1-2023 Antitrust Report I

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I. Introduction

The Biden Administration is leaving its mark at both the Antitrust Division of the U.S. Department of Justice ("DOJ" or "Antitrust Division") and the Federal Trade Commission ("FTC" or "Commission"). U.S. antitrust enforcement is likely to continue to be vigorous going forward during 2023. The current enforcement policy is part of a growing broader political consensus that antitrust laws should promote societal goals beyond market efficiency or consumer welfare, to include labor, privacy, sustainability, and equities. To some extent, this "new" approach is consistent with what competition authorities in other key jurisdictions (*e.g.*, the United Kingdom ("UK") and the European Commission ("EC")) have already adopted.

In the time that Chair Lina M. Khan has led the FTC, significant procedural and substantive changes have been adopted that impact the timing and burden of the FTC's investigations and have produced antitrust enforcement actions that are broader in nature in certain transactions. Procedurally, the FTC has announced changes in its Hart-Scott-Rodino ("HSR") Act review process that extend the review period for all deals, and, for those transactions that potentially raise concerns, not only further delays closing, but imposes greater burdens on the parties to comply. In addition, the FTC indicated that it will, in deals that raise concerns, impose on the transaction parties the requirement that for at least 10 years they will need the FTC's approval before proceeding with specified categories of *future* transactions *regardless of the size* of those transactions. This type of provision has significant ramifications for repeat M&A players. The FTC also indicated that it would impose restrictions on divestitures of assets and, where appropriate, acquisitions, on divestiture buyers. Such requirements impact the range of potential firms that are willing to be divestiture buyers, potentially decreasing the chances that the concerns raised in a transaction can be resolved amicably through an FTC consent. The FTC also rescinded its Unfair Methods of Competition policy statement ("Section 5 Statement") in 2021 and replaced it with a new Section 5 Statement in December 2022 that suggests that the FTC will not limit its objectives to consumer welfare concerns.[1] In addition, the FTC rescinded the 2020 Vertical Merger Guidelines at a time when vertical transactions are subject to increased scrutiny and challenge.

On September 13, 2021, President Biden nominated Alvaro Bedoya, a privacy lawyer, to fill the expired Commission seat held by Commissioner Rohit Chopra. Bedoya had been the founding director of the Georgetown Law Center on Privacy & Technology. His focus has been on surveillance technologies. Commissioner Chopra departed the FTC on October 8, 2021 to assume his position as Chairman of the Consumer Financial Protection Bureau. On December 1, 2021, the U.S. Senate Commerce Committee split 14-14 on a vote to advance Bedoya's

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[1] Press Release, Fed. Trade Comm'n, *FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition* (Nov. 10, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition*.

nomination for FTC Commissioner. On January 4, 2022, President Biden renominated Bedoya for the FTC Commission position. On May 16, 2022, Commissioner Bedoya was finally sworn in as a commissioner, for a term expiring on September 25, 2026. Commissioner Bedoya's arrival provides the Democrats a majority of the seats on the Commission. Although the full implications of the Democratic majority remain to be seen, within weeks of Commissioner Bedoya's arrival, the Commission had its first partisan, three-to-two, vote to block the *Meta/Within* transaction, followed by a partisan divide on the new Section 5 Statement and the decision to challenge the *Microsoft/Activision* transaction. On October 14, 2022, Republican Commissioner Noah Phillips resigned, and on February 14, 2022, Republican Commissioner Christine Wilson announced her intention to resign; but with the already-existing Democratic majority, these vacancies are unlikely to matter in the outcome of any specific case.

Assistant Attorney General ("AAG") Jonathan Kanter moved quickly after his confirmation in 2021 to begin implementing his enforcement policy. In his first full year as the head of the Antitrust Division, Kanter has proven to be a proactive enforcer, willing to bring actions that are consistent with more progressive views of the antitrust laws. Even prior to AAG Kanter's arrival—under the direction of the Attorney General's Office—the DOJ had brought a series of enforcement actions that included vertical, potential competition, and monopsony theories of harm, in some cases rejecting sizeable settlement offers of the transaction parties aimed at avoiding litigation. As discussed further below, the DOJ's success rate in the cases brought thus far in the Biden Administration has been mixed, with some courts indicating concern over the perceived disconnect between the theories of harm asserted by the agency and "market realities." Notably, during 2022, the DOJ did not accept *any* consents settling concerns raised by a transaction—with parties either fixing those concerns themselves or the DOJ seeking to block the transaction.[2]

The DOJ has also stepped up the enforcement of the ban against "interlocking directorates," including investigating the placement of executives on boards of companies by private equity firms.[3] The agency has expressed concerns that board seats on rival companies in the same sector could influence those companies to act in ways that reduce vigorous competition. Although to date no enforcement action has been brought, the investigations have resulted in a number of publicly announced resignation from boards.

Although there had been some momentum in Congress to modify the antitrust laws, given the other pressing legislative initiatives and midterm elections, no broad across-industry reform occurred in 2022. However, at the very end of the year, we did see additional funding for the agencies and Congressional encouragement of vigorous antitrust enforcement, accompanied by changes in the fees charged in connection with the filing of notifications under the HSR Act. In addition, in public statements and announced intentions to revise the merger guidelines, the leaders of both agencies have made clear their intentions to be vigilant in antitrust enforcement, including in merger review.[4] Given this heightened antitrust environment, it is now more important than ever that transaction parties identify current overlapping operations that may raise issues under traditional horizontal merger theories, as well as other possible areas of inquiry, including vertical merger issues, the elimination of potential competition, and the impact of the transaction on labor markets. Transaction parties should also have a clear understanding of what remedies they will be prepared to offer (or, if possible, self-impose) if, at the end of the investigation, the reviewing agency remains concerned about the transaction. Transaction parties should have a clear understanding early in the review process of whether they are prepared to litigate if the DOJ decides to challenge the transaction. Finally, particular care needs to be exercised in transactions that may raise concerns with competition authorities outside of

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[2] *See* Speech, Ass't Atty. Gen. Jonathan Kanter of the Antitrust Division Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights (Sept. 20, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary.

[3] U.S. Dep't of Justice, Press Release, *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates* (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

[4] *See, e.g.*, Remarks of Ass't Atty. Gen. Jonathan Kanter of the Antitrust Division Delivers Keynote at Fordham Competition Law 49th International Law and Policy (Sept. 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

the United States to ensure that the parties' strategy and approach is coordinated globally. With careful planning, it remains the case that the vast majority of transactions, even those involving strategic firms, should be achievable, although potentially with greater delays and additional efforts by the parties.

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II. FTC Merger Enforcement Activities

At the beginning of 2022, the FTC had one preliminary injunction ("PI") case being appealed to the Third Circuit, which it subsequently won. It also had three consummated transactions and one proposed transaction in litigation before the FTC's administrative law judge ("ALJ"). The FTC had a rare loss in two of these administrative trials (*Altria/JUUL* and *Illumina/Grail*), both of which have been appealed to the full Commission. In another one (*Axon/Safariland*), the trial had been stayed during consideration by the U.S. Supreme Court of a challenge of FTC jurisdiction. The transaction parties abandoned the merger prior to trial in *NVIDIA/Arm*. Notably, both *Illumina/Grail* and *NVIDIA/Arm* involved vertical theories of harm.

In 2022, the FTC filed three district court PI cases (along with the accompanying administrative court cases) challenging hospital system mergers, each of which resulted in the parties abandoning their deal shortly after the suit was filed. The FTC brought three additional district court PI cases not involving healthcare: (1) *Lockheed/Aerojet*, a vertical deal in the defense sector in which the parties abandoned the deal after the suit was filed; (2) *Meta/Within*, in which the FTC narrowed its case to loss of potential competition in the still-developing virtual reality ("VR") marketplace; and (3) *Microsoft/Activision*, a vertical deal that involved development and publishing of high-end games for gaming systems and online platforms and the impact of the combination on cloud gaming. As noted above, both *Lockheed/Aerojet* and *Microsoft/Activision* raised vertical theories of harm.

Outside of litigation, the FTC obtained remedies as a condition for clearance in seven proposed transactions. All of the consents provide for divestitures to an identified upfront buyer.

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III. FTC Litigation Challenges

1. Litigation

a. FTC Successfully Challenged Hackensack Meridian Health/Englewood Healthcare Combination

On December 3, 2020, the FTC filed an action in the District Court for the District of New Jersey seeking to block Hackensack Meridian Health Inc.'s ("Hackensack") proposed acquisition of Englewood Healthcare Foundation ("Englewood").[5] The FTC alleged that the combined healthcare system would control three of the six general acute care ("GAC") hospitals in Bergen County, New Jersey, and would eliminate the close competition that existed between the parties. Hackensack University Medical Center, the system's flagship hospital, is just five miles away from one of Englewood's hospitals and those two hospitals offer the same services for 97% of their admissions.

Defendants argued that Bergen County is not the relevant product market. About 45% of Englewood's in-patient population lives outside Bergen County and about 10% of patients from Bergen County go to New York hospitals for in-patient services. In addition, Hackensack is an academic medical center, drawing from a much larger geographic area. Finally, the transaction had been approved by the New Jersey AG and the New Jersey Department of Health.

On August 4, 2021, Judge John Michael Vazquez granted the FTC's PI, halting the acquisition while the administrative trial proceeded.[6] The court found that the FTC had established its *prima facie* case that the transaction would lead to anticompetitive effects in the relevant markets, defined as "commercially insured patients in Bergen County."[7] The geographic bounds of Bergen County had been corroborated during trial by certain insurers testifying that they could not market a plan that did not include a Bergen County hospital to Bergen County residents. The Court found that the FTC had demonstrated that the post-merger Herfindahl-Hirschman Index ("HHI") would be 2,835, with a change in HHI of 841, and that Hackensack would control almost half of the market in Bergen County. The parties' internal documents were critical to the judge's decision and the Court cited these documents extensively to support claims that the two parties

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[5] Press Release, Fed. Trade Comm'n, *FTC Challenges Hackensack Meridian Health, Inc.'s Proposed Acquisition of Competitor Englewood Healthcare Foundation* (Dec. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-challenges-hackensack-meridian-health-incs-proposed.

[6] Opinion with Findings of Fact & Conclusions of Law, [*FTC v. Hackensack Meridian Health, Inc., No. 2:20-cv-18140, 2021 U.S. Dist. LEXIS 158158 (D.N.J. Aug. 4, 2021)*].

[7] [*Id. at *66*].

were close competitors. In addition, commercial insurer testimony indicated that Hackensack and Englewood do compete for the same patients and that these insurers viewed them as competitors.

The FTC's expert testified that the merger would have a price impact of approximately $31 million per year, based on the patient-based willingness-to-pay model. In addition, the Court analyzed an "acquisition clause" in Hackensack's contracts with payers that allows Hackensack to raise the rates of any hospitals it acquires to the rates of Hackensack's similar facilities as providing evidence that a post-merger price increase would occur.[8] Although Hackensack had sent letters to payors stating that it would not enforce these clauses, the Court held that these letters were created to bolster the parties' litigation position, would not be given any weight, and were not binding contracts.

The Court also rejected Hackensack's commitment to improvements at Englewood and Hackensack as being not specific or enforceable. The Court doubted the claims for expansion and optimization at Hackensack facilities. The Court noted that Hackensack had not previously signaled to insurers that it faced capacity constraints, had never declined a patient transfer and never redirected, or sought to transfer patients to Englewood. As a result, the Court held that the parties had failed to rebut the FTC's *prima facie* case. Moreover, the Court pointed out that its ruling merely indicates that, at this stage, the injunction is in the public interest, and not a determination that the merger is not in the public interest.

The FTC's former Office of Public Affairs Director, Lindsay Kryzak, stated the same day the Court issued its decision: "Too many hospital mergers lead to jacked up prices and diminished care for patients most in need. It remains a mystery why these two hospital systems decided to pursue a highly suspicious merger in the middle of a global pandemic. The Court has hit pause on this merger. … Hospital executives hatching merger plans should take note."[9]

On August 25, 2021, the hospitals filed an appeal of the PI with the Third Circuit.[10] In its appeal briefing, the hospitals contended that the district court erred in the "geographic market" definition, the likelihood of price increases, and the evaluation of the procompetitive benefits of the acquisition. The hospitals argued that a geographic market based on county lines is an arbitrary political boundary and does not reflect the commercial realities of the market. Additionally, the hospitals asserted that the district court erroneously used patients' willingness to pay as the standard, which has no bearing on insurers' willingness to pay.

Although the administrative trial was scheduled to begin on July 15, 2021, following a series of joint motions, that trial was postponed until 30 days after the Third Circuit ruled on the appeal of the PI.

On November 8, 2021, a coalition of Attorneys General ("AGs") from 24 states, the District of Columbia, and Guam, filed an *amicus* brief in the Third Circuit urging the Court to affirm the district court's decision. Notably absent from this brief was the New Jersey AG. As mentioned above, New Jersey's Department of Health and New Jersey's AG had approved the deal, although, as the FTC pointed out, under a statute that safeguards nonprofits' charitable assets. The American Hospital Association and the Association of American Medical Colleges also filed an *amicus* brief in support of the deal. According to these provider groups, no litigated FTC case has previously defined a relevant geographic market based on where "commercially insured patients" live; it is simply not feasible for hospitals to charge patients different prices based on where they live. Thus, they argued, the district court's acceptance of the FTC's relevant geographic market was legal error and grounds for reversal.

On March 22, 2022, the Third Circuit affirmed the lower court's ruling, indicating that "the District Court did not err in holding that the Hospitals failed to rebut … that the merger is likely to substantially lessen competition."[11] Although "[s]ome procompetitive benefits may exist … they are not significant enough to

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[8] *Id.* at *76–*79.

[9] Press Release, Fed. Trade Comm'n, *Statement of FTC Office of Public Affairs Director Lindsay Kryzak on District Court's Decision to Grant Preliminary Injunction Halting New Jersey Hospital Merger* (Aug. 4, 2021), *https://www.ftc.gov/news-events/press-releases/2021/08/statement-ftc-office-public-affairs-director-lindsay-kryzak*.

[10] Notice of Appeal, No. 21-2603, *FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160 (3d Cir. 2021)*.

offset the likely anticompetitive effects of the merger."[12] Moreover, while the district court should have considered the state's assessment of the public interest, the "modest quality improvements and upgrades likely to occur because of this merger … are not significant enough to overcome the FTC's strong *prima facie* case."[13]

The transaction parties abandoned the deal on April 12, 2022.[14]

b. Illumina/Grail: FTC Appeals After Losing Administrative Trial; Illumina Appeals EC Loss

On March 30, 2021, the FTC, in a four-to-zero vote, authorized the Staff to challenge Illumina's proposed acquisition of Grail in both federal court and in an administrative action.[15] According to the FTC, Illumina was the dominant provider of DNA sequencing, a necessary input for multi-cancer early detection ("MCED") tests. MCED tests could revolutionize how cancer is detected and treated; rather than wait for cancer symptoms to appear, MCED tests use a liquid biopsy to examine fragments of DNA in the bloodstream to determine whether cancer cells have shed any DNA, which is what a vast majority of cancerous tumors do. These tests would be used to detect approximately 50 different cancers, in direct contrast to existing diagnostic tests that can screen for only one. In addition, the MCED tests are used to detect five types of cancers for which there are no other screening tests available. All of these tests require use of a next-generation sequencing ("NGS") platform, including NGS equipment and designated consumables, such as cells/cartridges and reagents.

Grail, with its Galleri MCED test, is competing with several other firms to develop and commercialize this technology. The FTC asserted that Grail and its rivals' MCED tests in development relied on Illumina's NGS platforms. Illumina had originally purchased Grail in 2015 but had subsequently decreased its ownership to 14.5% of Grail's voting stock.

The FTC alleged harm under both potential competition and vertical theories. According to the FTC, Illumina, as the only supplier of a critical input, possessed the ability to foreclose or disadvantage Grail's MCED rivals. Thus, if the acquisition were consummated, Illumina would gain the incentive to foreclose or disadvantage firms that pose a significant competitive threat to Grail and to limit the competition of any MCED product that Illumina expected to compete closely with Galleri. Since Grail's rivals would have no alternatives, they would not be able to divert purchases away from Illumina. In addition, Illumina would have the ability to monitor each company developing an MCED test using its platform. Galleri would then be well positioned to recapture all or most of the sales from Grail's rivals.

The FTC further posited that short-read NGS is the only type of sequencing technology that can satisfy all the requirements for MCED tests. Thermo Fisher Scientific, Inc. is the only other short-read NGS platform provider in the United States. Beijing Genomics Institute ("BGI") is the only other short-read NGS platform provider in the world. BGI, however, was at the time enjoined from selling in the United States during the duration of a patent infringement suit filed by Illumina. Although some other firms are attempting to develop NGS platforms, the FTC believes these firms are years away from launching viable substitutes for Illumina's short-read NGS. Moreover, even if other NGS platforms entered the market, the FTC asserted that it would

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[11] *FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 179 (3d Cir. 2021)*.

[12] *Id. at 177*.

[13] *Id. at 179*.

[14] Jeff Lagasse, *Hackensack Meridian Health, Englewood Health call off merger after appeals court block*, Healthcare Finance (Apr. 12, 2022), *https://www.healthcarefinancenews.com/news/hackensack-meridian-health-englewood-health-call-merger-after-appeals-court-block*.

[15] Press Release, Fed. Trade Comm'n, *FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail* (Mar. 30, 2021), *https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection*.

take years, if at all, for MCED test developers to switch from Illumina's NGS platforms to another platform. A switch of platform might require new clinical trials and the need to reconfigure testing.

Because the MCED market asserted by the FTC is pre-commercial, market shares did not exist. As a result, the FTC relied on Illumina's internal projections, with a projected market size of tens of billions of dollars by 2025.

Prior to bringing the suit, the FTC rejected as an effective remedy Illumina's offer to its clinical oncology customers to guarantee contractually equal and fair access to Illumina's sequencing. Illumina responded by issuing an "open letter" that bound it to continue to provide "unfettered access" to its gene-sequencing product until August 18, 2033 and committed to cut its price by more than 40% by 2025. Illumina later added a commitment not to share any customer confidential or proprietary information or data with Grail, any subsidiary of Grail, or any employees of Illumina who work within the same division as Grail post-merger. Existing or new customers of Illumina may sign the open offer at any time prior to August 18, 2027. In the intervening months, Illumina also began negotiating long-term supply agreements with a number of these customers consistent with these terms.

On April 6, 2021, Illumina and Grail responded to the suit, calling it "speculative and baseless" and indicated that it would deprive patients of an accelerated process that would lead to the adoption of a revolutionary blood test.[16] They filed a motion to have the case moved from the District of Columbia to the Southern District of California, where the companies and many witnesses are located.[17] On April 20, 2021, Judge Rudolph Contreras granted the transfer motion.[18]

The FTC ended up not being the only antitrust authority with an interest in blocking the transaction. The transaction had not been notified by the parties to the EC because Grail had no active products or European Union ("EU") revenues. In an unprecedented action consistent with its recently revised referral guidelines,[19] the EC requested that the competition authority in France refer the review to it; France—with support from Belgium, Greece, the Netherlands, Iceland, and Norway—did so in early April 2021;[20] on April 19, 2021, the EC accepted the referral.[21] On April 29, 2021, Illumina asked the General Court of the EU in Luxembourg to bar the EC from reviewing the transaction, citing, among other things, the seven-month delay since the deal announcement for the EC to seek such a referral.[22] On July 13, 2022, the General

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[16] Answer of Defendants Illumina, Inc. and Grail, Inc., *FTC v. Illumina, Inc.*, C.A. No. 1:21-cv-00873 (D.D.C. Apr. 6, 2021).

[17] Defendants' Motion to Transfer Venue Pursuant to *28 U.S.C. § 1404(a)*, *FTC v. Illumina, Inc.*, No. 1:21-cv-00873 (D.D.C. Apr. 2, 2021).

[18] Order Granting Defendants' Motion to Transfer Venue, *FTC v. Illumina, Inc.*, C.A. No. 1:21-cv-00873 (D.D.C. Apr. 20, 2021).

[19] *See* Eur. Comm'n, Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases (Mar. 26, 2021), *https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf*; *see also* Press Release, Euro. Comm'n, *Mergers: Commission Announces Evaluation Results and Follow-up Measures on Jurisdictional and Procedural Aspects of EU Merger Control* (Mar. 26, 2021), *https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384*.

[20] Fr. Conseil d'État, Ord. 450878, 450881, *Grail/Illumina* (Apr. 1, 2021), *https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-04-01/450878*.

[21] Press Release, Eur. Comm'n, *Daily News: Mergers: Commission to Assess Proposed Acquisition of GRAIL by Illumina* (Apr. 20, 2021), *https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846*. On July 14, 2022, the U.S. Chamber of Commerce took the unusual step of suing the FTC in federal district court for the District of Columbia to obtain, among other things, the private correspondence between FTC officials and the EC relating to the transaction, alleging that the FTC conspired with the EC to halt the transaction. Complaint 10-12, *Chamber of Commerce of the United States of America v. FTC*, C.A. No. 1:22-cv-02070 (D.D.C. July 14, 2022).

[22] Press Release, Illumina, Inc., *Illumina Files Action for Annulment of European Commission's Decision Asserting Jurisdiction to Review GRAIL Acquisition* (Apr. 29, 2021), *https://www.illumina.com/company/news-center/press-releases/2021/e2c75c6a-6cbe-4e45-b8a6-6d90d40c253e.html*.

Court dismissed Illumina's appeal.[23] Although the Court agreed with Illumina that the EC should not have waited so long before invoking the referrals, this delay was determined not to have undermined Illumina's right of defense, and therefore, did not justify annulment of the review procedure. On September 30, 2022, Illumina filed its appeal of the General Court's judgment on, among other grounds, Illumina's right of defense due to the EC's delay in invoking the process.[24]

Undeterred by the jurisdictional challenge, the EC continued with its review of the transaction pending the appeal. On July 22, 2021, the EC confirmed that the transaction would face an in-depth Phase II investigation, citing concerns that the deal might reduce competition and innovation in the emerging market for cancer detection tests based on sequencing technologies. Consistent with the FTC's case, the EC's concerns were premised on a vertical input foreclosure theory.

Meanwhile, the FTC reacted to the EC's exercise of jurisdiction by filing a motion to dismiss its PI complaint, without prejudice, in federal district court on May 20, 2021.[25] The FTC told the court that since the EC is investigating the transaction, the parties cannot implement the transaction, which obviated the need for a PI. Instead, the FTC argued, the merits of the FTC's challenge could be decided in administrative court, with the administrative trial scheduled to commence on August 24, 2021. The transaction parties filed a brief in opposition to the dismissal without prejudice, arguing that the FTC should not be allowed to seek a PI at a later date.[26] During the hearing on May 28, 2021, Judge Ann Bencivengo informed the defendants that they needed to show "legal prejudice" to prevail.[27] The defendants argued that they would suffer such prejudice, since the FTC's move made it impossible for the companies to get a full and fair hearing of their case before the September 2021 outside date specified in their agreement and that the uncertainty of closing would be problematic for the company, as it planned to introduce its blood test during the summer of 2021. Judge Bencivengo rejected these arguments and granted the FTC's dismissal motion on June 1, 2021.[28]

With the EC review process and the FTC administrative challenge extending well beyond the agreement's outside date, Illumina faced the potential risk that Grail would terminate the agreement in September 2021 and collect a $600 million break fee (on its $7.1 billion deal) from Illumina. Illumina took action on August 18, 2021, by closing the transaction, even though the EC asserted that its approval was needed *before* consummation of the transaction. Illumina did, however, keep Grail a separate company during the EC review. Nevertheless, as discussed below, this bold move subjected Illumina to potential stiff fines for gun-jumping if the EC ultimately prevails on the jurisdictional question. In its September 20, 2021 Statement of Objections on the transaction, the EC warned Illumina: "This is the first time companies openly [implemented] their deal while we are carrying out an in-depth investigation."[29] Subsequently, on July 19,

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[23] Press Release, Eur. Comm'n, *Commission Alleges Illumina and GRAIL Breached EU Merger Rules by Early Implementation of Their Acquisition* (July 19, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4604.

[24] Appeal by Grail LLC against the judgment of the General Court, *Illumina v. Comm'n*, Case C-625/22 P, https://curia.europa.eu/juris/document/document.jsf?text=&docid=269127&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=627677.

[25] Press Release, Fed. Trade Comm'n, *Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case* (May 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth.

[26] Opposition to FTC's Motion to Dismiss the Complaint Without Prejudice, *FTC v. Illumina, Inc.*, 3:21-cv-00800 (S.D. Cal. May 26, 2021).

[27] Jonathan Wosen, *Illumina's Chances of Acquiring Grail Take a Hit After San Diego Judge's Decision*, THE SAN DIEGO UNION-TRIBUNE (May 28, 2021), https://www.sandiegouniontribune.com/business/story/2021-05-28/illuminas-chances-of-acquiring-grail-take-a-hit-after-san-diego-judges-decision.

[28] Order, *FTC v. Illumina, Inc.*, 3:21-cv-00800 (S.D. Cal. June 1, 2021).

2022, the EC formally charged Illumina with having violated the law, with the issuance of a Statement of Objections.

The FTC's administrative law trial began on August 24, 2021. On September 1, 2022, ALJ Chappell ruled in favor of Illumina.[30] The FTC issued a public version of the ALJ's 197-page opinion on September 9, 2022. In that opinion, the judge provided a fulsome evidentiary basis for his finding that the FTC's potential competition concerns were "speculative" and, notably, that the FTC had failed to prove that Illumina would have the ability and incentive to foreclose or disadvantage Grail's rivals because the remedy offer "effectively constrains" Illumina from being able to do so. The ALJ decision provides a significant amount of detail regarding Illumina's pricing and supply commitments, firewalls and protections of confidential information, and monitoring and enforcement provisions (which includes a biannual audit and a commitment to binding arbitration). He found these monitoring and enforcement mechanisms to be adequate to prevent or redress potential violations of the commitment. In addition, the Judge noted that Illumina agreed to enter into a consent order providing the same provisions as the open offer, including authorizing the appointment of a monitor trustee.

Substantively, the Judge found that the FTC had failed to demonstrate that a substantial lessening of harm to competition in the relevant market for the research, development, and commercialization of MCED tests is "probable and imminent," since Grail is years away from being profitable. Illumina expects that the vast majority of its revenues in the next 10 years will come from its NGS products, and, therefore, Illumina does not have a current or near-term incentive to harm its rivals. Instead, the risk to Illumina's DNA sequencing sales and reputation would be a counterincentive to foreclosure, with any attempt to raise prices or otherwise foreclose or harm competing MCED test developers potentially leading them and other customers to no longer invest in current or future applications based on Illumina's technology. The Judge found that the FTC's potential competition concerns were "speculative" and that the FTC had failed to prove that Illumina would have the ability and incentive to foreclose or disadvantage Grail's rivals, because the remedy offer "effectively constrains" Illumina from being able to do so. He found the monitoring and enforcement mechanisms to be adequate to prevent or redress potential violations of the commitment. Moreover, he found that the FTC had failed to demonstrate that substantial lessening of competition in the relevant market for the research, development, and commercialization of MCED tests is "probable and imminent," since Grail is years away from being profitable and the vast majority of Illumina's revenue in the next 10 years will come from its NGS products; therefore, Illumina does not have a current or near-term incentive to harm Grail's rivals. Instead, the risk to Illumina's NGS sales and reputation would be counterincentive to foreclosure, with any attempt to raise prices or otherwise foreclose or harm MCED test developers leading them and other customers to no longer invest in current or future applications on Illumina systems. In addition, the Judge found a number of areas where the FTC's economic expert included improper assumptions of the "but-for" world without the merger, including that: (1) absent the merger Illumina would not have an incentive to favor Grail when Illumina already owned 12% of Grail; (2) Grail's rivals would pay a royalty similar to the royalty Grail paid Illumina; and (3) the rivals of Grail's products may not be close substitutes for Grail, which would impact the ability of Illumina to recapture its lost NGS profits through the sales diverted from those rivals to Grail.

The summary of the conclusions of law is particularly worth reviewing given its emphasis on the multitude of factors that must be considered in a vertical merger (rather than just that foreclosure might be possible), recognition that vertical mergers create efficiencies and that the case law supports applying the real-world effects of contractual commitments to the determination of the potential for anticompetitive harm, and, finally, that antitrust/economic theory and speculation cannot trump facts.

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[29] Press Release, Eur. Comm'n, *Mergers: The Commission Adopts a Statement of Objections in View of Adopting Interim Measures Following Illumina's Early Acquisition of GRAIL* (Sept. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4804.

[30] Initial Decision, *In the Matter of Illumina, Inc.*, FTC Docket No. 9401 (Sept. 9, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

On September 2, 2022, the FTC appealed the ALJ's decision to the Commission, so the matter is not yet settled at the FTC.[31]

Nor is the matter settled in the EU. In the first phase of the EC's review, Illumina offered the same "open letter" commitments that were rejected by the FTC but later found to be adequate by FTC ALJ Chappell to address foreclosure concerns: The EC suspended the review of the matter on February 3, 2022, pending the receipt of additional information from Illumina. On July 19, 2022, Illumina provided the additional information, thereby restarting the clock, and also offered to change the deal terms. Specifically, Illumina offered competitors an irrevocable, non-exclusive, royalty-free license of some of its "reversible terminator patents" that form the basis of patent infringement litigation and a commitment not to raise any other patent claims for three years against Chinese competitor BGI. The EC had until September 12, 2022 to decide the matter, and on September 6, 2022, issued its decision blocking the transaction.

The EC's statement indicated: "With this transaction, Illumina would have an incentive to cut off Grail's rivals from accessing its technology, or otherwise disadvantage them. … It is vital to preserve competition between early cancer detection test developers at this critical stage of development."[32] The EC took the position that Illumina had failed to put forward any remedies to address the Commission's concerns and that during its in-depth investigation it had received feedback from a large number of customers and competitors that were concerned that, following the merger, Illumina would cut access to its NGS technology to Grail's rivals to gain control over the early stage cancer-detection testing market.

Illumina is appealing both the EC's jurisdiction and the EC's decision to block the acquisition. On December 4, 2022, the EC ordered Illumina to completely unwind its ownership of Grail. Illumina has objected to this order, saying it imposes a disproportionate burden on the company pending the outcome of its appeal of the EC's prohibition order.

c. Parties Abandon NVIDIA/Arm Transaction After FTC Sues to Block Merger

In its second court challenge of a vertical transaction in 2021 involving next-generation products, the FTC, on December 2, 2021, voted four-to-zero to bring an administrative court action to block U.S. computer chip supplier NVIDIA Corp.'s ("NVIDIA") $40 billion acquisition of UK computer chip designer, Arm Ltd. ("Arm"). Similar to the *Illumina/Grail* case, the FTC decided not to pursue a PI at the outset, presumably due to the pending reviews of the transaction in a number of jurisdictions, likely postponing the consummation of the transaction for at least several months.

NVIDIA, one of the world's largest computing companies, develops and markets computer chips and devices, and, according to the complaint, is the dominant supplier of stand-alone graphics processing units for personal computers and datacenters that are used widely for artificial intelligence processing and graphics processing.[33] NVIDIA also develops and markets products for advanced networking, datacenter central processing units, and computer-assisted driving. Arm, which is owned by Tokyo-based Softbank

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[31] Complaint Counsel's Appeal of the Initial Decision, *In the Matter of Illumina, Inc.*, FTC Docket No. 9401 (Oct. 4, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401%20-%20COMPLAINT%20COUNSEL_S%20APPEAL%20OF%20THE%20INITIAL%20DECISION%20-%20PUBLIC%20%281%29.pdf.

[32] Press Release, Eur. Comm'n, *Commission Prohibits Acquisition of GRAIL by Illumina* (Sept. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

[33] Press Release, Fed. Trade Comm'n, *FTC Sues to Block $40 Billion Semiconductor Chip Merger* (Dec. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger. The FTC indicated that it had cooperated closely with Staff of the competition agencies in the EU, the UK, Japan, and South Korea. Presumably, the FTC did not file a case in federal district court as well because competition approvals remained outstanding in these jurisdictions and in China, so there was not the threat that the parties would be able to close their transaction absent a PI. The transaction may also be subject to certain foreign investment concerns; the UK, for instance, reportedly is considering whether the proposed transaction could affect national security, in addition to competition.

Group Corp., creates and licenses microprocessor designs and architectures, referred to as "Arm Processor Technology," to other technology companies, including NVIDIA, and, according to the FTC, has become the *de facto* industry standard. Companies reportedly rely on Arm's technology to make computer chips that power a wide range of modern computing devices, including driver-assistance systems and large datacenters.[34] The FTC complaint alleged that the combined firm would be able to stifle innovative next-generation technologies, and could undermine critical infrastructure developments.[35] Arm licenses its Arm Processor Technology using an industry-described neutral, open-licensing approach. Arm typically profits when its licensees sell more units.[36] As discussed below, post-merger, its incentives would be different.

Specifically, the complaint alleged harm in three relevant product markets: (1) DPU SmartNICs (network interface devices that incorporate software-programmable cores for offloading and isolating processing tasks related to networking security, virtualization, and other datacenter support services from the server's main CPU); (2) high-level automotive advanced driver assistance, and central computer system-on-a-chip; and (3) Arm-Based Datacenter CPUs for cloud computing service providers. In each of these markets, the marketplace is characterized as small but likely to increase significantly in the near term. Arm's technology and partnering is viewed as critical to product development and innovation, and the proposed acquisition allegedly would create a firm with the incentive and ability to harm rivals in the market.

The FTC posited that Arm's technology is a critical input that enables competition between NVIDIA and its competitors in these markets and that the proposed merger would give NVIDIA the ability and incentive to use its control of this technology to undermine its competitors, reducing competition, and ultimately resulting in reduced product quality, reduced innovation, higher prices, and fewer choices. The complaint also argued that the acquisition would harm competition by giving NVIDIA access to the competitively sensitive information of Arm's licensees and that it would likely decrease the incentive for Arm to pursue innovations that are perceived to conflict with NVIDIA's business interests. Arm's licensees routinely share competitively sensitive information with Arm and rely on Arm for support in developing, designing, testing, debugging, troubleshooting, maintaining, and improving their products. Arm licensees currently share this information with Arm because Arm is a neutral partner, not a rival computer chip maker. Accordingly, the FTC alleged that this acquisition would likely harm innovation competition by eliminating innovations that Arm would have pursued but for a conflict with NVIDIA's interests.

The complaint also alleged the lack of mitigating factors. *First*, the parties would not be able to demonstrate that entry into or expansion of products in the relevant markets that do not incorporate Arm Processor Technology would be timely, likely, or sufficient to reverse the anticompetitive effects of the proposed transaction. *Second*, the proposed acquisition would not generate verifiable, cognizable, merger-specific efficiencies that would reverse the likely competitive harm from the proposed acquisition.

Interestingly, the complaint requested the Court, in addition to prohibiting the transaction, to require that, for a period of time, NVIDIA and Arm provide prior written notice to the FTC of acquisitions of any other company.

Prior to the complaint being filed, NVIDIA consistently defended the transaction on the grounds that it would benefit the industry and promote competition and vowed to preserve Arm's open-licensing model, invest in research and development activities, and expand Arm's offerings, which would create more opportunities for customers who use Arm's products. NVIDIA reportedly had offered the UK a series of conduct

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[34] Complaint ¶ 4, *In the Matter of Nvidia Corp.*, FTC Docket No. 9404 (Dec. 6, 2021), *https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf*.

[35] *See also* Statement by BC Director Vedova in the FTC's press release, *infra* note 33 ("The FTC is suing to block the largest semiconductor chip merger in history to prevent a chip conglomerate from stifling the innovation pipeline for next-generation technologies, … . The FTC's lawsuit should send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations.").

[36] Complaint ¶ 25, *infra* note 34.

remedies, including to spin-off Arm's licensing business as a separate entity, and committing to equal access and open licensing of Arm's intellectual property as well as protection of confidential information.

The administrative trial was scheduled to begin on August 9, 2022. The EC "stopped the clock" on its review on November 25, 2021, extending the EC's April 12, 2022 deadline for a decision. The UK's deadline for a decision was May 2, 2022. The review in China was also likely to take several more months. Faced with the extensive reviews and the FTC challenge, on February 14, 2022, NVIDIA terminated its proposed acquisition because of the regulatory challenges preventing its consummation. In accordance with their agreement, Arm's parent, Softbank Group Corp., retained the $1.25 billion prepaid by NVIDIA as a termination fee.[37] The FTC responded to the deal's termination in a statement that not only noted that the deal had been abandoned, but also that "upon termination of the proposed transaction with NVIDIA, Softbank and Arm announced plans for an initial public offering of Arm, citing forecasts of 'both record revenues and record profits for this year' and 'a very highly profitable and cash-generative business' that will 'continue to innovate for our customers, which is what Arm has always done and we will do on an accelerating basis going forward.' "[38]

d. Parties Abandon Lockheed/Aerojet Merger After FTC Sues to Block Transaction

On January 25, 2022, the Commission voted (four-to-zero) to block Lockheed Martin Corporation's ("Lockjet") proposed acquisition of Aerojet Rocketdyne Holdings, Inc. ("Aerojet"), the last independent U.S. supplier of missile propulsion systems, on vertical theory grounds.[39] Aerojet supplies advanced power, propulsion, and armament systems, which are critical components for the missiles made by Lockheed and other prime defense contractors. The agency's complaint alleged that if the deal were allowed to proceed, Lockheed would use its control of Aerojet to harm rival defense contractors and further consolidate multiple markets critical to national security and defense. Specifically, the FTC alleged that the acquisition would give Lockheed control over "inputs that its rivals require to compete against Lockheed" and would have the incentive to deny, limit, or otherwise disadvantage these rivals.

This marked the FTC's first litigated challenge of a defense merger in decades. Although the U.S. Department of Defense did not publicly state its views on the transaction, the FTC noted its role in the merger investigation. On February 15, 2022, the FTC released a 28-page State of Competition in the Defense Industrial Base Report (the "Report"), arguing that rapid consolidation in the defense sector has resulted in insufficient competition, which could have serious consequences for national security.[40] The Report indicates that there are five prime contractors that today dominate the defense industry—Lockheed, Raytheon Technologies Corp., General Dynamics Corp., Northrop Grumman Corp., and Boeing Co.—and espoused the need to rebuild the competitive bench by lowering barriers for small businesses and bringing in new entrants.

On February 15, 2022, the transaction parties abandoned the deal.[41]

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[37] Press Release, NVIDIA, *NVIDIA and SoftBank Group Announce Termination of NVIDIA's Acquisition of Arm Limited* (Feb. 7, 2022), https://nvidianews.nvidia.com/news/nvidia-and-softbank-group-announce-termination-of-nvidias-acquisition-of-arm-limited.

[38] Press Release, Fed. Trade Comm'n, *Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd.* (Feb. 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd.

[39] Press Release, Fed. Trade Comm'n, *FTC Sues to Block Lockheed Martin Corporation's $4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc.* (Jan. 25, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne.

[40] OFFICE OF UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND SUSTAINMENT, U.S. DEP'T OF DEFENSE, STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE (Feb. 2022), https://media.defense.gov/2022/Feb/15/2002939087/-1/-1/1/STATE-OF-COMPETITION-WITHIN-THE-DEFENSE-INDUSTRIAL-BASE.PDF.

e. Parties Abandon Transaction After FTC and Rhode Island AG Seek to Block Merger of Rhode Island's Two Largest Healthcare Providers

On February 17, 2022, the FTC (in a four-to-zero vote) authorized Staff to file an administrative complaint and a PI challenge in the U.S. District Court of Rhode Island to block the proposed merger of Lifespan Corp. and Care New England, Rhode Island's two largest hospital systems. The Rhode Island AG joined in the PI suit.[42]

The complaint alleges that both systems offer a broad range of inpatient GAC services and operate the only two stand-alone inpatient behavioral health facilities in Rhode Island. According to the complaint, the merger would likely reduce competition in the State of Rhode Island and 19 nearby Massachusetts communities for both GAC services and inpatient behavioral health services. As a result, the merger would increase the combined firm's ability to raise hospital rates, and individuals would likely face higher premiums, co-pays, and deductibles. Similarly, if the merger were consummated, the combined healthcare system would have reduced incentives to invest in vital non-price dimensions of competition, such as quality of care, access to services, and technology. The complaint further alleges that if the merger were consummated, Lifespan Corp. and Care New England would control at least 70% of the Rhode Island market for GAC services and at least 70% of the market for inpatient behavioral health services. Even when including the surrounding Massachusetts towns, the system would have a 50% share of GAC and at least 50% of the market for inpatient behavioral services. In its press release announcing the administrative complaint, the FTC's Bureau of Competition director claimed that "this merger would create a new health care conglomerate with outsized power over the entire continuum of healthcare services."[43] The Rhode Island Attorney General also issued a statement that similarly cited to the "extraordinary market power" of the combination and also that the parties had not proven that the planned deal was financially feasible.[44]

Commissioner Rebecca Kelly Slaughter, joined by Chair Khan, issued a concurring statement that indicated they would have included in the challenge allegations about the merger's potential impact on the labor market due to the reduction of competition among health care employers.[45]

The administrative trial was scheduled to begin on July 20, 2022. The transaction parties expressed disappointment regarding the challenge and noted that the FTC and the Rhode Island AG had failed to recognize the "30 conditions" they offered to allay concerns potentially raised by the transaction.[46] On February 23, 2022, the parties terminated the deal.[47]

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[41] Press Release, Lockheed Martin Corp., *Lockheed Martin Terminates Agreement to Acquire Aerojet Rocketdyne* (Feb. 13, 2022), https://news.lockheedmartin.com/2022-02-13-Lockheed-Martin-Terminates-Agreement-to-Acquire-Aerojet-Rocketdyne.

[42] Press Release, Fed. Trade Comm'n, *FTC and Rhode Island Attorney General Step in to Block Merger of Rhode Island's Two Largest Healthcare Providers* (Feb. 17, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-rhode-island-attorney-general-step-block-merger-rhode-islands-two-largest-healthcare-providers.

[43] *Id.*

[44] Press Release, Rhode Island Office of the Atty. Gen., *Attorney General Denies Application for Merger of Lifespan and Care New England Health Systems* (Feb. 17, 2022), https://riag.ri.gov/press-releases/attorney-general-denies-application-merger-lifespan-and-care-new-england-health.

[45] Fed. Trade Comm'n, Concurring Statement of Commissioner Slaughter and Chair Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System, FTC File No. 2110031 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.

[46] Press Release, Lifespan Health Sys., *Federal Trade Commission (FTC) Decides to Challenge Lifespan and Care New England Merger; RI Attorney General Joins FTC in Challenge* (Feb. 17, 2022), https://www.lifespan.org/news/federal-trade-commission-ftc-decides-challenge-lifespan-and-care-new-england-merger-ri.

f. FTC Challenged Two Additional Hospital Merger Deals on Same Day: Parties Promptly Abandon Both

On June 2, 2022, the FTC brought two challenges to block hospital system mergers: (1) Utah healthcare systems HCA Healthcare's merger with Steward Health Care System ("HCA/Steward");[48] and (2) RWJBarnabas Health's ("RWJ") acquisition of Saint Peter's Healthcare System ("St. Peter's") in Middlesex County, New Jersey.[49] The Commission vote in both matters was five-to-zero to seek a PI and institute an administrative case. On June 14, 2022,[50] and June 16, 2022,[51] respectively, the parties abandoned their proposed transactions.

In the *HCA/Steward* challenge, the FTC alleged that the head-to-head competition between the second (HCA) and fourth (Steward) largest hospital systems in the Wasatch Front region of Utah helps keep costs down in the Salt Lake City area. These two systems reportedly compete for inclusion in insurance networks, health care quality, service lines, and nurse and physician recruitment. In some asserted Utah markets, the merger would purportedly reduce competition from three competitors to two, and in one of the markets, from four competitors to three.

In *RWJ/St. Peter's*, St. Peter's University Hospital is less than a mile from RWJ in New Brunswick, New Jersey and the parties own the only two hospitals in that city. The FTC further alleges that the combined system would have about 50% of GAC services in the county. The competition between the systems reportedly incentivizes both systems to improve quality, technology, amenities, equipment, access to care, and service offerings.

g. FTC Unsuccessfully Challenged Meta's Acquisition of Within

On July 27, 2022, in a split three-to-two (along political party affiliation) Commissioner vote, the FTC voted to block Meta Platforms Inc.'s (f/k/a Facebook) acquisition of Within Unlimited Inc. ("Within"), the creator of Supernatural, an immersive subscription VR fitness application, in the Northern District of California.[52] The

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[47] *Lifespan*, *Care New England Call Off Merger Following Regulatory Roadblocks*, Fierce Healthcare (Feb. 24, 2022), https://www.fiercehealthcare.com/hospitals/ftc-rhode-island-move-block-lifespan-care-new-england-merger.

[48] Press Release, Fed. Trade Comm'n, *FTC Sues to Block Merger Between Utah Healthcare Rivals HCA Healthcare and Steward Health Care System* (June 2, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-sues-block-merger-between-utah-healthcare-rivals-hca-healthcare-steward-health-care-system.

[49] Press Release, Fed. Trade Comm'n, *FTC Sues to Block Merger Between New Jersey Healthcare Rivals RWJBarnabas Health and Saint Peter's Healthcare System* (June 2, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-sues-block-merger-between-new-jersey-healthcare-rivals-rwjbarnabas-health-saint-peters.

[50] Press Release, Fed. Trade Comm'n, *Federal Trade Commission Opposition to Transaction Leads New Jersey Healthcare Rivals RWJBarnabas Health and Saint Peter's Healthcare System to Abandon Proposed Merger* (June 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/federal-trade-commission-opposition-transaction-leads-new-jersey-healthcare-rivals-rwjbarnabas.

[51] Fed. Trade Comm'n, *Statement of Bureau of Competition Director Holly Vedova Regarding the Decision of Utah Healthcare Competitors HCA Healthcare and Steward Health Care System to Abandon Their Proposed Merger* (June 16, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/statement-bureau-competition-director-holly-vedova-regarding-decision-utah-healthcare-competitors.

[52] Press Release, Fed. Trade Comm'n, *FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within* (July 27, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within. The lawsuit also originally named Mark Zuckerberg as a defendant. The FTC already has a suit underway, *FTC v. Meta Platforms, Inc.*, Case No. 1:20-cv-03590 (D.D.C.), to unwind Facebook's 2012 acquisition of

original complaint alleges Meta's Beat Saber fitness app competed with Supernatural. In addition, the FTC noted that Facebook had set its sights on building, and ultimately controlling, a VR "metaverse," as reflected in its rebranding of the company from Facebook to "Meta." Meta already controls Meta Quest 2, the leading VR headset that comprises about 78% of all VR headset sales, Meta Quest, the "dominant" VR hardware, which it acquired in 2014 along with a popular VR app store, as well as a number of popular games and apps. Meta also offers the "App Lab," a Meta-produced tool that allows third-party developers to distribute apps not present in the Meta Quest Store directly to consumers. Combined, Meta has one of the largest first-party VR content organizations in the world. The FTC's original complaint also cited network effects as one possible impact of the combination, and that the proposed acquisition would be "one more step along that path toward dominance."[53]

Moreover, according to the original FTC complaint, the VR industry currently exhibits a high degree of innovation and growth and is predicted to more than double in the next three years, to $12 billion in revenues. Users typically engage with the VR experience through a headset with displays in front of each eye to place a user in a fully rendered, three-dimensional environment. Unlike a game, video, or app on a tablet, phone or monitor, the 3D VR environment creates the perception of completely surrounding the user. The FTC alleged as separate relevant antitrust markets, the VR dedicated fitness app market and the VR fitness app market (which includes both dedicated fitness apps and incidental fitness apps). Dedicated fitness apps typically entail a higher degree of physical exertion than incidental fitness apps and use a subscription-based pricing model. The FTC asserted that it was reasonably probable that Meta would have entered this market through alternative means absent the acquisition, and would have substantially deconcentrated the market (as well as its mere presence as a potential entrant likely to influence competition in the market). The VR fitness app market allegedly included Meta's Beat Saber, and purportedly, the competition between Beat Saber and Supernatural has been beneficial to users.

Meta countered that Supernatural competes more closely with the many other fitness-specific VR apps, such as Liteboxer and FitXR, as well as general fitness apps such as Peloton, whereas Beat Saber is a game people play to have fun and has a different set of competitors. In addition, Facebook pointed to the unsettled state of the metaverse space, with other major participants, including Sony and Microsoft, playing a key role in designing this new digital universe. Users typically get apps for VR headsets from online app stores. In addition, Meta argues that this acquisition would inject new investment into the VR fitness space and improve the Quest platform to support better fitness apps and expand the VR ecosystem as a whole.

Meta's also contended that FTC Chair Khan had arrived at the FTC with a "preset agenda" and has "stated consistently and in blunt terms that Meta should *never* be allowed to acquire any other company, regardless of the facts as to any such transaction—and without regard to governing law."[54] On September 9, 2022, the FTC moved to strike Meta's bias defenses, arguing, among other things, that these allegations must first be brought at the FTC. On October 7, 2022, the FTC filed a shorter, amended complaint that focuses solely on the VR dedicated exercise app market, that includes Within's Supernatural, being only available on Meta's VR devices, and dropped allegations related to a broader VR fitness app market that would include dance apps and other physical activity but are not purely focused on exercise. The amended complaint no longer claims that Meta and Supernatural are competitors. The amended complaint also dropped Mark Zuckerberg as a defendant.[55] On October 13, 2022, Meta moved to dismiss the amended complaint on grounds that it fails to establish that the VR market is concentrated with high barriers to entry. On November 3, 2022, the court denied the bias claims as being inappropriate for the district court level.

Instagram and its 2014 acquisition of WhatsApp, two deals that the FTC alleges were intended to stifle competitive threats to the company in a "personal social networking" market.

[53] Complaint ¶ 8, *FTC v. Meta Platforms, Inc.*, 3:22-CV-04325 (N.D. Cal. July 27, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf*.

[54] Answer and Affirmative Defenses of Meta Platforms, Inc., *FTC v. Meta Platforms, Inc.*, 3:22-CV-04325 (N.D. Cal. Aug. 26, 2022) (emphasis in original).

[55] Amended Complaint, *FTC v. Meta Platforms, Inc.*, 3:22-CV-04325 (N.D. Cal. Oct. 7, 2022).

Judge Edward Davilla cleared at least five days for the antitrust trial between December 8 and December 20, 2022. The administrative court trial was scheduled to commence in January 2023. On February 1, 2023, Judge Davilla issued an order denying the FTC's PI request. The Court found that the FTC has made a sufficient evidentiary showing that there exists a well-defined relevant product market consisting of VR dedicated fitness apps. In addition, the Court found that regardless of the metrics used, the market is highly concentrated and since the FTC had made a prima facie case, the burden shifts to the defendants to show that the concentration ratios do not accurately depict the economic characteristics of the relevant market. Both parties agreed that the market is a nascent and emerging market, which characteristics may not be fully captured by concentration levels. The Court found that the defendants might not have rebutted the FTC's prima facie case of showing a competitive market despite the concentration levels, but that it need not reach a conclusion here because the FTC had failed to satisfy the other elements of a potential competition case. On February 25, 2023, the FTC voted to withdraw its administrative complaint, officially closing the agency's case.

h. FTC Challenges Microsoft's Acquisition of Activision Blizzard

On December 8, 2022, the FTC sued to block Microsoft Corp.'s ("Microsoft") acquisition of Activision Blizzard Inc. ("Activision") in its administrative court.[56] As of the time of the suit, the deal remains under investigation by UK and EC antitrust regulators. Although Microsoft, like Activision, develops gaming content, it does so for its own use only, and the primary concerns of the FTC are vertical in nature: The FTC alleges that by acquiring Activision, a leading video game developer with strong gaming franchises, Microsoft will be able to suppress competitors to its Xbox gaming consoles and its developing subscription content and cloud-gaming business.

In fact, the FTC alleges that Microsoft has acquired over 10 third-party studios and their titles and has a record of acquiring and using this valuable gaming content to suppress competition from rival consoles, including its acquisition of ZeniMax (which owns Bethesda Softworks), despite having given the EC assurances that it had no incentive to withhold games from rival consoles.[57] The FTC states that Microsoft's Xbox series S and X are one of only two types of high-performance video game consoles (the other being Sony's PlayStation), and that Microsoft and Sony control the market for high-performance video game consoles. Microsoft also offers a leading video games consoles subscription service, Xbox Game Pass, and a cutting-edge cloud-based video game streaming service. Activision is reportedly one of only a very small number of top video game developers that create and publish high-quality video games (referred to as "AAA" titles) for multiple devices, regardless of the producers, including video game consoles, personal computers, and mobile devices. The complaint alleges a "Big 4" of AAA publishers: Activision, Electronic Arts, Take-Two, and Ubisoft, as well as one other AAA studio, Epic Games.

The complaint alleges that, with control over Activision's franchises, Microsoft would have both the means and the motive to harm competition by manipulating Activision's pricing, degrading Activision's game quality or player experience on rival consoles and gaming services, changing the terms and timing of access to Activision's content, or withholding content from competitors entirely, resulting in harm to competitors. According to the complaint, Phil Spencer, CEO of Microsoft Gaming, told Microsoft investors that "[a]s our platform becomes more attractive, the flywheel of content creators and players accelerates. As the creative range on our platform continues to expand, more players are attracted to the service, and the growing scale of the customer base makes the platform more attractive for additional publishers, and so on."[58] The

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[56] Press Release, Fed. Trade Comm'n, *FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.* (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc.

[57] The European Commission stated publicly the day after the complaint was filed that Microsoft had not made any "commitments" to the European Commission.

[58] Complaint ¶ 56, *In the Matter of Microsoft Corp.*, FTC Docket No. 9412 (Dec. 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf.

complaint alleges as separate relevant product markets: (1) high-performance consoles (possibly including the "highly differentiated" Nintendo Switch); (2) multi-game content library subscription services (which are distinct from "buy-to-play games"); and (3) cloud-gaming subscription services. The relevant geographic market is the United States.

The Commission vote to issue the complaint was three-to-one, with Commissioner Christine Wilson dissenting.[59] Just prior to the FTC bringing its case, Microsoft entered into an agreement with Nintendo to provide access for 10 years to Activision's *Call of Duty* franchise to Nintendo's Switch devices, where the games are not currently available, if the Activision deal closes. The FTC took the position that: (1) Nintendo's devices are not in the same console league as Microsoft's and Sony; and (2) the *Call of Duty* franchise is but one of Activision's franchises.

Microsoft filed its answer on December 22, 2022. It points out that Activision Blizzard has not made its new games available through subscription services such as Microsoft's Game Pass, and that the acquisition would make playing Activision Blizzard's games more affordable. "The acquisition of a single game by the third-place console manufacturer cannot upend a highly competitive industry. That is particularly so when the manufacturer has made clear it will not withhold the game. The fact that Xbox's dominant *competitor* has thus far refused to accept Xbox's proposal does not justify blocking a transaction that will benefit *consumers*."[60]

Activision Blizzard also filed an answer on December 22, 2022. It argued that "if Xbox withheld *Call of Duty* from Sony's PlayStation or other platforms that compete with Xbox, Xbox would immediately forgo billions of dollars in lost game sales and cleave off a massive portion of the gamers that Activision has worked so hard to attract and retain."[61] Instead, Activision Blizzard argues that the FTC "invented highly gerrymandered relevant product markets—including a 'high-performance console' market limited to Xbox and PlayStation consoles, as well as individual markets for multi-game subscriptions and cloud gaming—in an attempt to support its conclusory theories of harm."[62]

2. Consent Decrees

The FTC entered into seven consents involving proposed transactions in 2022: (1) EnCap Energy Capital Fund XI, LP/EP Energy Corp. ("EnCap") (Uinta Basin waxy crude oil);[63]

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[59] Press Release, *supra* note 56.

[60] Answer and Defenses of Respondent Microsoft Corp.,*In the Matter of Microsoft Corp.*, FTC Docket No. 9412 (Dec. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/d09412rmicrosoftanswerpublic.pdf.

[61] Answer and Defenses of Respondent Activision Blizzard, Inc., *In the Matter of Microsoft Corp.*, FTC Docket No. 9412 (Dec. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/d09412ractivisionanswerpublic.pdf.

[62] *Id.*

[63] Press Release, Fed. Trade Comm'n, *FTC Requires ENCAP to Sell Off EP Energy Corp.'s Entire Utah Oil Business amid Concerns that Deal would Increase Pain at the Pump* (Mar. 25, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-requires-encap-sell-ep-energy-corps-entire-utah-oil-business-amid-concerns-deal-would-increase. The FTC conditioned clearance with the divestiture of energy producer EP Energy Corp.'s entire business and assets in Utah to Crescent Energy Company, an experienced operator in crude oil and natural gas production, and, with this divestiture purchase, a new competitor in the Uinta Basin. The FTC also required EnCap to provide transitional assistance and not enforce any employee noncompete or non-solicitation agreements against Crescent. In addition, the consent contains certain prior approval provisions for 10 years that are applicable to EnCap's acquisitions in the Uinta Basin and Crescent's transfer of the divested assets. The FTC asserted that the transaction would otherwise have eliminated head-to-head competition between two of only four significant producers in the sale of Uinta Basin waxy crude oil ("Uinta waxy crude") to Salt Lake City refiners. According to the FTC, Uinta waxy crude has distinct qualities and area refiners have invested capital to optimize certain equipment to best utilize this type of crude. The complaint asserts both unilateral and coordinated effects.

(2) Hikma Pharmaceuticals PLC/Custopharm, Inc. (corticosteroid drug triamcinolone acetonide ("TCA"));[64] (3) American Securities Partners VII, L.P./Ferro Corp. (porcelain enamel frit, glass enamel, and forehearth colorants);[65] (4) Buckeye Partners L.P./Magellan Midstream Partners, L.P. (petroleum terminals);[66] JAB Consumer Partners/SAGE Veterinary Partners, LLC (specialty and emergency veterinary clinics);[67] (6) JAB

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[64] Press Release, Fed. Trade Comm'n, *Federal Trade Commission Preserves Competition for Development and Marketing of Steroid Injectable Drug* (Apr. 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/04/federal-trade-commission-preserves-competition-development-marketing-steroid-injectable-drug. The FTC conditioned clearance on Custopharm's parent company retaining and transferring Custopharm's TCA assets to another subsidiary, Long Grove Pharmaceuticals, LLC. Long Grove must operate and maintain the TCA assets for at least four years. TCA is used to treat severe skin conditions, allergies, and inflammation. Only three competitors currently market this drug. The FDA recently approved marketing of Custopharm's TCA product and Hikma has an injectable TCA product in development. This remedy seeks to preserve competition in the market for generic TCA by removing any incentive for Hikma to terminate or delay the marketing of the TCA product in its own development pipeline.

[65] Press Release, Fed. Trade Comm'n, *FTC Requires Prince and Ferro to Sell Off Three Facilities amid Concerns that Deal would Increase Concentration in North American Market for Porcelain Enamel Frit* (Apr. 21, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-requires-prince-ferro-sell-three-facilities-amid-concerns-deal-would-increase-concentration.In-a-five-to-zero-vote, the FTC conditioned clearance upon the divesture of three facilities (a porcelain enamel frit and forehearth colorants plant in Leesburg, Alabama; a porcelain enamel frit and forehearth colorants plant and research center in Bruges, Belgium; and a glass enamel plant in Cambiago, Italy) to KPS Capital Partners, LP ("KPS"). In addition to the plant divestures, American Securities Partners must obtain prior approval from the FTC for 10 years before buying assets to manufacture and sell porcelain enamel frit, glass enamel, or forehearth colorants, and divestiture buyer KPS must obtain prior approval for three years before transferring the divested assets to anyone, and seven additional years before divesting to a buyer that manufactures and sells these products. The FTC cooperated with the EC and Mexico.

The FTC alleged that the combined firm would control a dominant position in North America for porcelain enamel frit, which is used for appliances, water heaters, and cookware. In addition, the FTC posited that the combination would have harmed competition in the highly concentrated worldwide markets for glass enamel (which is added to glass surfaces to provide extra color or decoration) and forehearth colorants (which is added to give glass bottles a specific color while being made).

[66] Press Release, Fed. Trade Comm'n, *FTC Acts to Protect South Carolina and Alabama Markets from Anticompetitive Gasoline Terminal Deal* (June 2, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-south-carolina-alabama-markets-anticompetitive-gasoline-terminal-deal. In a five-to-zero vote, the FTC conditioned approval of this transaction on divestiture of five terminals serving three local markets in North Augusta, South Carolina, Spartanburg, South Carolina and Montgomery, Alabama, to U.S. Venture, Inc. In these markets, Buckeye and Magellan are alleged to have been close competitors, and the combination would have allegedly increased the likelihood of coordinated interaction between the remaining competitors; reduced the number of terminating options for third-party customers; and increased prices for terminating services. The order requires: (1) Buckeye to seek prior approval from the FTC for a period of 10 years before it acquires any light petroleum products terminal within a 60-mile radius of the divested assets; and (2) U.S. Venture to obtain prior approval for three years before transferring any of the divested assets to anyone, and for an additional seven years before transferring those assets to any buyer with an interest in any light petroleum products terminal in any of the three relevant areas.

[67] Press Release, Fed. Trade Comm'n, *FTC Acts to Protect Pet Owners from Private Equity Firm's Anticompetitive Acquisition of Veterinary Services Clinics* (June 13, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services. In a five-to-zero vote, the FTC conditioned approval of this transaction on the divestiture of six clinics to divesture buyer United Veterinary Care, LLC. These clinics provide a variety of specialty and internal medicine services as well as emergency services in and around Austin, Texas, San Francisco, California, and in and between Oakland, Berkeley, and Concord, California. All of these markets are described by the FTC as being highly concentrated, and the combination would result in the combined firm being the only provider, or one of only two providers, in each of these delineated markets. The proposed order requires for 10 years that United Veterinary seek: (1) prior approval for an acquisition of a specialty or emergency veterinary clinic located within 25 miles of a JAB-owned veterinary specialty or emergency clinic in California or Texas; and (2) prior notice for any such acquisition in any other state. In addition, United Veterinary must obtain prior approval from the Commission before transferring any of the divested assets to any buyer for 10 years, except in the sale of all or substantially all of the company's business.

Consumer Partners/Ethos Veterinary Health LLC (specialty and emergency veterinary clinics);[68] and (7) Tractor Supply Company/Orscheln Farm and Home LLC (farm stores).[69]

3. Consummated Merger Challenges

a. FTC Challenge of Axon/VieVu Merger Continues Pending Supreme Court Decision

Very rarely does the U.S. Supreme Court get involved in a federal antitrust merger matter, much less one challenging the constitutionality of the FTC's procedures. In 2022, the Court heard these arguments in this case, and the 2020 administrative challenge of the FTC remains stayed until the Court has decided.

By way of background, on January 3, 2020, the FTC issued an administrative complaint challenging Axon Enterprise, Inc.'s ("Axon") May 2019 acquisition of VieVu, LLC ("VieVu").[70] The FTC alleged that Axon and

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Commissioners Wilson and Philips issued a statement taking issue with the "invocation of rhetoric unrelated to competition" and "the majority's evident distaste for private equity as a business model, instead of the facts uncovered in the investigation." Fed. Trade Comm'n, Concurring Statement of Comm'rs Wilson & Philips, *In the Matter of JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC*, FTC File No. 2110140 (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf.

[68] Press Release, Fed. Trade Comm'n, *FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics* (June 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics. In a five-to-zero vote, the FTC conditioned clearance on the divestiture of five clinics in and around Denver, Colorado, San Francisco, California, Washington, D.C., and Richmond, Virginia. The FTC's action in this matter is similar to the Sage transaction discussed, *supra* note 67. The prior approval provision extends to California, Colorado, the District of Columbia, Maryland, and Virginia. The divesture buyers—United Veterinary Care LLC and Veritas Veterinary Partners—also are subject to prior approval provisions for 10 years.

[69] Press Release, Fed. Trade Comm'n, *FTC Approves Consent Order Addressing Concerns Over Tractor Supply's Acquisition of Orscheln Farm and Home* (Oct. 11, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-approves-consent-order-addressing-concerns-over-tractor-supplys-acquisition-orscheln-farm-home. In a five-to-zero vote, the FTC conditioned clearance on the divestiture of: (1) 72 Orscheln stores, Orscheln's corporate offices and its Missouri distribution center to Bomgaars; and (2) 12 Orscheln stores to Buchheit. In total, the parties are required to divest 84 stores and related assets in 84 local geographic markets in 10 states (Arkansas, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, Ohio, Oklahoma, and Texas), out of the total 166 stores that Tractor Supply proposed acquiring. In addition, the consent requires Tractor Supply to provide assistance to Bomgaars and Buchheit as they convert their stores and imposes a firewall of the teams supporting Tractor Supply's stores and the stores that are being divested. For 10 years, Tractor Supply must obtain prior approval from the FTC before acquiring any other farm stores or any property that operated as a farm store within six months prior to August 17, 2021 (six months before the deal's signing) within 60 miles around each Orsheln store being divested. The consent also requires that Bomgaars and Buchheit obtain prior approval from the Commission before selling any of the Orscheln stores they acquired for a period of three years, and for an additional seven years, if the sale is to a person operating a farm store within a 60-mile radius of the store to be sold. The Commission determined that online retailers are not reasonable substitutes for brick-and-mortar farm stores. "Online retailers cannot provide their customers the ability to touch and feel products prior to purchase, nor can they offer in-person access to knowledgeable sales staff to learn about products best suited for their rural lifestyle needs. Additionally, online retailers require time to deliver their products to their customers, while farm stores provide their customers with immediate access to products that meet essential or immediate needs, such as animal feed when a customer runs out or components to fix broken farm equipment. Furthermore, many products sold at farm stores are not conducive to selling online, as they are large and heavy, and therefore impractical or expensive to ship." Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Tractor Supply Company and Orscheln Farm and Home LLC*, FTC File No. 211-0083 (Oct. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110083TractorSupplyAAPC.pdf. The FTC appointed an independent monitor to oversee the divestiture and the transition.

[70] Press Release, Fed. Trade Comm'n, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn.

VieVu were each other's closest competitors in the market for body-worn cameras ("BWCs") sold to large metropolitan police departments. Accordingly, the acquisition had eliminated direct and substantial competition between the two firms, further entrenching Axon's position as the dominant supplier of BWC systems to large metropolitan police departments.

The FTC complaint alleged that, post-merger, Axon began to tout its pricing power and raised its prices.[71] In addition, the FTC alleged that Axon had limited the availability of VieVu BWC systems to customers and had stopped developing new generations of VieVu hardware and software. According to the FTC, new entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects and that the barriers to entry are high because of substantial upfront capital investment requirements, switching costs, and the need for large metropolitan police department referrals.

The FTC indicated that, as part of the merger, Safariland, the parent of VieVu, had entered into several non-compete and customer non-solicitation agreements covering products and services not related to the merger and that Axon and Safariland had entered into company-wide non-solicitation agreements with a 10-or-more-year term. The parties also entered into a decade-long supply agreement whereby Safariland would develop and exclusively supply conducted electrical weapons ("CEW") holsters to Axon for its taser-branded CEW. The FTC deemed Axon to be the dominant supplier of CEWs. The FTC asserted that these restraints were not reasonably limited to protecting a legitimate business interest.

Hours before the Commission filed its complaint on January 3, 2020, Axon filed an injunctive and declaratory judgment action in the U.S. District Court for the District of Arizona.[72] The action alleged that the administrative proceeding had violated Axon's *Fifth Amendment* due process and equal protection rights by subjecting Axon to unfair procedures before an administrative body rather than a trial before a neutral federal judge and that the Commission's structure was unconstitutional. In addition, the case sought a declaratory judgment that Axon's acquisition did not violate any antitrust laws. On January 9, 2020, Axon moved the district court to preliminarily enjoin the Commission's administrative proceeding.[73] On January 10, 2020, Axon filed a motion to stay the administrative action until entry of the final judgment in Axon's federal action. Axon and Safariland filed their answers in the administrative action on January 21, 2020 and January 22, 2020, respectively. On February 27, 2020, the ALJ denied Axon's motion to stay proceedings. On April 8, 2020, the district court dismissed Axon's complaint due to a lack of subject matter jurisdiction and denied Axon's injunctive motion as moot.[74] On April 13, 2020, Axon appealed the decision to the Ninth Circuit, which heard oral arguments on July 17, 2020. On January 28, 2021, the majority of the Panel of the Ninth Circuit concluded that, while the Federal Trade Commission Act ("FTC Act") itself does not expressly state that a party cannot sue in federal court to challenge the enforcement process, Congress implicitly precluded district court jurisdiction. The majority also found that Axon had "no right to avoid the administrative proceeding itself."[75]

On April 15, 2021, the full Ninth Circuit denied Axon's request to have the Panel's decision reconsidered. Later that same day, Axon requested the Ninth Circuit to stay the FTC's administrative proceeding while it appealed to the U.S. Supreme Court the constitutionality of the FTC's proceeding.[76] On July 20, 2021, Axon

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[71] Complaint ¶¶ 5–6, *In the Matter of Axon Enter., Inc.*, FTC Docket No. D9389 (Jan. 3, 2020), *https://www.ftc.gov/system/files/documents/cases/d09389_administrative_part_iii_-_public_redacted.pdf*.

[72] Complaint, *Axon Enter., Inc. v. FTC*, No. CV-20-00014 (D. Ariz. Jan. 3, 2020).

[73] Plaintiff's Motion for Preliminary Injunction, *Axon Enter., Inc. v. FTC*, No. CV-20-00014 (D. Ariz. Jan. 9, 2020).

[74] *Axon Enter. Inc. v. FTC, 452 F. Supp. 3d 882 (D. Ariz. 2020)*.

[75] *Axon Enter. Inc. v. FTC, 986 F.3d 1173, 1182 (9th Cir. 2020)*.

[76] Motion to Stay Mandate Pending Filing of Petition for Writ of Certiorari, *Axon Enter. Inc. v. FTC*, No. 20-15662 (9th Cir. Apr. 15, 2021).

petitioned the U.S. Supreme Court, arguing that it makes little sense to subject a company to the constitutional harm it is trying to avoid before hearing its claims. On December 20, 2021, Axon filed a supplemental brief in support of its petition, stating that the Fifth Circuit's decision, issued December 13, 2021, in *Cochran v. SEC*,[77] has created a clear circuit split. While the *Cochran* ruling involves the Securities Exchange Act ("SEC Act"), Axon maintains that, for "purposes of determining whether Congress impliedly stripped district courts of jurisdiction over structural constitutional challenges," there is no distinction between the SEC Act and the FTC Act.[78] On January 25, 2022, the U.S. Supreme Court granted *certiorari*, setting the stage for its consideration of Axon's argument.[79] Oral arguments were held on November 7, 2022.

After the complaint was issued, Safariland and Axon rescinded the non-compete and non-solicitation provisions that the FTC complaint alleged were anticompetitive. On April 17, 2020, Safariland agreed to settle the FTC's allegations by entering into a consent that ensured that Safariland would not enter into new agreements with similar anticompetitive provisions with Axon. Axon also indicated that it was willing to divest the acquired business entity, but the FTC demanded that it also agree to grant licenses for its own intellectual property to any buyer of the business, effectively creating a "clone" of Axon.

The evidentiary hearing in the administrative proceeding was scheduled to begin on May 19, 2020, but the ALJ extended commencement until October 13, 2020, due to the Covid-19 pandemic. On October 2, 2020, the Ninth Circuit granted a request from Axon to pause the administrative trial proceedings while Axon challenged the Commission's merger review process. The Panel indicated that it had granted a temporary stay of the order to preserve the *status quo* pending consideration of the appeal on the merits.[80]

b. FTC Continues with Challenge of Altria's Investment in JUUL After ALJ Rules for Parties

On April 1, 2020, the FTC announced that it had filed an administrative complaint alleging that Altria Group, Inc. ("Altria") and JUUL Labs Inc. ("JUUL") had entered into agreements violating Section 1 of the Sherman Act, Section 5 of the FTC Act, and Section 7 of the Clayton Act.[81] The FTC alleged that: (1) Altria and JUUL were competitors in the market for closed-system e-cigarettes between 2013 and 2017; (2) Altria's Mark Ten e-cigarettes had achieved second place in the market by mid-2017; (3) JUUL had entered the retail market in 2015 and had increased its market share rapidly after mid-2017 to 70% in October 2018; (4) instead of competing aggressively against JUUL, Altria entered into deal negotiations, with Altria's exit from the market being demanded by JUUL; and (5) Altria ceased competing in the e-cigarette market.

On December 20, 2018, the companies had announced a purchase agreement pursuant to which Altria acquired a 35% nonvoting stake, convertible into voting stock upon receipt of HSR clearance. In addition, upon HSR clearance, Altria had the right to appoint three of nine members of JUUL's board of directors. The parties had certain other agreements, which the FTC noted contained a non-compete provision that ended Altria's development of a newly improved portfolio of products. The FTC contended that the transaction eliminated a threat to JUUL's market dominance and assured JUUL's dominance through the

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[77] *Cochran v. SEC, 20 F.4th 194 (5th Cir. 2021)*.

[78] Supplemental Brief for Petitioner 3, *Axon Enter. Inc. v. FTC*, No. 21-86 (Dec. 20, 2021).

[79] *Axon Enter. Inc. v. FTC*, No. 21-86, *cert. granted*, *2022 U.S. LEXIS 599 (Mem.)* (Jan. 24, 2022). *See also* Matthew Perlman, *High Court Takes Up Axon's FTC Challenge*, LAW360, *https://www.law360.com/competition/articles/1457921/high-court-takes-up-axon-s-ftc-challenge*.

[80] Order, *Axon Enter. Inc. v. FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020), *https://www.law360.com/articles/1316925/attachments/0*.

[81] Press Release, Fed. Trade Comm'n, *FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL* (Apr. 1, 2020), *https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul*. Democratic Commissioner Chopra issued a concurring statement, joined by Democratic Commissioner Slaughter.

extensive resources that Altria would bring to it, including distribution capabilities and offering its premier shelf space at retailers.

The parties argued that the non-compete at issue was ancillary to a legitimate business purpose. Furthermore, Altria's e-cigarette business had been struggling: the investment in JUUL provided it a more solid foothold in the e-cigarette category.[82]

The administrative trial began on June 2, 2021.[83] Over the next 13 days, the FTC and the respondents presented opposing views of the history of the deal negotiations, the role of the regulatory scheme, and the state of competition in the relevant market following the transaction.

The FTC's briefing and trial presentation focused on the parties' negotiations and the term sheets memorializing discussions among the parties' principals. The FTC, dismissing Altria's explanations for its removal of its products from the market as pretext, ultimately argued that the parties had violated Section 1 of the Sherman Act under a rule of reason analysis by agreeing that Altria would exit the U.S. e-cigarette market as a condition of the transaction, and, separately, by entering into a written non-compete.[84] By attributing Altria's exit to the transaction, the FTC treated the partial acquisition as a full acquisition that had the effect of totally eliminating an actual competitor from the market, in violation of Section 7 of the Clayton Act. The FTC also argued that even if Altria had independently decided to discontinue the sale of its e-cigarette products, the transaction violated Section 7 of the Clayton Act under an actual potential competition theory of harm.

At trial and in their briefing, the respondents detailed Altria's history of failed innovations in the e-cigarette space and the increasing regulatory scrutiny of e-vapor products, culminating in the FDA's letter to e-cigarette manufacturers calling for action to address youth usage of e-cigarettes. Rejecting the FTC's claims of pretext, the respondents argued that the evidence confirms that Altria removed its products for independent business reasons, and that the FTC failed to meet its burden under Section 1 of the Sherman Act of proving the existence of an illegal agreement, which, in turn, undermines the premise of the FTC's Section 7 of the Clayton Act "actual competition" claim.[85] As to the FTC's potential competition theory, the respondents argued that the FTC had failed to demonstrate that Altria was an actual potential competitor due to, among other factors, the demanding regulatory approval process for e-vapor products.

On December 17, 2021, ALJ Chappell extended the decision time period by 30 days under Commission rules, indicating that he would file a sealed version of his decision on the case by January 21, 2022, and citing an "extraordinarily high" volume of material presented at trial. The record reportedly included 2,480 exhibits and 3,410 pages of trial transcripts from 37 witnesses.[86] The companies exchanged lengthy post-

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[82] Answer and Defenses of Respondent Altria Grp. Inc., *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (July 27, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_r_altria_answer_and_defenses_public599010.pdf; Answer and Defenses of Respondent JUUL Labs, Inc., *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (July 27, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_r_jli_answer_and_defenses_public599011.pdf.

[83] Third Order Regarding Scheduling in Light of Public Health Emergency, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (June 3, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_commission_third_order_regarding_scheduling_in_light_of_public_health_emergency.pdf.

[84] Complaint Counsel's Post-Trial Brief, FTC Docket No. 9393 (Aug. 23, 2021), https://www.ftc.gov/system/files/documents/cases/d09393_-_complaint_counsel_s_post-trial_brief.pdf.

[85] Post-Trial Brief of Respondents Altria Group, Inc. and JUUL Labs, Inc., *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (Aug. 24, 2021), https://www.ftc.gov/system/files/documents/cases/d09393_-_post-trial_brief_of_respondents_altria_group_inc._and_juul_labs_inc.pdf.

[86] Order Extending Time for Filing Initial Decision Pursuant to Commission Rule 3.51, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (Dec. 17, 2021), https://www.ftc.gov/system/files/documents/cases/d09393_alj_order_extending_time_for_filing_initial_decision_pursuant_to_commission_rule_3_51public603476.pdf.

trial briefs and proposed findings of fact and conclusions of law totaling over 4,000 pages, with the last filing submitted on October 20, 2021. On January 11, 2022, ALJ Chappell requested an additional extension of the decision time period to February 17, 2022, citing "good cause" given the extensive record; the Commission granted his request on January 19, 2022.[87]

On February 23, 2022, ALJ Chappell dismissed the complaint, finding for the transaction parties on all counts.[88] The 263-page decision painstakingly detailed the history of the transaction parties' negotiation of their deal to assess whether Altria's decisions to remove certain of its products in September and December 2018 constituted independent business decisions or were the result of an understanding between the transaction parties.[89] ALJ Chappell, unmoved by the circumstantial evidence presented by the FTC, found Altria's explanations of its business reasons for removing its products to be credible, logical, and supported by substantial evidence, including contemporaneous documents, thereby undermining the FTC's claim of an illegal agreement under Section 1 of the Sherman Act. As to the FTC's Section 7 of the Clayton Act allegation, ALJ Chappell concluded that the evidence failed to demonstrate that Altria's products would still be on the market but for the transaction with JUUL or that Altria's removal of its products from the market substantially harmed or is reasonably likely to substantially harm competition, given Altria's lack of competitive significance at the time of the transaction. ALJ Chappell further noted that since the transaction, concentration in the relevant market has actually decreased. As to harm to future competition, ALJ Chappell found that concluding Altria's future products would obtain FDA approval and reach the market in the near future would require an unacceptable level of speculation. Finally, with reference to the rejection of the FTC's claim of harm to future competition, ALJ Chappell also disposed of the FTC's claim that the written non-compete between the parties constituted a violation of Section 1 of the Sherman Act, reasoning that the lack of evidence proving a reasonable probability that Altria would have competed in the relevant market in the near future undermines the FTC's ability to meet its initial burden of demonstrating the anticompetitive effects of the non-compete provision under the rule of reason analysis.

On March 2, 2022, the FTC staff responded by filing its notice to appeal the decision to the full Commission. The parties have filed their appeals briefs, the Commission held an oral argument on September 9, 2022, and, on November 3, 2022, the Commission requested the parties to submit supplemental briefs on the "potential applicability of the per se rule and the inherently suspect standard to an alleged unlawful agreement" between the parties.[90] The deadline for a Commission ruling on the appeal has been extended to April 2023.

Antitrust Report
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[87] Order Granting Extension of Time, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (Jan. 19, 2022), *https://www.ftc.gov/system/files/documents/cases/d09393commissionorderextension.pdf*.

[88] Press Release, Fed. Trade Comm'n, *Administrative Law Judge Dismisses FTC Antitrust Complaint Against Altria Group and JUUL Labs, Inc.* (Feb. 24, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/02/administrative-law-judge-dismisses-ftc-antitrust-complaint-against-altria-group-juul-labs-inc*.

[89] Initial Decision, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (Feb. 23, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/d09393altriainitialdecisionpublic.pdf*.

[90] Order Requesting Further Briefing and Extending Deadline for Commission Ruling, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (Nov. 3, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/D09393-Commission-Order-Scheduling-Briefing%28Public%29.pdf*.

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IV. U.S. Department of Justice Enforcement

The DOJ began 2022 with three active litigation merger challenges, involving an alliance (*American Airlines/JetBlue*, which the DOJ argues is tantamount to a merger), a vertical case that included a long-term distribution arrangement (*U.S. Sugar/Imperial Sugar*), and a monopsony case involving top-selling authors (*Penguin/Simon & Schuster*). In all three of these cases, the DOJ focused on the existence of a small category of top firms, with a competitive moat around them, and the elimination of a rival maverick through the transaction. Of the pending 2021 cases, the DOJ lost one (*U.S. Sugar*), won one (*Penguin*), and as of the end of the year, had the remaining case tried, but with a court decision outstanding (*JetBlue*).

As discussed below, in 2022, the DOJ brought four challenges in district court: the parties abandoned one of the challenges soon after it was brought (*Verzatec/Crane*); the DOJ lost two after trial—*Booz Allen/EverWatch*, which involved competition over a single contract, and *UnitedHealth/Change*, which involved a remedy to eliminate the horizontal overlap and behavioral safeguards to address vertical theories of harm; and one case, *Assay Abloy/Spectrum*, remained pending at the end of the year. Notably absent after many decades of agency practice, the DOJ did not enter into any consents to resolve concerns in either proposed or consummated transactions.

1. Court Challenges

a. DOJ Challenges American Airlines/JetBlue Alliance Remains Undecided

On September 21, 2021, the Antitrust Division and AGs in six states and the District of Columbia brought a civil action in the U.S. District Court for the District of Massachusetts, alleging that the "Northeast Alliance" entered into by American Airlines Group Inc. ("American") and JetBlue Airways Corporation ("JetBlue") on July 15, 2020 violates Section 1 of the Sherman Act.[91] The complaint alleged that, in the alliance, "the two rivals have quietly agreed to share their revenues and coordinate which routes to fly, when to fly them, who will fly them, and what size planes to use on flights to and from four major airports": Boston Logan, JFK, LaGuardia, and Newark.[92] The complaint further alleged that American and JetBlue "will effectively merge

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[91] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Unprecedented Domestic Alliance Between American Airlines and JetBlue* (Sept. 21, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-unprecedented-domestic-alliance-between-american-airlines-and. The six states are Arizona, California, Florida, Massachusetts, Pennsylvania, and Virginia.

[92] Complaint 2, *U.S. v. American Airlines Grp.*, C.A. No. 1:21-cv-11558 (D. Mass. Sept. 21, 2021), https://www.justice.gov/opa/press-release/file/1434621/download.

their operations" for these four airports, which comprise about two-thirds of JetBlue's business.[93] As a result, the alliance would eliminate significant competition between the two airlines, which has led to lower fares and higher quality services and will diminish JetBlue's incentives to compete with American in other markets across the country.[94]

The complaint asserted the following: Four large airlines—legacy carriers American, Delta, and United, as well as Southwest Airlines—have control over 80% of, and therefore dominate, domestic air travel. Because airlines are generally unable to merge formally across national borders, American has orchestrated *de facto* mergers through a series of alliances, which are intricate joint ventures involving extensive coordination and sharing of revenues. JetBlue has been "an important counterweight to the concentration of power" and its own estimate indicated that "it has saved consumers a total of more than $10 billion since the airline's founding, offering lower fares and better service and forcing competitors to do the same … . JetBlue's reputation for lowering fares is so well known in the airline industry that it has earned a name: the 'JetBlue Effect.' "[95] The complaint further asserted that American and JetBlue had been "poised to compete even more intensively"[96] before entering into the Northeast Alliance:

> Recognizing the significant and growing threat posed by JetBlue, and not satisfied with the consolidation that has made it the largest airline in the world, American now seeks to co-opt JetBlue through an unprecedented domestic alliance. Knowing full well that an outright merger would invite a challenge under Section 7 of the Clayton Act, American instead seeks to align JetBlue's economic incentives with its own far-reaching partnership … . In so doing, American and JetBlue have violated Section 1 of the Sherman Act by effectively merging their operations in Boston and NYC and eliminating competition that has resulted in substantial benefits for consumers. JetBlue itself recognized the danger posed by this close dependence.[97]

"If JetBlue complies with American's wishes, the Northeast Alliance gives American ways to reward JetBlue"[98] and if they don't, ways to punish JetBlue. The Mutual Growth Incentive Agreement commits the parties "to pool and apportion revenues earned on flights" for these four airports "such that each partner earns the same revenues regardless of whether a passenger flies on an American or a JetBlue plane."[99] "While American and JetBlue technically retain the ability to price independently, in reality neither airline will have the incentive to undercut the other on price because doing so would simply reduce the revenues each earns under the revenue-sharing arrangement."[100] In addition, the parties "can raise fares simply by one of them exiting a market where it competed against the other" or cutting the number of seats they fly in a market, and "then share in their now-ally's increased profits … . In any of these ways, American and JetBlue can increase fares without ever talking to each other about pricing."[101]

Moreover, according to plaintiffs, the Northeast Alliance effectively operates like a merger in domestic markets that have either Boston or JFK/LaGuardia as an endpoint. In these markets, American and JetBlue will coordinate capacity and share revenue with one another. "Under a merger analysis, the Northeast

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[93] *Id.* at ¶ 22.

[94] *Id.* at ¶ 2.

[95] *Id.* at ¶¶ 5, 6.

[96] *Id.* at ¶ 7.

[97] *Id.* at ¶ 9.

[98] *Id.* at ¶ 12.

[99] *Id.* at ¶ 19.

[100] Complaint 2, *American Airlines Grp.*, at ¶ 20, *supra* note 92.

[101] *Id.*

Alliance would be presumptively anticompetitive in 11 domestic markets … where both parties provided competing nonstop service to and from Boston" and in 17 domestic markets where the parties "both provided competing nonstop service to and from JFK/LaGuardia."[102] The complaint alleges harm in 98 domestic markets where no airline provided nonstop service but JetBlue's connecting service through Boston or JFK/LaGuardia competed against American's connecting service through other hubs, and purportedly the revenue-sharing and capacity coordination provided in the Northeast Alliance will dampen incentives to compete. Finally, the complaint alleges harm to competition in transatlantic markets where JetBlue announced plans to launch services.[103]

The complaint preemptively asserted that Covid-19 does not excuse the combination, yet the huge drop in the volume of fliers has led to big losses to carriers. In the first half of 2021, American reported a $1.2 billion loss and JetBlue had a $183 million loss during the same time period (the last days of the Trump Administration). In addition, the parties' agreement with the U.S. Department of Transportation ("DOT") on January 10, 2021 does "not address the competitive harms likely to occur in the markets" with Boston endpoints; is "too small in scope to address the harms likely to occur in the markets" with NYC endpoints; "fails to remedy the harms in other markets where Defendants likely will reduce capacity and raise fares"; and fails "to prevent the diminution in JetBlue's independence and disruptiveness that is likely to result from the Northeast Alliance."[104]

The parties subsequently amended their agreements to carve out capacity coordination and revenue-sharing in six concentrated markets to and from Boston, where both parties had provided competing nonstop service prior to the pandemic. The complaint states that these amendments leave open the prospect that the parties could add these routes back under certain circumstances and that the six markets remain covered by code-sharing.[105]

American and JetBlue both issued statements contending that the Northeast Alliance does not amount to a merger, that the Northeast Alliance promotes competition with other airlines, and that the Northeast Alliance had already resumed more routes and flights.[106] These include expanded low-fare offerings and making more long-haul international flights from New York viable for American. The defendants filed a motion to dismiss the lawsuit on November 22, 2021, which was denied on June 9, 2022. The trial began September 27, 2022 and, after 18 days of trial testimony, closing arguments were held on November 18, 2022. On March 7, 2023, the DOJ, along with the AGs of three states and the District of Columbia, filed in the same court an action to block JetBlue's acquisition of Spirit. Airlines. The DOJ tried to get the case assigned to the same Judge as a "related case" but the Judge refused to take the case. It will be assigned to another judge.

b. DOJ Wins Injunction to Block Penguin Random House/ Simon & Schuster Merger

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[102] *Id.* at ¶ 49.

[103] *Id.* at ¶¶ 63–67.

[104] *Id.* ¶ 79. Interestingly, Spirit Airlines filed an administrative complaint before the DOT on January 7, 2021, regarding the Northeast Alliance. On September 21, 2021, the DOT stayed the proceedings in the Spirit challenge and indicated that its agreement with American and JetBlue will remain in place during the pendency of the DOJ antitrust litigation. U.S. Dep't of Trans., Clarification of Departmental Position on American Airlines—*JetBlue Airways Northeast Alliance Joint Venture, 86 Fed. Reg. 53401 (Sept. 27, 2021)*, *https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20849.pdf*.

[105] Complaint, at ¶ 80, *supra* note 92.

[106] *See* Press Release, American Airlines, *American Airlines Statement on Lawsuit Filed by U.S. Department of Justice* (Sept. 21, 2021), *https://news.aa.com/news/news-details/2021/American-Airlines-Statement-on-Lawsuit-Filed-by-US-Department-of-Justice/default.aspx*; Press Release, JetBlue, *JetBlue CEO Robin Hayes Provides an Update on the Northeast Alliance and Action by the U.S. Department of Justice* (Sept. 21, 2021), *http://mediaroom.jetblue.com/investor-relations/press-releases/2021/09-21-2021-212310385*.

IV. U.S. Department of Justice Enforcement

On November 2, 2021, the DOJ brought a PI action in federal district court for the District of Columbia to prevent Penguin Random House, LLC ("Penguin")—the world's largest book publisher—from buying Simon & Schuster, Inc. ("Simon").[107] The case does not focus on broad theories of harm, instead focusing on the parties' *buyer* power in a narrow submarket. Although the complaint does make a bare-bones assertion that the transaction could result in consumers having fewer new books to choose from and that the merger would give Penguin "outsized influence over who and what is published, and how much authors are paid for their work,"[108] the primary focus is on harm to authors of anticipated best-selling books.[109]

The transaction involves the combination of Penguin, the number one, and Simon, the fourth largest, book publisher (both part of a so-called "Big Five"). These five firms combined have about 60–65% of the broader book market. The case, however, focuses to a great extent on examples of head-to-head competition between Penguin and Simon for anticipated top selling books (defined by the DOJ as where the advances exceed $250,000, calculated by the DOJ to total more than

$1 billion in 2020), where they are the final two bidders for book rights. Combined, the Big Five have a 90% share of this narrower market, and the two merging firms alone have a 49% share. The next largest competitor would be less than half the combined firm's size, and the two largest publishers would collectively control more than two-thirds of this market. In addition, apparently, competition between these two firms has resulted in authors earning more for their publishing rights in the form of advances (*i.e.*, upfront payments made to authors for the rights to publish their works), and receiving better editorial, marketing, and other services that are critical to the success of their books.[110] In most cases, the advance represents an author's total compensation.[111] The complaint further alleged that smaller publishers lack the resources and capabilities of the Big Five publishers and thus they are limited in their ability to compete for the publishing rights to anticipated top-selling books. Smaller publishers typically have smaller "backlists" than the Big Five, which are a critical source of revenue that allow the Big Five to pay more frequent and higher advances to authors.[112] Smaller publishers also lack scale in book sales and therefore lack the financial resources to: (1) regularly pay the advances required to secure publishing rights to anticipated top-selling books, and (2) absorb the financial losses from books that do not meet their sales expectations. Therefore, the complaint asserted, authors of anticipated top-selling books generally do not view smaller publishers as competitively significant options compared to the Big Five. Many smaller publishers lack distribution capabilities and depend upon Penguin and Simon for distribution services.[113] Moreover, the complaint claimed, the fact that smaller publishers may be an acceptable alternative for certain authors will not protect other authors who have benefitted from competition between Penguin and Simon, and who would continue to benefit in the future if the merger is enjoined.[114]

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[107] Complaint, *United States v. Bertelsmann SE & Co. KGaA*, C.A. No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021), https://www.justice.gov/atr/case-document/file/1445931/download.

[108] *Id*. at 2.

[109] The DOJ has obtained enforcement actions in some monopsony-based matters, including in 2017 in *Danone/WhiteWave* (see Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of Danone's Stonyfield Farms Business in Order for Danone to Proceed with WhiteWave Acquisition* (Apr. 3, 2017), https://www.justice.gov/opa/pr/justice-department-requires-divestiture-danone-s-stonyfield-farms-business-order-danone, in which the DOJ alleged that the transaction would have "blunted competition between the top two purchasers of raw organic milk" in the northeast United States).

[110] Complaint ¶ 2, *supra* note 107.

[111] *Id*. at ¶ 5.

[112] Complaint, *United States v. Bertelsmann SE & Co. KGaA*, *supra* note 107.

[113] *Id*. at ¶ 55.

[114] *Id*. at ¶ 50.

The complaint also alleged both unilateral and coordinated effects. According to the DOJ, a few large players dominate the industry and the terms of author contracts, other than advances, have become fairly standardized over time. With fewer players and an obvious leader, the remaining "Big Four" would likely find it easier to reach and sustain a consensus that harms authors through coordination.[115] The Big Five have a history of collusion.[116]

Penguin answered the complaint on December 13, 2021, arguing that its plan to buy a competitor, Simon, would be a boon for the industry, benefiting authors, booksellers, and readers. Penguin asserted that the DOJ "misunderstands" the way the publishing industry functions.[117] According to Penguin, the DOJ's assumptions regarding diminution of compensation to the highest-paid authors is "legally, economically and factually wrong, and it ignores the vast majority of authors who will indisputably benefit from the transaction."[118] Many writers outside of the highest-paid authors would stand to make more money by being brought into the Penguin supply chain, widely considered to be the best in the business, which would then make their work more visible and available. There are more than just the Big Five publishers—with other major players, including Disney, Amazon, and Scholastic, along with hundreds of small- and mid-size publishing houses. In addition, Penguin argues that the company's various imprints operate separately and can submit competing bids for the same book. According to Penguin, on any given deal, also at least one smaller publisher will compete, and some of the country's highest-selling authors, including J. K. Rowling (*Harry Potter*) and Jeff Kinney (*Diary of a Wimpy Kid*), are published by companies outside of the Big Five publishers. The focus on the small group of authors who command the highest advances is an "invented market," since publishers do not "divide the market for book rights into distinct categories based on the author's compensation."[119] The defendants argue that there is no objectively definable market for authors of anticipated top-selling books: on the whole, of books for which Penguin pays an advance of $1 million or more, fewer than 45% reach the list of 1,000 best-selling books, while of those with lower advances, 10% make that list. In addition, 4% of books drive 60% of the company's profits. Penguin's supply chain and distribution network also helps neighborhood bookstores compete with Amazon and the combination would counterweight Amazon's buying power.

A 12-day trial began on August 1, 2022. The parties took issue with the government's market definition, which they argued "erase[d] 98% of the market, shriveling it down to … a price segment, not a cognizable 'market.' "[120] With respect to the government's coordinated effects claim, the parties argued that the Apple e-books case was of little relevance as it related to downstream e-book prices, not competition to contract with authors.

On October 31, 2022, U.S. District Court Judge Florence Y. Pan ruled in the DOJ's favor, finding that the DOJ had demonstrated that the effect of the proposed merger may be substantially to lessen competition in the market for the U.S. publishing rights to anticipated top-selling books.[121] While the DOJ complaint included two markets, the trial evidence and testimony focused on books with an advance of $250,000 or more, which showed highest levels of concentration. The Judge rejected the argument that competition existed among the imprints that each of the Big Five publishers own. Judge Pan accepted the narrower market definition, but suggested that, even under alternative definitions, the DOJ has met its burden. Judge

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[115] *Id*. at ¶ 52.

[116] *Id*. at ¶ 53.

[117] Answer ¶ 11, *United States v. Bertelsmann SE & Co. KGaA*, C.A. No. 1:21-cv-02886 (D.D.C. Dec. 13, 2021).

[118] *See* Elizabeth A. Harris & Alexandra Alter, *Penguin Random House Defends Effort to Buy Simon & Schuster*, N.Y. TIMES (Dec. 13, 2021), https://www.nytimes.com/2021/12/13/books/penguin-random-house-simon-schuster.html.

[119] Answer ¶¶ 4, 6, *supra* note 117.

[120] Defendants' Pre-Trial Brief 3, *United States v. Bertelsmann SE & Co. KGaA*, C.A. No. 1:21-cv-02886 (D.D.C. July 15, 2022).

[121] Order, *United States v. Bertelsmann SE & Co. KGaA*, C.A. No. 1:21-cv-02886 (D.D.C. Oct. 31, 2022).

Pan indicated that "[d]efining a relevant market is not an end unto itself; 'rather, it is an analytical tool to ascertain the locus of competition'. … [T]he $250,000 cutoff is merely useful; it is not intended to be a rigid bright line, but rather it is helpful '[f]or analytical purposes' to facilitate the assessment of anti-competition effects."[122] The Court found that in competing for the most attractive new books, the Big Five have significant advantages over smaller publishers, including having the capital to take chances and place bigger bets on the book's success; that is, they can offer higher advances for more books. In addition, the Big Five reportedly also offer significant advantages in ensuring a book's presence in the media and visibility to its target audience, and are able to get stores to place their books in prominent displays, as well as to have them better positioned in Amazon's search results. Successful authors who first publish with smaller publishers often prefer to publish their next book with a Big Five publisher.

In its opinion, the Court indicated that the DOJ "[did] not rely solely on the high degree of market concentration that would result from the merger and the attendant presumption of anti-competitive harm; instead, the government also 'bolster[s] its *prima facie* case by offering additional evidence.' "[123] The government presents evidence that: (1) the merger will cause anticompetitive effects from the elimination of competition between Penguin and Simon, and

(2) the higher concentration will increase the risk of coordinated conduct by the larger publishers. The DOJ also presented evidence of the fierce competition between the transaction parties to publish anticipated top-selling books, and that eliminating direct competition between them is likely to harm authors.

At trial, defendants argued that the DOJ economist's second score auction model is flawed because: (1) "it inaccurately assures that all book transactions involve auctions" (when only a small percentage do); and (2) the model "used the wrong input for variable-profit margins."[124] The court stated that although the defendants were "correct that the model does not precisely reflect how book contracts are allocated among publishers, its exclusive reliance on auctions is a reasonable simplification."[125] In addition, the DOJ economist also ran a series of models based on the "gross upward pricing pressure index."

As for the likelihood of coordination, the Court found that "the *Apple* case provides the backdrop for trends in the industry that appear to demonstrate that the Big Five are already engaging in tacit collusion or parallel accommodating conduct when acquiring books." The Court cited to various ways in which contract terms had also been standardized, as further evidence suggesting coordination. In addition, the court was unconvinced that bidding outcomes are decided by any factors other than the highest bidder, except in a small number of cases.

The Court dismissed the "medley of other agreements" raised by the defendants: (1) the power of literary agents to constrain anticompetitive behavior by publishers; (2) the efficiencies that will offset anticompetitive effects; (3) the lack of negative effects from the last major merger in the industry; and (4) the parties' interest in finding the best home for Simon. The court rejects all four arguments in turn.

The Court concluded by finding that the DOJ has presented a compelling case that predicts substantial harm to competition as a result of the proposed merger. The defendants have failed to show that the relevant market is not well defined; have failed to establish that the market share data do not accurately reflect market conditions and have failed to rebut the DOJ's case. Thus, while this case involves a concern on upstream market effects, the DOJ's approach followed that typically taken in more traditional cases, and the court endorses the DOJ's approach.

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[122] *United States v. Bertelsmann SE & Co. KGaA, C.A. No. 1:21-cv-02886, 2022 U.S. Dist. LEXIS 202847, at *35–*36, *43 (D.D.C. Nov. 15, 2022)*.

[123] *Id.* at *68.

[124] *Bertelsmann SE & Co. KGaA, 2022 U.S. Dist. LEXIS 202847, at *78*.

[125] *Id.*

On November 21, 2022, Paramount announced that it had terminated its agreement for Penguin to purchase Simon. Penguin paid a $200 million termination fee.[126]

c. DOJ Loses Suit to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar and Appeals

On November 23, 2021, the DOJ brought a civil action in federal district court in Delaware to enjoin United States Sugar Corporation ("U.S. Sugar") from acquiring Imperial Sugar Company ("Imperial").[127] U.S. Sugar operates a large sugar refinery in Florida and sells all of its refined sugar through United Sugars Corporation ("United Sugars"), a marketing cooperative owned by U.S. Sugar and three other refined sugar producers. Combined, United Sugars's member-owners operate nine sugar refineries located in Florida, Minnesota, North Dakota, Montana, and Wyoming. Although U.S. Sugar is acquiring Imperial, United Sugars has entered into an agreement with U.S. Sugar and the other member-owners pursuant to which United Sugars would market and sell all of the refined sugar produced by Imperial post-acquisition. Imperial operates a sugar refinery in Savannah, Georgia, and sells its refined sugar directly to customers. Imperial also has an intermediate sugar transfer and liquification facility in Ludlow, Kentucky.

American Sugar Refining, also known by its Domino brand name, is the other producer supplying a significant portion of refined sugar in the southeastern United States. The DOJ complaint posits that the merger will reduce the number of suppliers of refined sugar in the southeast from three to two suppliers because Imperial's production would be combined into the United Sugars' cooperative. This would apparently leave "wholesale customers in this region at the mercy of a cozy duopoly"[128] (that combined comprise 75% of sugar sales in the southeastern United States) because transportation costs make up a significant portion of the total price that customers pay for refined sugar, and, therefore, the nearest sugar producers tend to be customers' best competitive options. In fact, the DOJ alleges that the transaction will "further strain beleaguered supply chains by forcing customers to turn to more distant or foreign suppliers for alternatives."[129] The complaint alleges as relevant markets the production and sale of refined sugar sold to wholesale customers located in: (1) the southeastern United States, and (2) Georgia (where Imperial's refinery resides) and its bordering states. In calculating concentration levels, the DOJ has aggregated all of the refined sugar that United Sugar sells in the relevant geographic area. Although the DOJ characterizes the market as being already concentrated, the HHIs for the market for the production and sale of refined sugar to customers located in the southeast is only going from 2,000 to 2,800. However, in the market for production and sale of refined sugar to customers located in Georgia and its bordering states, the proposed acquisition increases HHIs from over 2,000 to over 3,100. In addition, some customers have specific needs or preferences for granulated refined sugar instead of liquid sugar; some customers have specific needs or preferences for bulk shipments and bagged sugar; and some customers have specific needs or preferences for cane sugar over beet sugar. All of these factors make Imperial and United Sugars particularly close competitors for many customers and, after the proposed transaction, United Sugar would likely be able to charge these customers more.

The complaint alleged that, given the market structure, there is an enhanced likelihood post-merger that United Sugars (*i.e.*, not the purchaser of the assets, but the cooperative that competes with Imperial) and Domino would coordinate with each other and refrain from competing aggressively. The transaction would more closely align the incentives of United Sugars and Domino. According to the complaint, today, Domino is a very large vertically integrated firm that imports some raw sugar, whereas United Sugars is somewhat

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[126] Form 8-K, Paramount Global (Nov. 21, 2022), *https://ir.paramount.com/node/68191/html*.

[127] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar* (Nov. 23, 2021), *https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar*.

[128] Complaint 1, *U.S. v. United States Sugar Corp.*, C.A. 1:21-cv-01644 (D. Del. Nov. 23, 2021), *https://www.justice.gov/atr/case-document/file/1451211/download*.

[129] *Id.* at ¶ 5.

smaller and imports nothing, and Imperial is the smallest of the three and has no domestic sugar-growing business to defend against imports. After the acquisition, Imperial would be eliminated as an independent force, and United Sugars and Domino would both be very large firms with similar market shares and a similar level of vertical integration. Both would, therefore, benefit from a competitive détente. Moreover, the refined sugar market is vulnerable to such coordinated interaction because: (1) refined sugar is a relatively homogenous product and there are high barriers to entry; (2) refined sugar prices are relatively transparent and sugar producers regularly monitor their competitors' prices; (3) this transparency is sufficient for firms to discern whether their rivals are undercutting them on price and enables competitors to signal to each other; (4) producers can readily identify which competitors are serving particular customers; and (5) producers other than United Sugars and Domino would benefit from the increased prices and therefore would not have the incentive to frustrate increased coordinated interaction between United Sugars and Domino, nor do distributors have the ability to constrain prices charged by United Sugars and Domino.

The complaint also alleged that United Sugars and Imperial today compete head-to-head to supply refined sugar to customers across the southeast.[130] This competition has purportedly led to lower prices, better service reliability, and better product quality for wholesale customers in this region.

Finally, the DOJ rejected the existence of any countervailing factors. Entry and expansion by producers of refined sugar are unlikely to prevent or remedy the transaction's likely anticompetitive effects in the relevant markets. Neither would the USDA's sugar program safeguard against substantial harm be threatened by this deal; it is vigorous competition among sugar refiners—not federal regulation—that sets the prices and terms of sale for refined sugar and that ensures higher prices, high-quality products, and reliable service. There are no merger-specific efficiencies that outweigh the harm threatened by this deal.

The transaction parties argued that the combination will actually create production logistics, and supply chain synergies, and efficiencies that will benefit U.S. consumers. Among other things, Imperial sources its raw sugar primarily from Central and South America and the Caribbean, while the sugar refined by the United Sugars cooperative is domestic. This means that Imperial could help supplement the supply if domestic crops are limited by severe weather or other potential disruptions. In addition, absent the acquisition, Imperial would be shutting down its operations.

In their pre-trial papers and at trial, the parties took issue with the DOJ's geographic market, arguing that "sugar flows readily and cost-effectively throughout the United States," and with the DOJ's characterization of Imperial as a critical competitor: Imperial "is a high-priced sugar supplier that … must purchase all the raw sugar it refines" and primarily relies on higher-cost, imported raw sugar. The parties further challenged the DOJ's use of Section 7 of the Clayton Act when the "alleged harms DOJ claims will occur result from a separate distribution agreement between U.S. Sugars and United," not from the merger agreement between U.S. Sugars and Imperial, and that any such claims against United Sugars were barred by virtue of the Capper-Volstead Act, which exempts from the antitrust laws cooperative associations of agricultural products for the purposes of marketing farm products. To the extent the transaction had the potential to harm competition, the parties argued that the U.S. Department of Agriculture has been tasked "with ensuring that there is an adequate supply of sugar available in the United States at reasonable prices," and "is uniquely able to prevent" the alleged competitive harm that would ensue if the acquisition were not enjoined.

Judge Maryellen Noreika held a four-day bench trial in the case starting April 18, 2022. On September 23, 2022, Judge Noreika determined that the transaction will not violate Section 7 of the Clayton Act. The Court rejected the DOJ's allegations that the merger would reduce competition for the supply of refined sugar in the southeast U.S. and result in higher prices and less reliable service. The Court concluded that the analysis should also consider the role of distributors in the market and sugar that can be sourced from other geographic areas in response to a price increase. The Judge also found persuasive the role that the USDA Federal Sugar Program has in safeguarding against the potential anticompetitive effects of the transaction.

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[130] *See, e.g.*, *id.* at ¶ 5.

On September 26, 2022, the DOJ sought an emergency injunction pending appeal from the district court and filed an appeal of the decision in the U.S. Court of Appeals for the Third Circuit.[131] On September 28, 2022, District Court Judge Noreika denied the injunction, stating:

> Here, the Government has not established a strong showing that it is likely to succeed on the merits. The Court held a trial, listened to witnesses and evaluated the evidence. As set forth in the Court's Memorandum Opinion of September 23, 2022 (D.I. 242), the Government failed in its burden to prove a prima facie case of a Clayton Act § 7 violation. The credentials and experience of the Government's only expert were lacking. (D.I. 242 at 24–25.) And the Government, relying on that expert, failed to identify a relevant product market and its proffered geographic market was unduly narrow. … The Government also ignored the economic realities of the sugar market, including the availability of its own regulatory tools to constrain any potential anticompetitive impacts of the Proposed Transaction. The Government has also failed to establish irreparable harm in the absence of the requested injunction. … Finally, as to the other factors, on balance those support denial of the Government's motion. Although it is unclear that Defendants will be harmed by a short delay, the public interest lies in allowing the Proposed Transaction to go forward. The Court heard testimony from Dr. Barbara Fecso, a Ph.D. economist who has worked at USDA for almost 30 years and with the Federal Sugar Program for almost 20 years. There is no one at USDA with a longer tenure working on the Federal Sugar Program or in making recommendations to the undersecretaries for that program. Dr. Fecso testified credibly that she anticipates that the Proposed Transaction is not likely to lead to higher prices but, in fact, may lower prices for U.S. purchasers and consumers of refined sugar by creating certain efficiencies and cost savings.[132]

On September 29, 2022, the DOJ filed an emergency motion seeking an injunction pending appeal with the Third Circuit,[133] which was denied the next day, September 30, 2022.[134] On November 28, 2022, the parties closed the transaction, while the Third Circuit continued to hear the appeal on the merits. The Third Circuit panel provided the following expedited briefing schedule: Appellant's brief and appendix must be filed and served no later than October 31, 2022; Appellees' brief must be filed and served no later than November 21, 2022; and Appellant's reply brief, if any, must be filed and served no later than December 5, 2022.[135]

d. DOJ Loses Suit to Block UnitedHealth/Change Deal and Appeals

On February 24, 2022, the DOJ and the States of Minnesota and New York brought a preliminary injunction action in the U.S. District Court for the District of Columbia to block UnitedHealth Group Inc.'s ("UHG") proposed $13 billion acquisition of Change Healthcare Inc. ("Change").[136] The complaint alleges that the proposed transaction would harm competition in commercial health insurance markets and the market for health care claims technology used by health insurers to process health insurance claims and reduce health care costs.

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[131] Notice of Appeal, *U.S. v. United States Sugar Corp.*, C.A. 1:21-cv-01644 (D. Del. Sept. 26, 2022), *https://content.mlex.com/Attachments/2022-09-27_M425KFMR3J18JUBI%2FNotice%20of%20Appeal.pdf*.

[132] Mem. Order, *U.S. v. United States Sugar Corp.*, C.A. 1:21-cv-01644 (D. Del. Sept. 28, 2022), *https://www.ded.uscourts.gov/sites/ded/files/opinions/21-1644_2.pdf*.

[133] Emergency Motion of the United States for an Injunction Pending Appeal and an Administrative Injunction Pending Adjudication of this Motion, *U.S. v. United States Sugar Corp.*, C.A. 22-2806 (3d Cir. Sept. 29, 2022).

[134] Order, *U.S. v. United States Sugar Corp.*, C.A. 22-2806 (3d Cir. Sept. 30, 2022), *https://content.mlex.com/Attachments/2022-10-03_BYT197BGXXR48J58%2F22-2806%20Document%2027.pdf*.

[135] *Id.*

[136] Press Release, Dep't of Justice, *Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare* (Feb. 24, 2022), *https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare*.

According to the complaint, the transaction would allow UHG to control a critical data highway through which about half of all Americans' health insurance claims pass each year. UHG purportedly would have access to and potentially use its health insurance rivals' competitively sensitive information for its own business purposes and control these competitors' access to innovations in vital health care technology. The complaint further asserts that the proposed transaction would eliminate the independence of Change's ClaimsXten product, which is essentially UHG's only major rival for first-pass claims-editing technology—a critical product used to efficiently process health insurance claims and save health insurers billions of dollars each year—thereby giving UHG more than an 80% "monopoly" share in that market.

Furthermore, the complaint asserts that the proposed acquisition would eliminate an independent and innovative firm, Change, that today provides a variety of participants in the health care ecosystem, including UHG's major health insurance competitors, with vital software and services. This includes electronic data interchange ("EDI") clearinghouse services, which transmit claims and payment information between insurers and providers, and first-pass claims-editing solutions, which review claims under the health insurer's policies and relevant treatment protocols. Change apparently markets itself as a valuable partner for insurers, working closely with them to innovate and problem-solve. UHG's acquisition of this neutral player would allegedly allow UHG to tilt the playing field in its favor, harming current competition and permitting UHG to control and distort the course of innovation in this industry for the foreseeable future.

UHG defended the acquisition by pointing out that Change, when combined with UHG's subsidiary Optum, will increase efficiency and reduce friction in health care, producing a better experience and lower costs. It further alleged that the DOJ's "deeply flawed position is based on highly speculative theories that do not reflect the realities of the health care system."[137] The "government's case rests entirely on speculation and theories unsupported by any past conduct" and "Optum's business model and financial success is dependent on providing products and services to external customers, not just UnitedHealthcare ["UHC"]. … Put simply, any misuse of customer information would be economic suicide for Optum because its sophisticated external customer base would simply cease using Optum's services and turn to any number of Optum competitors."[138] After all, UHC only comprises about 20% of the commercial health insurance market that Optum could market to; it would give up 80% of the marketplace if it abused its data access to other commercial health insurance payors.

On March 17, 2022, Judge Carl Nichols assigned to the case an 11-day trial to begin on August 1, 2022, with closing arguments being held after Labor Day. Optum and Change responded to the court date by extending their merger agreement to December 31, 2022.[139] As part of the extension, Optum would pay a $650 million fee to Change if the merger is unable to be completed because of the Court's decision and Change will pay a special cash dividend of $2.00 per share to its shareholders at or about the time of the closing. UHG also announced on April 22, 2022 that it had entered into a purchase agreement to sell Change's ClaimsXten business to TPG Capital ("TPG") for $2.2 billion, contingent on the closing of the main transaction. UHG argues that the ClaimsXten sale eliminates all of DOJ's horizontal merger concerns, and, as discussed above, the vertical misuse theory is flawed and without factual support. The DOJ asserts that UHG's divestiture is insufficient because Change's business is part of integrated offerings and a suite of payment accuracy products and services that UHG is not divesting. As a result, according to the DOJ, the divested business would be weaker and less competitive than it is today. Additionally, the DOJ alleges that TPG is unfamiliar with running this type of business and would have neither the same competitive capabilities nor the incentive to invest in pursuing innovations that Change is already developing.

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[137] Press Release, Optum, Inc., *Optum Statement in Opposition to DOJ Lawsuit Blocking Change Healthcare Merger* (Feb. 24, 2022), *https://www.optum.com/about-us/news/page.hub.optum-and-change-healthcare-fact-sheet.html*.

[138] Optum, Inc., *Benefits of Combination with Change Healthcare* (Mar. 15, 2022), *https://www.unitedhealthgroup.com/content/dam/UHG/PDF/2022/overview-optum-response.pdf*.

[139] Press Release, UnitedHealth Group, *Change Healthcare and Optum Extend Merger Agreement* (Apr. 5, 2022), *https://www.unitedhealthgroup.com/newsroom/2022/2022-04-05-change-healthcare-optum-extend-merger.html*.

On September 21, 2022, Judge Nichols issued a thorough opinion that squarely rejected each of the claims of competitive harm.[140] With respect to the horizontal claim, the Court rejected the government's view that the divestiture must be ignored at the *prima facie* stage, the result of which would have the government meeting its burden "with market-share statistics that have no connection to the post-acquisition world. Then, in the government's view, a defendant must prove that there is no lessening of competition."[141] But, according to the Court, even if the deal were assessed on the government's terms, the result would be the same: "[T]he evidence demonstrates that the divestiture will restore the competitive intensity lost because of the acquisition."[142] The Court also rejected the DOJ's arguments that the divestiture buyer, TPG, would not be incentivized or capable of maintaining the unit or assertions that the ClaimsXten cannot function on its own. Instead, the Court noted TPG's plans to "invest substantially in the ClaimsXten business,"[143] and, despite government assertions that it is marketed as part of a broader package, ClaimsXten was sold as a standalone product for most of its history and continues to be sold almost entirely "on a standalone basis."[144] In sum, the Court concluded that the DOJ failed to show that the proposed merger is likely to substantially lessen competition in the relevant market because the trial evidence shows that competition for claims editing—accounting for the divestiture—will match, and perhaps even exceed, current levels.

The Court indicated that the DOJ's vertical theory of harm can be distilled to four steps, each of which must be established as likely: (1) that Optum will gain incremental access and use rights to the claims data of UHC's rivals; (2) that Optum will have an incentive to share the data—or the competitively sensitive insights derived from that data—with UHC; (3) that rival payers' fear of UHC using the data or insights will chill innovation; and (4) that less innovation means less competition in the relevant markets. The Court found that "the central problem with this vertical claim is that it rests on speculation rather than real-world evidence that the events are likely to unfold as the Government predicts."[145]

First, the Court rejected the DOJ's data misuse concerns by noting that the "evidence adduced at trial established that, for it to be likely that the proposed acquisition would substantially lessen competition, [UHC] would have to uproot its entire business strategy and corporate culture; intentionally violate or repeal longstanding firewall policies; flout existing contractual commitments; and sacrifice significant financial and reputational interests." The Court found that "the government has failed to show that [UHC]'s post-merger incentives will lead it to take such extreme actions."[146] The Court also credited firewalls and customer contracts, with commitments for data safeguards, as being adequate to prevent abuse: "The government offered no conflicting testimony at trial—indeed, the government did not call a single rival payer witness to testify against [UHC]'s firewalls or other aspect of its data protection measures."[147]

Second, the Court similarly dismissed the concern that UHC will have the ability and incentive to withhold or delay future Change innovations, noting that (1) the products that UHG allegedly would be incented to withhold are merely conceptual, not actual products, and (2) withholding such innovations would be inconsistent with UHG's past practices.[148] As with data misuse, the Court noted that "[t]he government did

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[140] *United States v. UnitedHealth Group Inc., C.A. No. 1:22-cv-0481, 2022 U.S. Dist. LEXIS 170934 (D.D.C. Sept. 21, 2022)*.

[141] *Id.* at *30–*31.

[142] *Id.* at *32.

[143] *Id.* at *37.

[144] *Id.* at *41.

[145] *UnitedHealth Group Inc., C.A. No. 1:22-cv-0481, 2022 U.S. Dist. LEXIS 170934, at *51*.

[146] *Id.*

[147] *Id.* at *70–*71.

[148] *Id.* at *84.

not call a single rival payer to offer corporate testimony that it would innovate less or compete less aggressively if the proposed merger goes through. Nor did any of the rival payer employees who did testify support the government's theory. To the contrary, all the payer witnesses rejected the notion that the proposed merger would harm innovation." Moreover, the DOJ "rests on the axiomatic truth" that payers who are innovating less are also competing less, but made no attempts to show that the lessening of innovation and competition would be substantial.

As part of its decision, the Court ordered that the divestiture occur at the time of closing, which obviates the need for HSR clearance for the divestiture sale. The transaction closed on October 3, 2022.[149] On November 18, 2022, the DOJ filed with the U.S. Court of Appeals for the District of Columbia an appeal of the district court's decision, seeking UHC's divestiture of Change.[150]

e. Parties Abandon Verzatec/Crane Deal After DOJ Sues

On March 17, 2022, the DOJ filed a lawsuit in U.S. District Court for the Northern District of Illinois to block the proposed $360 million proposed acquisition of Crane Composites ("Crane") by Grupo Verzatec S.A. de C.V. ("Verzatec").[151] Crane and Verzatec are allegedly "fierce" competitors in the production and supply of pebbled fiberglass reinforced plastic ("FRP") wall panels, a product used as a wall covering for restaurants, grocery stores, hospitals, and convenience stores. The DOJ asserts that the combination would create a monopoly and that Verzatec wanted to acquire Crane to gain "pricing and market control" and "achieve FRP dominance," in violation of Section 2 of the Sherman Act and Section 7 of the Clayton Act.

The Court scheduled the trial for October 4, 2022. On March 26, 2022, Verzatec announced that it had abandoned the transaction.

f. DOJ Loses Suit to Block Booz Allen's Acquisition of EverWatch Corp.

On June 29, 2022, the DOJ filed a civil action in the U.S. District Court in Maryland to block Booz Allen Hamilton Holding Corp.'s ("Booz Allen") proposed acquisition of EverWatch Corp., a government solutions company focused on defense and intelligence work.[152] According to the complaint, the transaction would ensure that there would result in only one potential provider for the provision of operational modeling and simulation services to support the National Security Agency's ("NSA") signals intelligence data missions (a project called "Optimal Decision"). For more than 20 years, Booz Allen had been the only provider of these support services, but in 2019, EverWatch apparently hired key workers from Booz Allen and intended to challenge Booz Allen's obtainment of the contract renewal. The NSA was preparing to issue a new request for proposals to begin formally the selection process for Optimal Decision services when the merger was announced. According to the DOJ, Booz Allen and EverWatch would have competed head-to-head to win the contract for tshese services, but, under the merger agreement, Booz Allen has "veto" power over any new EverWatch government contract valued at more than $500,000. Therefore, the DOJ asserts, the merger agreement itself violates Section 1 of the Sherman Act because it immediately reduced the ability of EverWatch to compete and each company's incentive to bid aggressively for the Optimal Decision contract. The DOJ also rebuffed possible resolutions proffered by the parties to "swap out" EverWatch as a proposed

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[149] Press Release, UnitedHealth Group, *Optum and Change Healthcare Complete Combination* (Oct. 3, 2022), https://www.unitedhealthgroup.com/newsroom/2022/2022-10-3-optum-change-healthcare-combination.html.

[150] Notice of Appeal, *United States v. UnitedHealth Group Inc.*, C.A. No. 1:22-cv-0481 (D.D.C. Nov. 18, 2022).

[151] Press Release, Dep't of Justice, *Justice Department Sues to Block Verzatec's Proposed Acquisition of Crane* (Mar. 17, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-verzatec-s-proposed-acquisition-crane.

[152] Press Release, Dep't of Justice, *Justice Department Sues to Block Booz Allen Hamilton's Proposed Acquisition of EverWatch* (June 29, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-booz-allen-hamilton-s-proposed-acquisition-everwatch.

prime contractor on the basis that the replacement prime contractor would be reliant on EverWatch to continue the work that EverWatch had been doing as the team leader.

Booz Allen indicated that it strongly disagreed with the DOJ's characterization of the transaction; to the contrary, it believed that the transaction would enhance competition overall in an industry that is highly competitive.[153] The companies argue that they have no incentive and no ability to underperform or overbill on the NSA contract. The contract for these services is on a "cost" basis, with the NSA having the discretion over any incentive payments. The acquisition will permit the combined company to serve better the NSA Capabilities Directorate and other government customers and to increase its competitiveness with large systems integrators such as Lockheed Martin and Raytheon Technologies Corp. EverWatch provides the company with complementary capabilities. The defendants point to more than 14 companies who indicated initial interest in competing to be named prime contractor at an early stage of the NSA's planning.

On July 8, 2022, the DOJ filed a motion for an emergency PI to abrogate Booz Allen's merger agreement and to prevent the parties from proceeding with the merger. Due to the timing of the proposed merger and the imminent NSA timeline for accepting bids, the DOJ argued that the PI is necessary to ensure the companies to submit independent bids for the Optimal Decision. In this regard, the DOJ focused on an interim operating covenant of the merger agreement. On August 12, 2022, the DOJ filed a motion to have the Court suspend the merger agreement while the suit is ongoing, purportedly in order to reinstate the ability and incentives to compete on the project.

On August 30, 2022, defendants proposed a remedy in which they would close but promise to continue competing for the NSA contract by creating firewalls, incentives and other behavioral modifications. The DOJ argued that the defendants' proposal was insufficient to address the government's concern that the deal's certainty will eliminate the incentive to compete. On September 14, 2022, the DOJ proposed as a remedy to resolve the litigation that: (1) the transaction not be permitted to close until 90 days after the bids are due to the NSA, (2) EverWatch be permitted to renegotiate the terms of its agreement with Booz Allen, and (3) both parties be authorized to terminate the agreement. The DOJ argued that its proposed order protects competition by creating uncertainty that the merger will close as initially planned and incentivizes the parties to compete vigorously for the Optimal Decision project. The parties rejected the DOJ's proposal, and the preliminary injunction hearing took place on September 15 and 16, 2022.

On October 11, 2022, Judge Catherine C. Blake denied the DOJ's motion for a PI.[154] In her opinion released on October 17, 2022, Judge Blake found no direct evidence that suggested that the proposed transaction would have a detrimental effect on competition for the NSA contract or otherwise.[155] Instead, the Judge characterizes the "uncontextualized statements" of lower-level workers as being banter immediately following news of the deal rather than evidence that the companies would dampen competition. The Judge found that Booz Allen would have strong incentives to maintain a competitive bid, noting that the Department of Defense contract constitutes a small part of the NSA's contracting work, with billions of dollars at stake in the industry; and the merger could allow the company to compete more effectively with other companies such as Raytheon Technologies Corp. and Lockheed Martin Corp. Booz Allen needs a sterling reputation to have a shot at these other opportunities. The individual employees at both companies are incentivized to win the contract because the winning team at either company will get a bonus if the NSA picks their respective bid.

The Court found that although it is not suggesting that a single contract can *never* be a relevant market if "a single purchaser represented the entire market for a commodity, … the 'commodity' here—modelling and innovation services—has a much broader market than the [DOJ] suggests. A single purchaser cannot, as

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[153] Press Release, Booz Allen Hamilton, *Booz Allen Response to Antitrust Suit* (June 30, 2022), https://www.boozallen.com/menu/media-center/q1-2023/response-to-antitrust-suit.html.

[154] Order, *United States v. Booz Allen Hamilton Inc.*, C.A. No. CCB-22-1603 (D. Md. Oct. 11, 2022).

[155] *United States v. Booz Allen Hamilton Inc., C.A. No. CCB-22-1603, 2022 U.S. Dist. LEXIS 190006 (D. Md. Oct. 17, 2022)*.

the [DOJ] argues here, claim their particular use or application of a commodity is a market separate from the commodity itself."[156]

Although the decision permitted the deal to close on October 14, 2022, the Court allowed the DOJ to pursue a full trial in a Clayton Act claim if the DOJ so chooses. In December 2022, the DOJ decided not to pursue the challenge further.

g. DOJ Sues to Block ASSA ABLOY's Acquisition of Spectrum Brands' Hardware and Home Improvement Division

On September 15, 2022, the DOJ filed a PI action in U.S. District Court for the District of Columbia to block ASSA ABLOY AB's ("ASSA") proposed acquisition of the hardware and home improvement division of Spectrum Brands Holdings, Inc. ("Spectrum"). The complaint alleges harm in two separate and distinct product markets: (1) premium residential hardware; and

(2) smart locks.

ASSA sells its residential door hardware products in the United States under the August, EMTEK, and Yale brands. Spectrum sells these same products under the Baldwin and Kwikset brands. The DOJ alleges that ASSA and Spectrum are two of the three largest producers of residential door hardware, with important head-to-head competition between the two companies. Combined, ASSA (the third-largest producer) and Spectrum (the largest producer) would purportedly control approximately 50% of overall residential door hardware. Moreover, according to the DOJ, the transaction would give ASSA a near monopoly (with a 65% share in 2021, purportedly 10 times larger than its next-largest competitor) in premium mechanical door hardware, and more than a 50% share in smart locks, with only one significant competitor. The complaint indicates that "premium mechanical door hardware" is "made of high-quality, durable metals (primarily forged brass and cast bronze), and is highly customizable, design-driven, and constructed with superior craftsmanship."[157] The complaint asserts that the loss of competition will result in higher prices, reduced quality and less innovation.

A smart lock is a digital door lock that can be remotely operated and monitored through a wireless connection to another electronic device, such as a smart phone or a smart speaker. Yale and Kwikset are the two leading brands in this developing market.

According to the DOJ, the transaction parties had offered to divest "selected portions" of ASSA's "globally integrated business," which the DOJ describes in the complaint as being inadequate to address the competitive harms of the merger.[158] On December 1, 2022, ASSA announced that it had sold these businesses to Fortune Brands, subject to the Court approving the acquisition of the underlying transaction. The case is scheduled to go to trial on April 17, 2023.

2. DOJ Consents

Breaking from a couple of decades of precedent, the DOJ entered into no consent decrees in 2022 to resolve concerns that it had about proposed transactions.

3. Abandoned Transactions

[156] *Id. at *33*.

[157] Complaint ¶ 33, *United States v. ASSA ABLOY AB*, C.A. No. 1:22-cv-02791 (D.D.C. Sept. 15, 2022).

[158] *Id.* at 3.

On March 29, 2022, the DOJ announced that Cargotec Corporation ("Cargotec") had abandoned its merger with Konecranes PLC ("Konecranes") after the DOJ rejected the settlement proposal offered by the parties.[159] Cargotec and Konecranes compete in the sale of four types of shipping container handling equipment used by port customers to move goods. The four types of equipment are straddle carriers, rubber-tired gantry cranes, automated stacking cranes, and rail-mounted gantry cranes. Each piece of equipment apparently has a unique design that allows the equipment to move containers between different modes of transportation in the supply chain. According to the DOJ, the proposed settlement would have had the company "extracting and retaining the strongest parts of both businesses and selling off the least desirable assets to placate the department. … The department will not accept patchwork settlements that do not replace the competition that is lost by a merger." The DOJ acknowledged collaborating with the Australian Competition and Consumer Commission, the EC, and the UK's Competition and Markets Authority.

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[159] Press Release, *Dep't of Justice, Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue* (Mar. 29, 2022), *https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department*.

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V. Congress Enacts Significant Funding Increases and Other Changes to Antitrust Merger Review

On December 29, 2022, President Biden signed into law the Consolidated Appropriations Act of 2023 which included the non-funding antitrust legislation, the Merger Filing Fee Modernization Act of 2022 ("MFFMA") and the State Antitrust Enforcement Venue Act ("State Venue Act").[160] The MFFMA—first introduced in 2021—increases premerger filing fees for most transactions valued at $500 million or more, and also includes a new requirement that companies disclose information regarding subsidies they receive from a "foreign entity of concern." The State Venue Act provides state AGs greater choice over the venues in which they pursue antitrust enforcement litigation. The Appropriations Act also allocates significant additional funding to the FTC and Antitrust Division for the 2023 fiscal year.

While the new legislation does not change the HSR Act's reportability thresholds, it does—for the first time in more than two decades—change the HSR filing fees for reportable mergers. The FTC is expected to implement the revised filing fees later in 2023, and filings submitted on or after the effective date will be subject to the new filing fees. Going forward, the FTC will annually adjust both the filing fees and the size-of-transaction fee thresholds based upon the Consumer Price Index and changes in the Gross National Product, respectively. The FTC and the DOJ will also report annually through 2027 the total revenue generated from each fee tier.

The new law also requires merging parties to disclose in their HSR Notification and Report Forms any subsidies received from a "foreign entity of concern" as defined in *42 U.S.C. § 18741(a)(5)*. Such foreign entities include, among other things, countries determined by the Secretary of Energy, in consultation with the Secretary of Defense and the Director of National Intelligence, "to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States." China, Russia, Iran, and North Korea are among the countries currently identified as "foreign entities of concern." Pursuant to the new law, the FTC and the DOJ, in consultation with other government agencies, will promulgate rules that specify the information that affected parties must include in their HSR forms and when such changes will take effect. Once effective, filing parties should expect increased scrutiny of any disclosed foreign subsidies, even if such subsidies are unrelated to the transaction being notified.

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[160] Pub. L. No. 117-328, 117th Cong., H.R. 2617 (2022) (enacted), text available at *https://www.congress.gov/bill/117th-congress/house-bill/2617*. These provisions were introduced as separate legislation: *see also* Merger Filing Fee Modernization Act. H.R. 3843, 117th Cong. (2021). text available at *https://www.congress.gov/bill/117th-congress/house-bill/3843*: State Antitrust Enforcement Venue Act, H.R. 3460, 117th Cong. (2021), text available at *https://www.congress.gov/bill/117th-congress/house-bill/3460*.

The State Venue Act provides states the same choice of venue currently enjoyed by the United States when bringing enforcement actions under federal antitrust laws. State AGs may now bring federal antitrust enforcement actions in venues of their choice, without risk that the individual state action could be consolidated into a different jurisdiction under the rules for multidistrict litigation. The change increases the likelihood that parties could face simultaneous antitrust enforcement actions in multiple federal jurisdictions.

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VI. Conclusion

Antitrust policy and enforcement are currently in the political limelight. Even absent passage of legislation to materially alter the merger review standards and HSR rule changes, the DOJ and the FTC are likely to be very active in investigating and undertaking enforcement actions in mergers. Particularly hot areas will continue to be nascent/potential competition, particularly in high technology/pharma areas, vertical transactions, and digital/data sectors. Heightened antitrust enforcement conditions exist as well outside the United States in a number of key jurisdictions. Although in a vast majority of transactions—even those involving strategic buyers—the transaction will ultimately close, obtaining all requisite competition approvals could take additional time and require additional effort by the transaction parties. Transaction parties should take into account these trends when negotiating their deal terms and adopting their regulatory strategies.

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