Ct., at 49—50, 67 L.Ed. 183; Pan American World Airways v. United States, supra, 371 U.S., at 309—310, 83 S.Ct., at 484—485, 9 L.Ed.2d 325. Cf. Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553.

30 With respect to the question (upon which we intimate no view) whether judicial review of the Comptroller's decision is possible notwithstanding the absence of a specific provision, see Note, 75 Harv.L.Rev. 756, 762—763 (1962); Note, 37 N.Y.U.L.Rev. 735, 750, n. 95 (1962); cf. 1 Davis, Administrative Law (1958), s 4.04.

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31 See generally Jaffe, Primary Jurisdiction Reconsidered. The Anti-Trust Laws, 102 U. of Pa.L.Rev. 577 (1954); Latta, Primary Jurisdiction in the Regulated Industries and the Antitrust Laws, 30 U. of Cin.L.Rev. 261 (1961); Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Col.L.Rev. 673 (1958).

32 In People of State of California v. Federal Power Comm'n, supra, the Court held that the FPC must stay its proceeding on a merger application until the completion of a pending antitrust suit by the Justice Department; a fortiori, the court entertaining the suit would not be required to abstain pending consideration of the merger application by the FPC. We need not and do not consider the question whether the California decision would control here had the Comptroller been denied an opportunity to approve the merger before the antitrust suit was commenced.

33 Cf. United States v. Aluminum Co. of America, 148 F.2d 416, 425 (C.A.2d Cir., 1945). In the instant case, unlike Aluminum Co., there is virtually no time lag between the banks' furnishing competing financial institutions (small-loan companies, for example) with the raw material, i.e., money, and the institutions' selling the finished product, i.e., loans; hence the instant case, compared with Aluminum Co. in this respect, is a fortiori. As one banker testified quite frankly in the instant case in response to the question: 'Do you feel that you are in substantial competition with these institutions (personal-finance and sales-finance companies) that you lend * * * such money to for loans that you want to make?'—'Oh, no, we definitely do not. If we did, we would stop making the loans to them.' (R. 298.) The reason for the competitive disadvantage of most lending institutions vis-a-vis banks is that only banks obtain the bulk of their working capital without having to pay interest or comparable charges thereon, by virtue of their unique power to accept demand deposits. The critical area of short-term commercial credit, see pp. 1721—1722, supra, appears to be one in which banks have little effective competition, save in the case of very large companies which can meet their financing needs from retained earnings or from issuing securities or paper.

34 As one witness for the defendants testified:

'We have had in Philadelphia for 50 years or more the mutual savings banks offering 1/2 per cent and in some instances more than 1/2 per cent higher interest than the commercial banks. Nevertheless, the rate of increase in savings accounts in commercial banks has kept pace with and in many of the banks exceeded the rate of increase of the mutual banks paying 3 1/2 per cent. * * *

'I have made some inquiries. There are four banks on the corner of Broad and Chestnut. Three of them are commercial banks all offering 3 per cent, and one is a mutual savings bank offering 3 1/2. As far as I have been able to discover, there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get 1/2 of 1 per cent more interest. If you ask me why, I will say I do not know. Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level.' (R. 1388—1389.)

35 Consider the following colloquy between governmental counsel and a witness for the defendants:

'Q. What do you consider to be the area of a branch office?

'A. Well, there is no set rule on that. We hope to have an area from 1 1/2 to 2 miles.

'However, we have opened branches directly in the communities where other banks are established, in fact, across the street from them because it is not only a question of getting new business, it's a question of servicing and retaining the accounts that we now have.

'Q. And your business is not necessarily dependent upon it (the customer) being within a mile or two of a branch, is it?

'A. To a large degree, it is, because we found that we were losing deposit accounts regularly from our in-town offices because other banks were opening or had offices in other sections of the city; and in order to retain those accounts and to get additional business we felt it was necessary to establish branches.' (R. 1815.)

As far as the customer for a bank loan is concerned, 'the size of his market is somewhat dependent upon his own size, how well he is known, and so on. For example, for small business concerns known primarily locally, they may consider that their market is a strictly local one, and they may be forced by circumstances to do business with banks in a nearby geographic relationship to them. On the other hand, as business increase in size, the scope of their business activities, their national reputation, the alternatives they have available to them will be spread again over a very large area, possibly as large as the entire United States.' (R. 1372.) (Defendants' testimony on direct examination.)

36 The figures for PNB and Girard respectively are: 54% and 63% of the dollar volume of their commercial and industrial loans originate in the four-county area; 75% and 70%, personal loans; 74% and 84%, real estate loans; 41% and 62%, lines of credit; 94% and 72%, personal trusts; 81% and 94%, time and savings deposits; 56% and 77%, demand deposits; 93% and 87%, demand deposits of individuals. Actually, these figures may be too low. The evidence discloses that most of the business done outside the area is with large borrowers and large depositors; appellees do not, by and large, deal with small businessmen and average individuals not located in the four-county area. For example, of appellees' combined total business demand deposits under $10,000 94% originate in the four-county area. This reinforces the thesis that the smaller the customer, the smaller is his banking market geographically. See note 35, supra.

The appellees concede that the four-county area has sufficient commercial importance to qualify, under Brown Shoe Co., supra, 370 U.S., at 336—337, 82 S.Ct., at 1529—1531, 8 L.Ed.2d 510, as a 'section of the country' within the meaning of s 7. See Maryland & Va. Milk Producers Assn. v. United States, 362 U.S. 458, 469, 80 S.Ct. 847, 854—855, 4 L.Ed.2d 880; cf. United States v. Yellow Cab Co., 332 U.S. 218, 226, 67 S.Ct. 1560, 1564—1565, 91 L.Ed. 2010; Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 279, 55 S.Ct. 182, 185—186, 79 L.Ed. 356.

37 Appellees suggest not that bank offices skirting the four-county area provide meaningful alternatives to bank customers within the area, but that such alternatives are provided by large banks, from New York and elsewhere, which solicit business in the Philadelphia area. There is no evidence of the amount of business done in the area by banks with offices outside the area; it may be that such figures are unobtainable. In any event, it would seem from the local orientation of banking insofar as smaller customers are concerned, see notes 35 and 36, supra, that competition from outside the area would only be important to the larger borrowers and depositors. If so, the four-county area remains a valid geographical market in which to assess the anticompetitive effect of the proposed merger upon the banking facilities available to the smaller customer—a perfectly good 'line of commerce,' in light of Congress' evident concern, in enacting the 1950 amendments to s 7, with preserving small business. See Brown Shoe Co., supra, 370 U.S., at 315—316, 82 S.Ct., at 1518—1519, 8 L.Ed.2d 510. As a practical matter the small businessman can only satisfy his credit needs at local banks. To be sure, there is still some artificiality in deeming the four-county area the relevant 'section of the country' so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate the relevant geographical market. Note, 52 Col.L.Rev. 766, 778—779, n. 77 (1952). And it is notable that outside the four-county area, appellees' business rapidly thins out. Thus, the other six counties of the Delaware Valley account for only 2% of appellees' combined individual demand deposits; 4%, demand deposits of partnerships and corporations; 7%, loans; 2%, savings deposits; 4%, business time deposits.

38 See Kaysen and Turner, Antitrust Policy (1959), 133; Stigler, Mergers and Preventive Antitrust Policy, 104 U. of Pa.L.Rev. 176, 182 (1955); Bok, supra, at 308—316, 328. Cf. Markham, Merger Policy Under the New Section 7: A Six-Year Appraisal, 43 Va.L.Rev. 489, 521—522 (1957).

39 Comment, 'Substantially to Lessen Competition * * *': Current Problems of Horizontal Mergers, 68 Yale L.J. 1627, 1638—1639 (1959); see, e.g., Machlup, The Economics of Sellers' Competition (1952), 84—93, 333-336; Bain, Barriers to New Competition (1956), 27. Cf. Mason, Market Power and Business Conduct: Some Comments, 46—2 Am.Econ.Rev. (1956), 471.

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40 See p. 1724, supra. We note three factors that cause us to shade the percentages given earlier in this opinion, in seeking to calculate market share. (1) The percentages took no account of banks which do business in the four-county area but have no offices there; however, this seems to be a factor of little importance, at least insofar as smaller customers are concerned, see note 37, supra. (2) The percentages took no account of banks which have offices in the four-county area but not their home offices there; however, there seem to be only two such offices and appellees in this Court make no reference to this omission. (3) There are no percentages for the amount of business of banks located in the area, other than appellees, which originates in the area. Appellees contend that since most of the 40 other banks are smaller, they do a more concentratedly local business than appellees, and hence account for a relatively larger proportion of such business. If so, we doubt much correction is needed. The five largest banks in the four-county area at present control some 78% of the area banks' assets. Thus, even if the small banks have a somewhat different pattern of business, it is difficult to see how that would substantially diminish the appellees' share of the local banking business.

No evidence was introduced as to the quantitative significance of these three factors, and appellees do not contend that as a practical matter such evidence could have been obtained. Under the circumstances, we think a downward correction of the percentages to 30% produces a conservative estimate of appellees' market share.

41 Kaysen and Turner, supra, note 38, suggest that 20% should be the line of prima facie unlawfulness; Stigler suggests that any acquisition by a firm controlling 20% of the market after the merger is presumptively unlawful; Markham mentions 25%. Bok's principal test is increase in market concentration, and he suggests a figure of 7% or 8%. And consult note 20, supra. We intimate no view on the validity of such tests for we have no need to consider percentages smaller than those in the case at bar, but we note that such tests are more rigorous than is required to dispose of the instant case. Needless to say, the fact that a merger results in a less-than-30% market share, or in a less substantial increase in concentration than in the instant case, does not raise an inference that the merger is not violative of s 7. See, e.g., Brown Shoe Co., supra.

42 See note 41, supra. It is no answer that, among the three presently largest firms (First Pennsylvania, PNB, and Girard), there will be no increase in concentration. If this argument were valid, then once a market had become unduly concentrated, further concentration would be legally privileges. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. Comment, note 39, supra, at 1644.

43 The fact that some of the bank officers who testified represented small banks in conpetition with appellees does not substantially enhance the probative value of their testimony. The test of a competitive market is not only whether small competitors flourish but also whether consumers are well served. See United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 588, 592 (D.C.S.D.N.Y.1958). '(C)ongressional concern (was) with the protection of competition, not competitors.' Brown Shoe Co., supra, 370 U.S., at 320, 82 S.Ct., at 1521, 8 L.Ed.2d 510. In an oligopolistic market, small companies may be perfectly content to follow the high prices set by the dominant firms, yet the market may be profoundly anticompetitive.

44 Entry is, of course, wholly a matter of governmental grace. See p. 1722, supra. In the 10-year period ending in 1961, only one new bank opened in the Philadelphia four-county area. That was in 1951. At the end of 10 years, the new bank controlled only one-third of 1% of the area's deposits.

45 The following colloquy is representative:

'Q. Mr. Jennings, what is the nature of competition among commercial banks?

'A. Keen, highly competitive. I think, from my own observation, that I have never known competition among banks to be keener than it is today. * * *

'Q. In what area does competition exist? * * *

'A. I think the stiffest, sternest competition of all is in the field to obtain demand deposits and loans. * * *

'Q. What form does the competition take?

'A. It takes many forms. If we are dealing with the deposits of large corporations, wealthy individuals, I would say that most, if not all, of the major banks of the country are competing for such deposits. The same would hold true as regards loans to those corporations or wealthy individuals.

'If we go into the field of smaller loans, smaller deposits, the competition is more regional—wide but nevertheless regional—and there the large banks as well as the small banks are after that business with everything they have.

'Q. What form does the competition take? Is it competition in price?

'A. No, I wouldn't say that it is competition as to price. After all, interest rates are regulated at the top level by the laws of the 50 states. Interest rates at the bottom level have no legal limitation, but for practical purposes the prime rate * * * furnishes a very effective floor. I would say that the area of competition for interest rates would range between, let us say, the prime rate of 4 1/2 and 6 per cent for normal loans exclusive of consumer loans, where higher rates are permitted.

'In the area of service charges, I would say that banks are competitive in that field. They base their service charges primarily on their costs, but they have to maintain a weather eye to windward as to what the competitors are charging in the service charge field. The minute they get out of line in connection with service charges they find their customers will start to protest, and if something isn't done some of the customers will leave them for a differential in service charges of any significance.

'I do not believe that competition is really affected by the price area. I think it is affected largely by the quality and the caliber of service that banks give and whether or not they feel they are being received in the right way, whether they are welcome in the bank. Personalities enter into it very heavily, but I do not think price as such is a major factor in banking competition. It is there, it is a factor, but not major.' (R. 1940—1942.)

It should be noted that besides competition in interest rates, there is a great deal of indirect price competition in the banking industry. For example, the amount of compensating balance a bank requires of a borrower (i.e., the amount the borrower must always retain in his demand deposit account with the bank) affects the real cost of the loan, and varies considerably in the bank's discretion.

46 Thus, arguably, the so-called failing-company defense, see International Shoe Co. v. Federal Trade Comm'n, 280 U.S. 291, 299—303, 50 S.Ct. 89, 91—93, 74 L.Ed. 431, might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures. But the question what defenses in s 7 actions must be allowed in order to avert unsound banking conditions is not before us, and we intimate no view upon it.

1 See Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 BusLaw 994, 995 (1961). Many of the bills are summarized in Funk, Antitrust Legislation Affecting Bank Mergers, 75 Banking L.J. 369 (1958).

2 These agencies and the areas of their primary supervisory responsibility are: (1) the Comptroller of the Currency—national banks; (2) the Federal Reserve System—state Reserve-member banks; (3) the FDIC—insured nonmember banks.

3 Samuelson, Economics (5th ed. 1961), p. 311.

4 For example, savings and loan associations, credit unions, and other institutions compete with banks in installment lending to individuals, and banks are in competition with individuals in the personal trust field.

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5 Since bank insolvencies destroy sources of credit, not only borrowers but also others who rely on the borrowers' ability to secure loans may be adversely affected. See Berle, Banking Under the Anti-Trust Laws, 49 Col.L.Rev. 589, 592 (1949).

6 The term 'merger' is generally used throughout this opinion to designate any form of corporate amalgamation. See note 7 in the Court's opinion, ante, p. 1724. Occasionally, however, as in the above paragraph, the terms 'merger' and 'consolidation' are used in their technical sense.

7 40 Stat. 1043, as amended, 12 U.S.C. (Supp. IV, 1963) s 215.

8 44 Stat. 1225, as amended, 12 U.S.C. (Supp. IV, 1963) s 215.

9 66 Stat. 599, as amended, 12 U.S.C. (Supp. IV, 1963) s 215a.

10 See Paton, Conversion, Merger and Consolidation Legislation—'Two-Way Street' For National and State Banks, 71 Banking L.J. 15 (1954).

11 64 Stat. 455, as amended, 12 U.S.C. s 214a.

12 64 Stat. 457; see 64 Stat. 892 (now 74 Stat. 129, 12 U.S.C. (Supp. IV, 1963) s 1828(c)).

13 Ibid. However, under the Act, insured banks merging with insured state banks did not have to obtain approval unless the capital stock or surplus of the resulting or assuming bank would be less than the aggregate capital stock or surplus of all the merging banks.

14 See Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 1, pp. 243—244 (1955); Hearings on S. 3911 before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 2d Sess. 60—61, 84 (1956); Hearings on S. 1062 before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess. 9 (1959).

15 See also H.R.Rep. No. 1416, 86th Cong., 2d Sess. 5 (1960) ('The Federal antitrust laws are also inadequate to the task of regulating bank mergers; while the Attorney General may move against bank mergers to a limited extent under the Sherman Act, the Clayton Act offers little help.'); id., at 9 ('Because section 7 (of the Clayton Act) is limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the act offers 'little help,' in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers.').

16 In the Senate, a sponsor of S. 1062, Senator Fulbright, reported that the '1950 amendment to section 7 of the Clayton Act, which for the first time imposed controls over mergers by means other than stock acquisitions, did not apply to bank mergers which are practically invariably accomplished by means other than stock acquisition. Accordingly for all practical purposes bank mergers have been and still are exempt from section 7 of the Clayton Act.' 106 Cong.Rec. 9711 (1960).

17 E.g., H.R. 5948, 84th Cong. 1st Sess. (1955); S. 198, 85th Cong., 1st Sess. (1957); S. 722, 85th Cong., 1st Sess. (1957); see note 1, supra.

18 S.Rep. No. 196, 86th Cong., 1st Sess. 17 (1959): 'Time and again the Nation has suffered from the results of unregulated and uncontrolled competition in the field of banking, and from insufficiently regulated competition. * * * The rapid increase in the number of small weak banks, to such a large number that the Comptroller could not effectively supervise them or control any but the worst abuses was one of the factors which led to the panic of 1907.

'The banking collapse in the early 1930's again was in large part the result of insufficient regulation and control of banks, in effect the result of too much competition.' See also 105 Cong.Rec. 8076 (1959): 'But unlimited and unrestricted competition in banking is just not possible. We have had too many panics and banking crises and bank failures, largely

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as the result of excessive competition in banking, to consider for a moment going back to the days of free banking or unregulated banking.'

19 See also S.Rep. No. 196, 86th Cong., 1st Sess. 16 (1959): 'But it is impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and not vested with a public interest.'

20 For the pertinent text of the statute, see note 8 in the Court's opinion, ante, p. 1724.

21 These factors are: 'the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter.' 12 U.S.C. (Supp. IV, 1963) s 1828(c). Compare s 6 of the Federal Deposit Insurance Act, 12 U.S.C. s 1816.

22 See also 106 Cong.Rec. 7259 (1960): 'The language of S. 1062 as amended by the House Banking and Currency Committee and as it appears in the bill we are now about to pass in the House makes it clear that the competitive and monopolistic factors are to be considered along with the banking factors and that after considering all of the factors involved, if the resulting institution will be in the public interest, then the application should be approved and otherwise disapproved.'

23 106 Cong.Rec. 7257 (1960): 'This puts the responsibility for acting on a proposed merger where it belongs—in the agency charged with supervising and examining the bank which will result from the merger. Out of their years of experience in supervising banks, our Federal banking agencies have developed specialized knowledge of banking and the people who engage in it. They are experts at judging the condition of the banks involved, their prospects, their management, and the needs of the community for banking services. They should have primary responsibility in deciding whether a proposed merger would be in the public interest.' (Emphasis added.)

24 H.R.Rep. No. 1416, 86th Cong., 2d Sess. 11—12 (1960): 'We are convinced, also, that approval of a merger should depend on a positive showing of some benefit to be derived from it. As previously indicated, your committee is not prepared to say that the cases enumerated in the hearings are the only instances in which a merger is in the public interest, nor are we prepared to devise a specific and exclusive list of situations in which a merger should be approved.'

25 Compare State Board of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 457, 82 S.Ct. 1380, 1384, 8 L.Ed.2d 620, in which this Court refused to reconsider certain prior decisions because Congress had 'posited a regime of state regulation' of the insurance business on their continuing validity. Cf. Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64.

26 If a bank merger such as this falls within the category of a 'stock' acquisition, a s 7 suit to enjoin it may be brought not only by the Attorney General, but by the Federal Reserve Board as well. See s 11 of the Clayton Act, 15 U.S.C. s 21 (vesting authority in the Board to enforce s 7 'where applicable to banks'). In an attempt to retain some semblance of the structure erected by Congress in the Bank Merger Act, the Court states that it 'supplanted * * * whatever authority the FRB may have acquired under s 11, by virtue of the amendment of s 7, to enforce s 7 against bank mergers.' Ante, p. 1731, note 22. Sicne both the Attorney General and the Federal Reserve Board have purely advisory roles where a bank merger will result in a national bank, the Court's reasoning with respect to the effect of the Bank Merger Act upon enforcement authority should apply with equal force to both.

27 Indeed the Court has erected a simple yardstick in order to alleviate the agony of analyzing economic data—control of 30% of a commercial banking market is prohibited. Ante, pp. 1741—1742.

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28 Although s 7 of the Clayton Act is applicable to an outright purchase of bank stock, this form of amalgamation is infrequently used in the banking field and does not involve divestiture problems of the same magnitude as does an asset acquisition.

29 It is true, as the Court points out (ante, p. 1737), that Congress, in enacting the Bank Merger Act, agreed that the applicability of the Sherman Act to banking should not be disturbed. See, e.g., 105 Cong.Rec. 8076 (1959). But surely this alone provides no conceivable justification for applying the Clayton Act as well. Apart from the fact that the Sherman Act covers many kinds of restraints besides mergers, one of the sponsors of the Bank Merger Act (Senator Fulbright) expressed his expectation that in a Sherman Act case a bank merger would not be subjected to strict antitrust standards to the exclusion of all other considerations: 'And even if the Sherman Act is held to apply to banking and to bank mergers, it seems clear that under the rule of reason spelled out in the Standard Oil case, different considerations will be found applicable, in a regulated field like banking, in determining whether activities would 'unduly diminish competition,' in the words of the Supreme Court in that case.' 106 Cong.Rec. 9711 (1960). Moreover, this Court has recognized in other areas that it may be necessary to accommodate the Sherman Act to regulatory policy. McLean Trucking Co. v. United States, 321 U.S. 67, 83, 64 S.Ct. 370, 382—383, 88 L.Ed. 544; Federal Communications Comm'n v. RCA Communications, Inc., 346 U.S. 86, 91—92, 73 S.Ct. 998, 1002—1003, 97 L.Ed. 1470. See also United States v. Columbia Steel Co., 334 U.S. 495, 527, 68 S.Ct. 1107, 1124, 92 L.Ed. 1533. And of course the Sherman Act is concerned more with existing anti-competitive effects than with future probabilities, and thus would not reach incipient restraints to the same extent as would s 7 of the Clayton Act. See Brown Shoe Co. v. United States, 370 U.S. 294, 317—318 and notes 32, 33, 82 S.Ct. 1502, 1519—1520, 8 L.Ed.2d 510.

30 In these respects a merger is precisely the contrary of what s 7 was originally designed to proscribe—the secret acquisition of corporate control. See the Court's opinion, ante, p. 1727.

31 That the stock-acquisition provision was not intended to cover mergers is strongly suggested by the second paragraph of s 7: 'No corporation shall acquire * * * any part of the stock * * * of one or more corporations * * * where * * * the effect * * * of the use of such stock by the voting or granting of proxies * * * may be substantially to lessen competition, or to tend to create a monopoly.' 15 U.S.C. s 18. (Emphasis added.) After a merger has been consummated, the resulting corporation holds no stock in any party to the merger; thus there can be in this situation no such thing as a restraint of trade by 'the use' of the voting power of acquired stock.

32 On this point, the dissenters agreed: 'It is true that the Clayton Act does not forbid corporate mergers * * *.' 291 U.S., at 600, 54 S.Ct., at 538, 78 L.Ed. 1007. See also United States v. Celanese Corp. of America, D.C., 91 F.Supp. 14.

33 See also Hearings on H.R. 988, H.R. 1240, H.R. 2006, H.R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 38—39 (1949); Hearings on H.R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 109—110 (1950): 'The loophole sought to be filled resulted from a series of Supreme Court decisions. (Swift & Co. v. F.T.C. and Thatcher Mfg. Co. v. F.T.C., 272 U.S. 554, 47 S.Ct. 175, 71 L.Ed. 405; Arrow-Hart & Hegeman Co. v. F.T.C., 291 U.S. 587, 54 S.Ct. 532, 78 L.Ed. 1007.) In these decisions the Supreme Court held that section 7 of the Clayton Act, while prohibiting the acquisition of stock of a competitor, gave the Federal Trade Commission no authority under section 11 to order divestiture of assets which had been acquired before a cease-and-desist order was issued, even though the acquisition resulted from the voting of illegally held stock.'

34 The Federal Trade Commission had assumed primary enforcement responsibility before the 1950 amendment. See Martin, Mergers and the Clayton Act (1959), p. 197.

35 Compare note 26, supra.

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36 See note 33 supra; Hearings on H.R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 97 (1950). And this Court has, after the 1950 amendment, described Arrow as a case involving an asset acquisition. Brown Shoe Co. v. United States, 370 U.S. 294, 313 and note 20, 82 S.Ct. 1502, 1517, 8 L.Ed.2d 510.

37 The single excerpt quoted by the Court (ante, p. 1732) casts no doubt on this proposition, for Senator Kilgore's remark occurred in the course of a discussion in which he was trying to make the point that there is no difference in practical effect, as opposed to the legal distinction, between a merger and a stock acquisition. Thus at the end of the paragraph quoted by the Court the Senator stated: '* * * I cannot see how on earth you can get the idea that the purchase of the stock of the corporation, all of it, does not carry with it the transfer of all of the physical assets in that corporation.' Hearings on H.R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 176 (1950).

38 H.R.Rep. No. 1191, 81st Cong., 1st Sess. 2 (1949).

39 Federal Trade Commission, The Merger Movement: A Summary Report (1948), passim.

40 E.g., Hearings on H.R. 988, H.R. 1240, H.R. 2006, H.R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 39—40 (1949); 95 Cong.Rec. 11503 (1949); 96 Cong.Rec. 16505 (1950).

41 Hearings on H.R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 5—6, 17, 57—59 (1950); Hearings on H.R. 988, H.R. 1240, H.R. 2006, H.R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 40, 113 (1949).

42 S.Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950); H.R.Rep. No. 1191, 81st Cong., 1st Sess. 2—3 (1949).

43 It is interesting to note that in the same year in which s 7 was amended Congress passed an act faciliating certain kinds of bank mergers which had theretofore been prohibited. See note 11, supra, and accompanying text.

44 Since the Court does not reach the Sherman Act aspect of this case, it would serve no useful purpose for me to do so.

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KeyCite Yellow Flag - Negative Treatment
Clarified by Washington v. United States Food and Drug Administration, E.D.Wash., April 13, 2023

668 F.Supp.3d 1125
United States District Court, E.D. Washington.

State of WASHINGTON, State of Oregon, State of Arizona, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, Attorney General of Michigan, State of Nevada, State of New Mexico, State of Rhode Island, State of Vermont, District of Columbia, State of Hawaii, State of Maine, State of Maryland, State of Minnesota, and Commonwealth of Pennsylvania, Plaintiffs,
v.
UNITED STATES FOOD AND DRUG ADMINISTRATION, Robert M. Califf, in his official capacity as Commissioner of Food and Drugs, United States Department of Health and Human Services, and Xavier Becerra, in his official capacity as Secretary of the Department of Health and Human Services, Defendants.

NO. 1:23-CV-3026-TOR
|
Signed April 7, 2023

Synopsis
Background: Seventeen states and District of Columbia, on behalf of themselves and as parens patriae on behalf of their residents, brought action under Administrative Procedure Act (APA) against Food and Drug Administration (FDA), among others, challenging FDA's new risk evaluation and mitigation strategy (REMS) containing restrictions on medication used in connection with termination of early pregnancy. States moved for preliminary injunction affirming FDA's original conclusion that medication was safe and effective, enjoining any actions to remove medication from market, and enjoining restrictions on medication, and various third parties moved for leave to file amicus briefs.

Holdings: The District Court, Thomas O. Rice, J., held that:

[1] states established standing to bring direct suit;

[2] exhaustion of states' administrative remedies was not required;

[3] states established serious issues going to merits of their claims;

[4] states established likelihood of irreparable harm in absence of preliminary relief;

[5] states established that balancing of equities and public interest favored preliminary injunction;

[6] enjoining REMS from medication entirely was not appropriate type of relief for preliminary injunction but enjoining FDA from reducing medication's availability was appropriate type of relief; and

[7] nationwide injunction was inappropriate.

Motion for preliminary injunction granted in part; motions for leave to file amicus briefs denied.

Procedural Posture(s): Motion for Preliminary Injunction; Other.

West Headnotes (53)

[1] **Injunction** Grounds in general; multiple factors

To obtain preliminary injunctive relief, plaintiff must demonstrate: (1) likelihood of success on merits; (2) likelihood of irreparable injury in absence of preliminary relief; (3) that balancing of hardships weighs in plaintiff's favor; and (4) that preliminary injunction will advance public interest. Fed. R. Civ. P. 65.

[2] **Injunction** Grounds in general; multiple factors
Injunction Balancing or weighing factors; sliding scale

Ninth Circuit permits a “sliding scale” approach under which a preliminary injunction may be issued if there are serious questions going to the merits and the balance of hardships tips sharply in the plaintiff's favor, assuming the plaintiff also

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demonstrates a likelihood of irreparable injury in the absence of preliminary relief and that a preliminary injunction will advance the public interest.

[3] **Injunction** Preservation of status quo

Injunction Mandatory preliminary injunctions

A preliminary injunction can either be prohibitory or mandatory.

[4] **Injunction** Prohibitory nature; preservation of status quo

A "prohibitory injunction" preserves the status quo, which is the last, uncontested status which preceded the pending controversy.

[5] **Injunction** Mandatory injunctions; restoration of status quo

A "mandatory injunction" orders a responsible party to take action.

[6] **Injunction** Mandatory injunctions; restoration of status quo

Injunction Clear, unequivocal or existing right to relief

Mandatory injunctions are disfavored and require a higher showing that the facts and law clearly favor the moving party.

[7] **Administrative Law and Procedure** Persons Affected or Aggrieved; Injury

States Capacity of State to Sue

State qualifies as "person" that can bring a cause of action under the Administrative Procedure Act (APA) as a person adversely affected or aggrieved by agency action. 5 U.S.C.A. § 702.

[8] **Administrative Law and Procedure** Nature and Form of Remedy

Administrative Procedure Act (APA) allows person to challenge agency action under various statutes. 5 U.S.C.A. § 702.

[9] **States** Parens patriae

A "parens patriae lawsuit" allows a state to sue in a representative capacity on behalf of its citizens' interests.

[10] **States** Parens patriae

In order to establish standing beyond Article III's minimum, as required to maintain a parens patriae lawsuit, the state must assert a quasi-sovereign interest apart from the interests of particular private parties. U.S. Const. art. 3, § 2, cl. 1.

[11] **States** Parens patriae

For purposes of determining a state's standing to maintain a parens patriae lawsuit, a state has a quasi-sovereign interest in the health and well-being, both physical and economic, of its residents, and in not being discriminatorily denied its rightful status within the federal system.

[12] **States** Parens patriae

In determining whether a state has standing beyond Article III's minimum, as required to maintain a parens patriae lawsuit, courts look to whether the injury is one that the state, if it could, would likely attempt to address through its sovereign lawmaking powers. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Preemption** Congressional Intent or Purpose

States Parens patriae

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Under *Massachusetts v. Mellon* bar, 262 U.S. 447, state lacks standing as parens patriae to bring action against federal government; however, courts must dispense with this bar if Congress so provides.

[14] **States** Parens patriae

States are not necessarily precluded from bringing a parens patriae suit against the federal government, including where the underlying statute forming the basis for an Administrative Procedure Act (APA) action authorizes a parens patriae suit. 5 U.S.C.A. § 702.

[15] **States** Capacity of State to Sue

In direct suit where state seeks redress for its own injuries, state must meet Article III's minimum requirements for standing. U.S. Const. art. 3, § 2, cl. 1.

[16] **Federal Civil Procedure** In general; injury or interest

To have Article III standing to bring an action, a plaintiff must allege that they have suffered, or will imminently suffer, a concrete and particularized injury in fact. U.S. Const. art. 3, § 2, cl. 1.

[17] **Administrative Law and Procedure** Interest in general

Under the Administrative Procedure Act (APA), in addition to meeting Article III's standing requirements, a claimant must establish that their interests are arguably within the zone of interests to be protected or regulated by the statute; this test is not especially demanding and requires only that the interest is sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further the statutory objectives. U.S. Const. art. 3, § 2, cl. 1; 5 U.S.C.A. § 702.

[18] **Health** Judicial review or intervention
States Capacity of State to Sue

States established standing to bring direct suit under Administrative Procedure Act (APA) challenging Food and Drug Administration's (FDA) new risk evaluation and mitigation strategy (REMS) containing restrictions on medication used in connection with termination of early pregnancy; states asserted they would suffer direct harm from restrictions due to unrecoverable costs on their Medicaid and other state-funded health care programs from increased surgical abortions and pregnancy care, practice restrictions on providers and pharmacists, including state employees, and unrecoverable costs in implementing systems to comply with patient agreement and licensure requirements of REMS. U.S. Const. art. 3, § 2, cl. 1; 5 U.S.C.A. § 702.

[19] **Administrative Law and Procedure** Exhaustion of Administrative Remedies

Administrative Procedure Act (APA) requires plaintiff to exhaust available administrative remedies before bringing their grievances to federal court. 5 U.S.C.A. § 704.

[20] **Administrative Law and Procedure** Nature and purpose

Administrative exhaustion requirement of Administrative Procedure Act (APA) allows administrative agency in question to exercise its expertise over subject matter and to permit agency opportunity to correct any mistakes that may have occurred during proceeding, thus avoiding unnecessary or premature judicial intervention into administrative process. 5 U.S.C.A. § 704.

[21] **Administrative Law and Procedure** Exhaustion of Administrative Remedies

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While Administrative Procedure Act (APA) does not mandate process by which plaintiff must exhaust administrative remedies, it provides for exhaustion to extent that it is required by statute or by agency rule as prerequisite to judicial review. 5 U.S.C.A. § 704.

[22] **Administrative Law and Procedure** Nature and purpose

The purpose of the Administrative Procedure Act's (APA) exhaustion requirement is to prevent premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record that is adequate for judicial review. 5 U.S.C.A. § 704.

[23] **Administrative Law and Procedure** Exceptions

Administrative Law and Procedure Futility

Under exceptional circumstances, administrative exhaustion of an Administrative Procedure Act (APA) claim is not required; such exceptional circumstances include where there is objective and undisputed evidence of administrative bias rendering pursuit of an administrative remedy futile. 5 U.S.C.A. § 704.

[24] **Administrative Law and Procedure** Futility

Where it appears the agency's position is already set and it is very likely what the result would be, recourse by administrative remedy is futile, and administrative exhaustion of an Administrative Procedure Act (APA) claim is not required. 5 U.S.C.A. § 704.

[25] **Health** Judicial review or intervention

Exhaustion of states' administrative remedies by filing of citizen petition under Food and Drug Administration's (FDA) risk evaluation and mitigation strategy (REMS) would have been futile, and thus states were not required to exhaust administrative remedies prior to bringing action under Administrative Procedure Act (APA) challenging FDA's new REMS containing restrictions on medication used in connection with termination of early pregnancy; similar information and requests had already been put forth before FDA in other challenges to restrictions, so FDA could not credibly argue that its decision on REMS would have changed upon another citizen petition. 5 U.S.C.A. § 704.

1 Case that cites this headnote

[26] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

Courts must uphold an agency action challenged under the Administrative Procedure Act (APA) unless it (1) relied on factors that Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C.A. § 706(2).

[27] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

An administrative decision is "arbitrary and capricious," warranting setting aside of the decision under the Administrative Procedure Act (APA), if it is internally inconsistent with the underlying analysis. 5 U.S.C.A. § 706(2)(A).

[28] **Administrative Law and Procedure** Scientific and technical matters

Review of an administrative decision under the Administrative Procedure Act (APA) is at its

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most deferential regarding an agency's scientific determinations within its area of expertise. 5 U.S.C.A. § 706.

[29] **Administrative Law and Procedure** Consistency with statute, statutory scheme, or legislative intent

Administrative regulations are valid if they are consistent with the statute under which they are promulgated.

[30] **Abortion and Birth Control** Civil liability and proceedings; injunction

States established existence of serious issues going to merits of their Administrative Procedure Act (APA) claims challenging Food and Drug Administration's (FDA) new risk evaluation and mitigation strategy (REMS) containing restrictions on medication used in connection with termination of early pregnancy, as requirement to obtain requested preliminary injunction preventing FDA from enforcing restrictions; record reflected that, in modifying medication's REMS, FDA did not assess whether medication continued to require REMS and elements to assure safe use (ETASU), and record demonstrated potentially internally inconsistent FDA findings regarding medication's safety profile. 5 U.S.C.A. § 702; Federal Food, Drug, and Cosmetic Act § 505-1, 21 U.S.C.A. §§ 355-1(a)(1), 355-1(f)(1).

[31] **Injunction** Irreparable injury

"Irreparable harm," for purposes of preliminary injunction, is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages.

[32] **Injunction** Irreparable injury

A court may imply a lack of irreparable harm, for purposes of preliminary injunction, where there is no speedy action and a plaintiff sleeps on its rights.

[33] **Abortion and Birth Control** Civil liability and proceedings; injunction

States established likelihood of irreparable harm in absence of preliminary relief, as required to obtain requested preliminary injunction preventing Food and Drug Administration (FDA) from enforcing new risk evaluation and mitigation strategy (REMS) containing restrictions on medication used in connection with termination of early pregnancy; states asserted that REMS imposed costs that were not compensable where restriction of access to medication caused patients to miss window for medication abortion, leaving them to obtain procedural abortion or carry pregnancy to term, which imposed higher costs on state-run health care programs, and that such costs could not be recovered through course of ordinary litigation.

[34] **Injunction** Irreparable injury

Economic costs that may not be recovered through the ordinary course of litigation satisfy the irreparable harm standard required to obtain preliminary injunction.

[35] **Injunction** Injunctions Sought by Government in General

Injunction Injunctions against government entities in general

When government is party to case in which preliminary injunction is sought, "balance of equities" and "public interest" factors merge.

[36] **Injunction** Health

Public's interest in health care favors preliminary injunction against administrative action where agency's action likely results in worse health outcomes.

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[37] **Abortion and Birth Control** Civil liability and proceedings; injunction

States established that balancing of equities and public interest favored preliminary injunction, as required to obtain requested preliminary injunction preventing Food and Drug Administration (FDA) from enforcing new risk evaluation and mitigation strategy (REMS) containing restrictions on medication used in connection with termination of early pregnancy, even if public interest was best served by deferring to FDA's judgments about what restrictions were necessary to ensure drugs were safe; states alleged that FDA made findings that were contrary to law and that were arbitrary and capricious and contended that public had interest in access to safe and effective medicine for those who terminated their pregnancies.

[38] **Injunction** Scope and duration of relief

When the court determines a preliminary injunction is warranted, injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.

[39] **Injunction** Purpose or function in general

The purpose of interim equitable relief in the form of a preliminary injunction is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.

[40] **Injunction** Scope and duration of relief

In crafting a remedy in the form of a preliminary injunction, a court need not grant the total relief sought by the applicant, but may mold its decree to meet the exigencies of the particular case.

[41] **Administrative Law and Procedure** Compliance with rulemaking procedures or other process

Ordinarily, when a regulation is not promulgated in compliance with the Administrative Procedure Act (APA), the regulation is invalid. 5 U.S.C.A. § 551 et seq.

[42] **Administrative Law and Procedure** Effect of Invalidity or Invalidation

The effect of invalidating an agency rule is to reinstate the rule previously in force.

[43] **Injunction** Discretion as to scope of relief

The scope of an injunction is within the broad discretion of the district court.

[44] **Abortion and Birth Control** Civil liability and proceedings; injunction

Enjoining risk evaluation and mitigation strategy (REMS) from medication entirely was not appropriate type of relief for preliminary injunction, in action brought by 17 states and District of Columbia challenging Food and Drug Administration's (FDA) new REMS containing restrictions on medication used in connection with termination of early pregnancy; enjoining REMS from medication entirely was well beyond status quo, and doing so would eliminate ability of pharmacies to provide medication, thereby reducing medication's availability, which would run directly counter to states' request.

[45] **Abortion and Birth Control** Civil liability and proceedings; injunction

Enjoining Food and Drug Administration (FDA) from reducing medication's availability was appropriate type of relief for preliminary injunction, in action brought by 17 states and District of Columbia challenging Food and Drug Administration's (FDA) new risk evaluation and mitigation strategy (REMS) containing restrictions on medication used in connection with termination of early pregnancy; in preserving status quo, it was fair and equitable

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for FDA to not act with respect to REMS until determination was made on merits, which was consistent with Administrative Procedure Act's (APA) provision authorizing courts to stay agency action to preserve status or rights pending conclusion of review proceedings. 5 U.S.C.A. § 705.

1 Case that cites this headnote

[46] **Injunction** Persons Liable

Generally, there is no requirement that an injunction affect only the parties in the suit.

[47] **Injunction** Geographical scope of relief

In issuing an injunction requested by plaintiff states, district judges must require a showing of nationwide impact or sufficient similarity to the plaintiff states to foreclose litigation in other districts.

[48] **Abortion and Birth Control** Civil liability and proceedings; injunction

Nationwide injunction was inappropriate, in action brought by 17 states and District of Columbia challenging Food and Drug Administration's (FDA) new risk evaluation and mitigation strategy (REMS) containing restrictions on medication used in connection with termination of early pregnancy; record did not demonstrate nationwide impact of sufficient similarity to plaintiff states' situation, as abortion restrictions varied state-by-state and plaintiff states alleged harm not shared nationwide, and there was also potential for competing litigation.

[49] **Amicus Curiae** Right to appear and act in general

Court has broad discretion to grant or refuse a prospective amicus participation.

1 Case that cites this headnote

[50] **Amicus Curiae** Right to appear and act in general

Amici may be either impartial individuals or interested parties.

[51] **Amicus Curiae** Right to appear and act in general

In deciding whether to grant leave to file an amicus brief, courts should consider whether the briefing supplements the efforts of counsel, and draws the court's attention to law that escaped consideration.

1 Case that cites this headnote

[52] **Amicus Curiae** Right to appear and act in general

An amicus brief should normally be allowed when the amicus has an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide; otherwise, leave to file an amicus curiae brief should be denied.

1 Case that cites this headnote

[53] **Amicus Curiae** Right to appear and act in general

District court would deny various third parties' motions for leave to file amicus briefs, in determining states' motion for preliminary injunction in action brought by 17 states and District of Columbia challenging Food and Drug Administration's (FDA) new risk evaluation and mitigation strategy (REMS) containing restrictions on medication used in connection with termination of early pregnancy, even though motions were unopposed; proposed briefs offered no additional legal or substantive information that was particularly helpful to district court's findings on motion for preliminary injunction.

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ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THOMAS O. RICE, United States District Judge

***1133** BEFORE THE COURT are Plaintiffs' Motion for Preliminary Injunction (ECF No. 3), Third Parties' Unopposed Motion for Leave to File Amicus Curiae Brief

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(ECF No. 52), and Third Parties' Unopposed Motion for Leave to File Amicus Brief (ECF No. 69). The Motion for Preliminary Injunction was submitted for consideration with oral argument on March 28, 2023. Kristin Beneski, Colleen M. Melody, and Noah G. Purcell appeared on behalf of Plaintiffs. Noah T. Katzen, Aravind Sreenath, and Molly Smith appeared on behalf of Defendants. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, Plaintiffs' Motion for Preliminary Injunction (ECF No. 3) is **granted in part**, Third Parties' Unopposed Motion for Leave to File Amicus Curiae Brief (ECF No. 52) is **denied**, and Third Parties' Unopposed Motion for Leave to File Amicus Brief (ECF No. 69) is **denied**.

BACKGROUND

This case concerns federal regulation of mifepristone used in connection with the termination of early pregnancy. ECF No. 35. Plaintiffs seek a preliminary injunction, asking this Court to "affirm[ ] "FDA's original conclusion that mifepristone is safe and effective, preserv[e] the status quo by enjoining any actions by Defendants to remove this critical drug from the market, and enjoin[ ] the unnecessary and burdensome January 2023 restrictions." ECF No. 3 at 5. The parties timely filed their respective response and reply. ECF Nos. 51, 60. The following facts are generally undisputed for purposes of resolving the instant motion.

In 1992, Subpart H regulations authorized the Food and Drug Administration ("FDA") to require conditions "needed to assure safe use" for certain drugs. Final Rule, 57 Fed. Reg. 58,942, 58,958 (December 11, 1992) (codified at 21 C.FR. § 314.520). In September 2000, FDA approved mifepristone [1] under Subpart H, concluding that mifepristone is safe and effective for medical termination of intrauterine pregnancy through 49 days' gestation when used in a regimen with the already-approved drug, misoprostol. ECF No. 35 at 21, ¶ 85. FDA's restrictions on mifepristone included requiring (1) an in-person dispensing requirement where the drug could only be dispensed in a hospital, clinic, or medical office, by or under the supervision of a certified provider who at the time could only be a physician, (2) providers attest to their clinical abilities in a signed form kept on file by the manufacturer, and agree to comply with reporting and other REMS requirements, and (3) prescribers and patients review and sign a form with information about the regimen and risks and that the prescriber provide copies to the patient and patient's medical record. *Id.* at 24, ¶ 87.

From 1992 to February 2002, seven New Drug Applications ("NDA"), including Mifeprex, ***1134** were approved subject to these conditions, in contrast to the 961 NDAs with no additional restrictions from January 1993 to September 2005. ECF No. 35 at 24–25, ¶ 88.

The Food and Drug Administration Amendments Act of 2007 effectively replaced Subpart H with the REMS statute codified at 21 U.S.C. § 355-1. Pub. L. No. 110-85, tit. IX, § 901. All drugs previously approved under Subpart H, including Mifeprex, were deemed to have a REMS in place. Pub. L. No. 110-85, tit. IX, § 909(b). Under the Federal Food, Drug and Cosmetic Act ("FDCA"), a new drug cannot be marketed and prescribed until it undergoes a rigorous approval process to determine that it is safe and effective. 21 U.S.C. § 355.

In 2011, FDA issued a new REMS for Mifeprex incorporating the same restrictions under which the drug was approved eleven years earlier. *Id.*, ¶ 90; ECF No. 51-2. In 2013, FDA reviewed the existing REMS and reaffirmed the restrictions in place. ECF No. 35 at 25, ¶ 91.

In 2015, Mifeprex's manufacturer submitted a supplemental NDA proposing to update the label to reflect evidence-based practices across the country – namely, the use of 200 mg of mifepristone instead of 600 mg. *Id.*, ¶ 92. In July 2015, the manufacturer submitted its REMS assessment, proposing minor modifications. *Id.* This submission prompted a review of the Mifeprex label and REMS by FDA. *Id.* at 26, ¶ 93. As part of the review, FDA received letters from more than 40 medical experts, researches, advocacy groups, and professional associations who asked, *inter alia*, that the REMS be eliminated in their entirety. *Id.* One letter asked FDA to "[e]liminate the REMS and ETASU (Elements to Assure Safe Use), including eliminating the certification and patient agreement requirements. *Id.* at 27, ¶ 95.

In 2016, FDA found "no new safety concerns have arisen in recent years, and that the known serious risks occur rarely," and that "[g]iven that the number of ... adverse events appear to be stable or decreased over time, it is likely that ... serious adverse events will remain acceptably low." *Id.* at 30, ¶ 100. Following this review, FDA changed Mifeprex's indication, labeling, and REMS, including increasing the gestational age

limit from 49 to 70 days, reducing the number of required in-person clinic visits to one, finding at-home administration of misoprostol safe, finding no significant differences in outcomes based on whether patients had a follow-up phone call or in person or based on the timing of those appointments, and allowing a broader set of healthcare providers to prescribe mifepristone. *Id.*, ¶ 101. However, FDA still required that mifepristone be administered in a clinic setting. *Id.*

In 2019, FDA approved a different manufacturer's abbreviated NDA for a generic version of mifepristone and established the Mifepristone REMS Program, which covered both Mifeprex and the generic drug. *Id.* at 32, ¶ 103; ECF No. 51-3. In May 2020, American College of Obstetricians and Gynecologists ("ACOG") sued FDA, challenging the Mifepristone REMS Program's in-person dispensing requirement in light of the COVID-19 pandemic. ECF No. 35, ¶ 104. In that case, the district court temporarily enjoined FDA from enforcing the in-person dispensation requirements under the REMS in light of the COVID-19 pandemic. *American College of Obstetricians and Gynecologists v. United States Food and Drug Administration*, 47 2F. Supp. 3d 183 (D. Md. 2020).

In April 2021, FDA suspended the in-person dispensing requirement during the COVID-19 public health emergency because, during the six-month period in ***1135** which the in-person dispensing requirement had been enjoined, the availability of mifepristone by mail showed no increases in serious patient safety concerns. *Id.*, ¶ 105.

On May 7, 2021, FDA announced it would review whether the Mifepristone REMS Program should be modified. ECF No. 51-4. FDA reviewed materials between March 29, 2016 and July 26, 2021, as well as publications found on PubMed and Embase and those provided by "advocacy groups, individuals, plaintiffs in *Chelius v. Becerra*, 1:17-493-JAO-RT (D. Haw.), application holders, and healthcare providers and researchers. *Id.* at 10–11.

On December 16, 2021, FDA announced its conclusions regarding the Mifepristone REMS Program. ECF No. 51-5. On January 3, 2023, FDA accepted these conclusions by approving the supplemental applications proposing conforming modifications. ECF Nos. 51-8; 51-11. The 2023 REMS removed the in-person dispensing requirement and added a pharmacy-certification requirement. ECF Nos. 51-4, 51-5. The FDA maintained the Prescriber and Patient Agreement Form requirements. *Id.*

DISCUSSION

I. Preliminary Injunction Standard

Plaintiffs, on behalf of themselves and as *parens patriae* in protecting the health and well-being of its residents, moves for a preliminary injunction "affirming FDA's original conclusion that mifepristone is safe and effective, preserving the status quo by enjoining any actions by Defendants to remove this critical drug from the market, and enjoining the unnecessary and burdensome January 2023 restrictions." *See* ECF Nos. 3 at 5; 35.

[1] Pursuant to Federal Rule of Civil Procedure 65, the Court may grant preliminary injunctive relief in order to prevent "immediate and irreparable injury." Fed. R. Civ. P. 65(b)(1)(A). To obtain this relief, a plaintiff must demonstrate: (1) a likelihood of success on the merits; (2) a likelihood of irreparable injury in the absence of preliminary relief; (3) that a balancing of the hardships weighs in plaintiff's favor; and (4) that a preliminary injunction will advance the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012). Under the *Winter* test, a plaintiff must satisfy each element for injunctive relief.

[2] Alternatively, the Ninth Circuit also permits a "sliding scale" approach under which an injunction may be issued if there are "serious questions going to the merits" and "the balance of hardships tips sharply in the plaintiff's favor," assuming the plaintiff also satisfies the two other *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("[A] stronger showing of one element may offset a weaker showing of another."); *see also* *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) ("We have also articulated an alternate formulation of the *Winter* test, under which serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." (internal quotation marks and citation omitted)).

[3] **[4]** **[5]** **[6]** A preliminary injunction can either be prohibitory or mandatory. *Marlyn Nutraceuticals, Inc. v.*

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Mucos Pharma GmbH & Co., 571 F.3d 873, 878 (9th Cir. 2009). A prohibitory injunction preserves the status quo which is the "last, uncontested status which preceded the pending ***1136** controversy." *Id.* at 879. A mandatory injunction "orders a responsible party to take action." *Id.* at 878. Mandatory injunctions are disfavored and require a higher showing that the "facts and law clearly favor the moving party." *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir. 2015).

Plaintiffs contend they are seeking a prohibitory injunction to maintain the "status quo." ECF Nos. 3, 78. Plaintiffs seek an "order enjoining Defendants from doing two things: (1) enforcing the 2023 REMS, and (2) changing the status quo to make mifepristone less available in the Plaintiff States." ECF No. 60 at 19. However, when addressing Defendants' argument that the 2023 REMS is less restrictive than any prior REMS, Plaintiffs contend they "seek to enjoin the application of *any* REMS, such that mifepristone can be prescribed just like the 20,000+ other drugs that don't have one." *Id.* at 10. At oral argument, Plaintiffs maintain they seek a prohibitory injunction.

The status quo, i.e., the last uncontested status preceding the pending controversy, were the REMS in place prior to the 2023 REMS. Considering the conflicting requests, the Court will apply the prohibitory injunction standard to the extent Plaintiffs seek to maintain the status quo.

A. Likelihood of Success on the Merits

Plaintiffs assert they are likely to succeed on the success of the merits of the claim that the 2023 REMS violated the Administrative Procedures Act ("APA"). ECF No. 3 at 16–19. Defendants disagree and also contend that Plaintiffs lack standing and have not exhausted their administrative remedies. ECF No. 51.

1. Standing

Plaintiffs brings suit on behalf of themselves and as *parens patriae* in protecting the health and well-being of its residents. *See* ECF No. 35. Defendants argue Plaintiffs lack standing where the federal government is the ultimate *parens patriae* and the alleged economic interests are insufficient to establish standing. ECF No. 51.

[7] **[8]** The APA provides a cause of action to any "person ... adversely affected or aggrieved by agency action." 5 U.S.C. § 702. A state qualifies as a "person" within the meaning of the APA. *See* *Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985). The APA allows a person to challenge agency action under various statutes. *See* *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984).

a. *Parens Patriae* Suit

[9] **[10]** **[11]** **[12]** A *parens patriae* lawsuit allows a state to sue in a representative capacity on behalf of its citizens' interests. *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 178 (D.C. Cir. 2019). In order to establish standing beyond Article III's minimum, the State must assert a quasi-sovereign interest "apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). A state has a quasi-sovereign interest "in the health and well-being – both physical and economic – of its residents" and "in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607, 102 S.Ct. 3260. Courts look to "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.*

[13] Under the *Mellon* bar, a state lacks standing as *parens patriae* to bring an action against the federal government. ***1137** *Massachusetts v. Mellon*, 262 U.S. 447, 485–86, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). However, "courts must dispense with [the *Mellon* bar] if Congress so provides." *Maryland People's Couns. v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985). "The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions ... are hard to reconcile." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 802, n.10, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015).

[14] Courts have determined that the APA alone does not demonstrate congressional intent to authorize a state to sue the federal government as *parens patriae. See* *Bernhardt*,

923 F.3d at 181; Am. Fed'n of Tchrs. v. Cardona, No. 5:20-CV-00455-EJD, 2021 WL 4461187, at *5 (N.D. Cal. Sept. 29, 2021). However, states are not necessarily precluded from bringing a *parens patriae* suit against the federal government, including where the underlying statute forming the basis for the APA action authorizes a *parens patriae* suit. *See* *New York v. United States Dep't of Lab.*, 477 F. Supp. 3d 1, 9, n.6 (S.D.N.Y. 2020); *New York v. Biden*, No. 20-CV-2340(EGS), 636 F.Supp.3d 1, 15 (D.D.C. Oct. 6, 2022) (allowing *parens patriae* suit against federal government where "Plaintiffs' efforts to mitigate the spread of COVID-19 are aimed at protecting the public health of their respective jurisdictions as a whole."); *Louisiana v. Becerra*, No. 3:21-CV-04370, 629 F.Supp.3d 477, 486–87 (W.D. La. Sept. 21, 2022) (finding states have *parens patriae* and/or quasi-sovereign interest in APA claims on behalf of citizens).

Regardless of whether Plaintiffs have standing to assert claims on behalf of its citizens under the APA in this case, Plaintiffs allege direct injuries sufficient to confer standing. Therefore, the Court declines to resolve the *parens patriae* issue.

b. Direct Suit

[15] **[16]** In a direct suit where a state seeks redress for its own injuries, the state must meet Article III's minimum requirements. *Bernhardt*, 923 F.3d at 178. A plaintiff "must allege that they have suffered, or will imminently suffer, a 'concrete and particularized' injury in fact." *City & Cnty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 981 F.3d 742, 754 (9th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[17] Under the APA, a claimant must also establish that their interests are "arguably within the zone of interests to be protected or regulated by the statute." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). This test is not "especially demanding" and requires only that the interest is "sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further the statutory objectives." *City & Cnty. of San Francisco*, 981 F.3d at 755 (citations omitted).

[18] Plaintiffs assert the following direct harm: (1) unrecoverable costs on the States' Medicaid and other state-funded health care programs from increased surgical abortions and pregnancy care, (2) practice restrictions on providers and pharmacists, including state employees, and (3) unrecoverable costs in implementing systems to comply with the 2023 REMS' patient agreement and licensure requirements. ECF Nos. 3 at 29–30; 60 at 7–10 (citations to the record omitted).

***1138** Plaintiffs have shown a reasonably probable threat to their economic interests in the form of unrecoverable costs that are fairly traceable to the 2023 REMS, which are allegedly in violation of the APA. *See* *California v. Azar*, 911 F.3d 558, 571–73 (9th Cir. 2018) (finding state had standing due to economic interests where state was responsible for reimbursing women who will seek contraceptive care through state-run programs). Therefore, Plaintiffs have established standing.

2. Administrative Exhaustion

Defendants contend Plaintiffs failed to exhaust their administrative remedies by not filing a citizen petition under the 2023 REMS. ECF No. 51 at 14–19. Plaintiffs maintain that a new citizen petition would be futile where FDA had the same information and arguments prior to the January 2023 REMS decision. ECF No. 60 at 4–7.

[19] **[20]** **[21]** Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. However, the APA requires a plaintiff to "exhaust available administrative remedies before bringing their grievances to federal court." *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) (citing 5 U.S.C. § 704). Administrative exhaustion allows "the administrative agency in question to exercise its expertise over the subject matter and to permit the agency an opportunity to correct any mistakes that may have occurred during the proceeding, thus avoiding unnecessary or premature judicial intervention into the administrative

process." *Buckingham v. Secretary of U.S. Dept. of Agr.*, 603 F.3d 1073, 1080 (9th Cir. 2010) (internal citation omitted). While the APA does not mandate a process by which a plaintiff must exhaust remedies, the APA provides for exhaustion "to the extent that it is required by statute or by agency rule as a prerequisite to judicial review." *Darby v. Cisneros*, 509 U.S. 137, 153, 113 S.Ct. 2539, 125 L.Ed.2d 113 (1993).

[22] As relevant here, the FDA created a regulatory mechanism by which interested persons may challenge agency activities under the Food, Drug, and Cosmetic Act ("FDCA"). *See* 21 C.F.R. §§ 10.1(a), 10.25(a), 10.45(b). "An interested person may petition the Commissioner to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action .... in the form of a citizen petition." 21 C.F.R. § 10.25(a). "A request that the Commissioner take ... administrative action must first be the subject of a final administrative decision based upon a petition submitted under § 10.25(a) ... before any legal action is filed in a court complaining of the action or failure to act." 21 C.F.R. § 10.45(b). The purpose of administrative exhaustion is to prevent "premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Tamosaitis v. URS Inc.*, 781 F.3d 468, 478 (9th Cir. 2015).

[23] **[24]** Under exceptional circumstances, administrative exhaustion of an APA claim is not required. *See Anderson v. Babbitt*, 230 F.3d 1158, 1164 (9th Cir. 2000). Exceptional circumstances include where there is "objective and undisputed evidence" of administrative bias rendering pursuit of an administrative remedy futile. *Id.* (brackets omitted); *see also* ***1139** *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990). Thus, where it appears the agency's position is "already set" and it is "very likely" what the result would be, such recourse is futile. *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 747 (9th Cir. 1991) (citation omitted); *see also Chinook Indian Nation v. Zinke*, 326 F. Supp. 3d 1128, 1144 (W.D. Wash. 2018) ("There is virtually no chance that requiring Plaintiffs to go through [agency's] formal request process will make any difference.").

[25] In 2020, fifteen Plaintiff States asked FDA to eliminate the REMS patient agreement and certification requirements as "onerous and medically unnecessary" and received a form response from FDA. ECF No. 60 at 5. In 2021, FDA conducted a "full review" of REMS, including information about comparator drugs with mifepristone. ECF No. 60 at 7. In 2022, the ACOG and other medical and professional healthcare access organizations petitioned FDA to, in part, eliminate the REMS as medically unnecessary and unduly burdensome for uses of mifepristone, primarily for miscarriage management. ECF Nos. 35 at 47, ¶ 139; 60 at 4; 61-1. FDA rejected ACOG's citizen petition. ECF No. 35 at 51, ¶ 144.

Based on the information and requests already put forth before FDA, FDA cannot credibly argue that its decision on the Mifepristone REMS Program would change upon another citizen petition. *See, e.g.*, ECF Nos. 51-5 at 22–23 (assessing whether to retain Mifeprex REMS); 61-13 at 2 (chronology of FDA communications). Thus, the Court finds that administrative exhaustion through a citizen petition on the January 2023 REMS would be futile.

3. APA Claim

Plaintiffs assert they are likely to succeed on the merits of the claim that the 2023 REMS is contrary to law and arbitrary and capricious under the APA. ECF No. 3 at 19–29.

[26] **[27]** **[28]** To obtain injunctive relief, Plaintiff must show that there are "serious questions going to the merits" of its claims or that it is "likely to succeed on the merits." *Cottrell*, 632 F.3d at 1131; *Farris*, 677 F.3d at 865. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary [and] capricious ... or otherwise not in accordance with law [or] in excess of statutory ... authority, or limitations." 5 U.S.C. § 706(2)(A), (C). Courts must uphold an agency action unless it (1) "relied on factors which Congress has not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," (3) "offered an explanation for its decision that runs counter to the evidence before the agency," or (4) the "decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 732–33 (9th Cir. 2017) (internal quotation marks

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omitted). Additionally, a decision is arbitrary and capricious if it is internally inconsistent with the underlying analysis. *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015). Review is "at its most deferential" regarding an agency's scientific determinations within its area of expertise. *Baltimore Gas & Elec., Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1982).

[29] Regulations are valid if they are "consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977). Under the FDCA, a new drug cannot be marketed and prescribed until it undergoes a rigorous approval process to determine that it is safe ***1140** and effective. 21 U.S.C. § 355. For certain drugs, a risk evaluation and mitigation strategy (REMS) is required when the agency determines, after considering six factors, it is "necessary to ensure that the benefits of the drug outweigh the risks of the drug." 21 U.S.C. § 355-1(a)(1). An existing REMS may be modified or removed to "ensure the benefits of the drug outweighs the risks of the drug [or] minimize the burden on the health care delivery system of complying with the strategy." 21 U.S.C. § 355-1(g)(4)(B).

Moreover, a REMS may include elements that are necessary to assure safe use [ETASU] due to a drug's "inherent toxicity or potential harmfulness" if the drug has "been shown to be effective, but is associated with a serious adverse drug experience, can be approved only if, or would be withdrawn unless, such elements are required as part of such strategy to mitigate a specific serious risk listed in the labeling of the drug." 21 U.S.C. § 355-1(f)(1)(A). A "serious adverse drug experience" is one that results in:

> death; an adverse drug experience that places the patient at immediate risk of death ...; inpatient hospitalization or prolongation of existing hospitalization; a persistent or significant incapacity or substantial disruption of the ability to conduct normal life functions; or a congenital anomaly or birth defect; or based on appropriate medical judgment, may jeopardize the patient and may require a medical or surgical intervention to prevent [such] an outcome.

21 U.S.C. § 355-1(b)(4)(A).

If the FDA determines ETASU is required, the ETASU shall:

> not be unduly burdensome on patient access to the drug, considering in particular – patients with serious or life-threatening diseases or conditions; patient who have difficulty accessing health care (such as patients in rural or medically underserved areas); and patients with functional limitations; and to the extent practicable, so as to minimize the burden on the health care delivery system – conform with [ETASU] for other drugs with similar, serious risks; and be designed to be compatible with established distribution, procurement, and dispensing systems from drugs.

21 U.S.C. § 355-1(f)(2)(C)–(D).

Plaintiffs contend that mifepristone no longer requires a REMS program with ETASU. ECF Nos. 3 at 19–21, 23–24; 60 at 11. Plaintiffs assert that (1) FDA acknowledges that serious adverse events are "exceedingly rare", (2) mifepristone's associated fatality rate is .00005%, with not a single death "casually attributed to mifepristone"(3) "all the data shows the mifepristone is among the safest drugs in the world, and safer than the vast majority of drugs for which FDA has never attempted to impose a REMS", and (4) "there is no reasoned scientific basis for subjecting it to additional burdens that are not applied to other, riskier medications." *See id.* Defendants do not address whether mifepristone qualifies for ETASU, asserting it need only determine whether modifications are appropriate under 21 U.S.C. § 355-1(g)(4)(B). *See* ECF Nos. 51 at 25; 78 at 22.

The FDA may modify or remove an approved REMS, including ETASU, if it determines "1 or more goals or elements should be ... modified, or removed from the approved strategy [in part] to ensure the benefits of the drug outweigh the risks of the drug." 21 U.S.C. § 355-1(g)(4)(B). Implicit in this assessment is whether the drug's risks require REMS and/or ETASU. 21 U.S.C. § 355-1(a)(1), (f)(1). Thus, it would be contrary to the plain language of the statute that the agency need not consider arguments that mifepristone's ***1141** REMS and ETASU should be removed in whole or part based on criteria under 21 U.S.C. § 355-1(a)(1), (f)(1).

[30] It is not the Court's role to review the scientific evidence and decide whether mifepristone's benefits outweigh its risks without REMS and/or ETASU. That is precisely FDA's role. However, based on the present record, FDA did not assess whether mifepristone qualifies for REMS and ETASU based on the criteria set forth under 21 U.S.C. § 355-1(a)(1), (f)(1). *See* ECF No. 51-4. Even under a deferential review, it appears FDA failed to consider an important aspect of the problem. *Turtle Island*, 878 F.3d at 732. Moreover, the record demonstrates potentially internally inconsistent FDA findings regarding mifepristone's safety profile. *Nat'l Parks Conservation*, 788 F.3d at 1141; *see, e.g.*, ECF Nos. 51-5 at 8–9 ("Serious adverse events ... are rare" [and] mifepristone "is safe and effective through 70 days gestation."); 51-9 (approving mifepristone for Cushing's syndrome without a REMS considering risks of fetal loss).

Therefore, the Court finds there are serious issues going to the merits of Plaintiffs' APA claims. *Cottrell*, 632 F.3d at 1131. The Court emphasizes this finding is not binding at a trial on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Given this determination, the Court finds it unnecessary to address the other arguments regarding the individual ETASU currently in place. *See* ECF No. 3 at 21.

B. Irreparable Harm

Plaintiffs assert they will suffer irreparable harm from the 2023 REMS in at least three ways: (1) financial costs on Plaintiffs that cannot be compensated, (2) burdens on Plaintiffs' institutions and providers who provide abortion care, and (3) harm to the health and well-being of patients and providers "by aggravating the ongoing crisis of reduced access to abortion care." ECF No. 3 at 29.

[31] **[32]** A plaintiff seeking injunctive relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22, 129 S.Ct. 365 (emphasis in original). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* "Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). A court may imply a lack of irreparable harm where there is no "speedy action" and a plaintiff sleeps on its rights. *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984).

[33] **[34]** Plaintiffs assert that the Mifepristone REMS Program imposes costs that are not compensable where the restriction of access to mifepristone causes patients to miss the window for medication abortion, leaving patients with procedural abortion or carrying a pregnancy to term, options that impose higher costs on Plaintiffs' state-run health care programs. ECF No. 3 at 29–30. Plaintiffs also contend the ongoing implementation of the 2023 REMS modifications impose costs on Plaintiffs. *Id.* at 33. Economic costs that may not be recovered through the ordinary course of litigation satisfy the irreparable harm standard. *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *see also California v. U.S. Health & Human Servs.*, 390 F. Supp. 3d 1061, 1065 (N.D. Cal. 2019). The Court finds that the alleged unrecoverable economic costs in this ***1142** case is sufficient to demonstrate irreparable harm. The Court need not reach Plaintiffs' other bases of irreparable harm.

Defendants argue Plaintiffs fail to show irreparable harm on two grounds: (1) the 2023 REMS loosen restrictions and (2) Plaintiffs delayed in filing this action. ECF No. 51 at 30. First, even taking Defendants' argument that the "net effect" of the 2023 REMS lessens restrictions, Plaintiffs continue to assert that *no* restrictions are necessary and the 2023 REMS impose new restrictions that Plaintiffs are still working to implement. *See* ECF No. 3 at 33. Second, as to any delay, Plaintiffs contend they did not know FDA would approve

the 2023 REMS in light of the *Dobbs* decision[2] until January 2023. ECF No. 60 at 15–16; *see also* ECF No. 78 at 9. This is a complex case with 18 Plaintiffs. The Court finds Plaintiffs' less than two-month delay from the FDA approval minimal considering the record and issues in this case. *Lydo*, 745 F.2d at 1213. Accordingly, these are not bases to deny preliminary relief based on the lack of irreparable harm. Plaintiffs have satisfied this element.

C. Balancing of Equities and Public Interest

Plaintiffs assert that the equities and public interest weigh strongly in their favor where the public's health is at stake. ECF No. 3 at 36.

[35] **[36]** When the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). The public's interest in health care favors a preliminary injunction where the agency's action likely "results in worse health outcomes." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 87 (2d Cir. 2020).

[37] Plaintiffs contend the public has an interest in access to safe and effective medicine for those who terminate their pregnancies. ECF No. 3 at 36. Defendants contend the public interest is "best served by deferring to FDA's judgments about what restrictions are necessary to ensure drugs are safe." ECF No. 51 at 32. The Court agrees with this general premise, but the allegations in this case are that FDA made findings (or failed to make findings) that the Court does not defer to, i.e. those contrary to law and those that are arbitrary and capricious. Thus, this argument does not strongly favor Defendants. Based on the public health and administrative considerations at issue in this case, Plaintiffs have shown the balance of the equities sharply tip in their favor and the public interest favors a preliminary injunction.

The Court finds Plaintiffs have satisfied the "alternative" *Cottrell* test. At this point, the Court will issue a status quo preliminary injunction but not a mandatory preliminary injunction.

D. Relief

The Court turns to Plaintiffs' remedy. Defendants contend that Plaintiffs' requested relief exceeds any permissible scope where Plaintiffs seek an order enjoining "any action to remove mifepristone from the market or otherwise cause the drug to become less available." ECF No. 51 at 33–36. Plaintiffs counter that an order enjoining Defendants from the following is appropriate: "(1) enforcing the 2023 REMS, and (2) changing the status quo to ***1143** make mifepristone less available in the Plaintiff States." ECF No. 60 at 19.

1. Type of Relief

[38] **[39]** **[40]** When the Court determines a preliminary injunction is warranted, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). In crafting a remedy, courts "need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 137 S. Ct. 2080, 2087, 198 L.Ed.2d 643 (2017) (citation omitted).

[41] **[42]** **[43]** "Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid." *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (citation omitted). "The effect of invalidating an agency rule is to reinstate the rule previously in force." *Id.* (citation omitted). "The scope of an injunction is within the broad discretion of the district court." *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 829 (9th Cir. 2011).

[44] First, the relief Plaintiffs seek by enjoining FDA from enforcing REMS is inconsistent. *Compare* ECF Nos. 3 at 37 (enjoining 2023 REMS) *with* 3-1 at 3 (enjoining REMS entirely). Enjoining REMS from mifepristone entirely is well beyond the status quo. Indeed, enjoining the 2023 REMS and returning to the status quo would eliminate the ability of pharmacies to provide the drug, thereby reducing its availability. This runs directly counter to Plaintiffs' request.

[45] Second, the relief Plaintiffs seek by enjoining FDA from reducing mifepristone's availability does not exceed the permissible scope of relief. In preserving the status quo, it

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is fair and equitable for FDA to not act with respect to the Mifepristone REMS Program until a determination is made on the merits. *See* *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (finding court's prohibition on taking any further action "effectively preserved the parties' last uncontested status"); *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 30 (D.D.C. 1997) (enjoining "FDA from proceeding with any approval or review proceedings"). This is consistent with the APA authorizing courts to stay agency action "to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

Accordingly, Defendants are preliminary enjoined from altering the status or rights of the parties under the operative Mifepristone REMS Program until a determination on the merits.

2. Scope of Relief

As a final matter, the Court notes Plaintiffs appear to seek a nationwide injunction. *See* ECF No. 3-1.

[46] **[47]** Generally, there is no "requirement that an injunction affect only the parties in the suit." *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987). While courts have the authority to issue nationwide preliminary injunctions, the Ninth Circuit cautions they are for "exceptional cases" and that have proof of "an articulated connection to a plaintiff's particular harm." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019). "District judges must require a showing of nationwide impact or sufficient similarity to the plaintiff states to foreclose litigation in other districts." *Azar*, 911 F.3d at 584; *see also* ***1144** *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (noting record must be developed on nationwide impact).

[48] First, the Court finds a nationwide injunction inappropriate where the record does not demonstrate a nationwide impact of sufficient similarity to Plaintiffs' situation. *Azar*, 911 F.3d at 584. Abortion restrictions vary state-by-state and Plaintiffs allege harm not shared nationwide. For example, Plaintiffs allege harm from the 2023 REMS in light of the influx of patients from states who do not have similar services available. Second, the Court finds a nationwide injunction inappropriate where there is the potential for competing litigation. [3] *Id.* at 583 (noting courts should consider "the equities of non-parties who are deprived the right to litigate in other forums.").

Under these circumstances, the Court declines to issue a nationwide injunction and will enter the preliminary injunction as it applies to Plaintiff States.

II. Amici Briefs

[49] **[50]** **[51]** **[52]** The Court has broad discretion to grant or refuse a prospective amicus participation. *See* *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by* *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Amicus may be either impartial individuals or interested parties. *See* *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986). In deciding whether to grant leave to file an amicus brief, courts should consider whether the briefing "supplement[s] the efforts of counsel, and draw[s] the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus. Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). "An amicus brief should normally be allowed when ... the amicus has an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.... Otherwise, leave to file an amicus curiae brief should be denied." *Cmty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (internal citations omitted).

[53] While these motions are unopposed, the proposed briefs offer no additional legal or substantive information that is particularly helpful to the Court's findings on the present motion. The briefs may be more useful during a trial on the merits. Therefore, the motions are denied.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Preliminary Injunction (ECF No. 3) is **GRANTED in part**.

2. Pursuant to Federal Rule of Civil Procedure 65(a), Defendants and their officers, agents, servants, employees, attorneys, and any person in active concert

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or participation, are **PRELIMINARILY ENJOINED** from:

> "altering the status quo and rights as it relates to the availability of Mifepristone under the current operative January 2023 Risk Evaluation and Mitigation Strategy under 21 U.S.C. § 355-1 in Plaintiff States."

***1145** 3. No bond shall be required. Fed. R. Civ. P. 65(c).

4. Third Parties' Unopposed Motion for Leave to File Amicus Curiae Brief (ECF No. 52) is **DENIED.**

5. Third Parties' Unopposed Motion for Leave to File Amicus Brief (ECF No. 69) is **DENIED**.

The District Court Executive is directed to enter this Order and furnish copies to counsel.

All Citations

668 F.Supp.3d 1125, Med & Med GD (CCH) P 307,689

Footnotes

1 As referenced herein, mifepristone is the drug used for early termination of pregnancy, such as Mifeprex and the generic drug. This Order does not impact mifepristone as used in Korlym, a drug used to treat Cushing's syndrome.

2 *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022).

3 *See, e.g., All. For Hippocratic Med. v. FDA*, No. 2:22-cv-00223-Z, 2023 WL 2523546 (N.D. Tex. Jan. 13, 2023).

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