A Glance at the Last Year of the Biden Administration's M&A Antitrust Enforcement and What Might Stick

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Introduction

Vigorous antitrust enforcement continued throughout the Biden Administration, both at the Antitrust Division of the U.S. Department of Justice ("DOJ" or "Antitrust Division") and the Federal Trade Commission ("FTC" or "Commission"). The Biden Administration's enforcement policy reflected the broader political consensus that antitrust laws should promote societal goals beyond market efficiency or consumer welfare, to include labor, privacy, and equities. The tough enforcement rhetoric—including the resistance to entering into remedies agreements to resolve antitrust concerns—was clearly aimed at stopping potential large strategic deals from leaving the corporate boardroom.

On July 3, 2023, President Joe Biden nominated two Republicans—Virginia Solicitor General Andrew Ferguson and Utah Solicitor General Melissa Holyoak—to fill FTC vacancies. Both of these nominations—along with the renomination of Commissioner Rebecca Slaughter—were voted out of committee on October 18, 2023, but were not confirmed by the Senate until March 7, 2024.[1] Although there were some notable divided votes by the Commission along partisan lines since then on policy points, there also has been agreement on specific decisions to challenge transactions, as well as the adoption of a significantly expanded new Hart-Scott-Rodino ("HSR") notification form. On December 10, 2024, President-elect Donald Trump announced the appointment of Commissioner Ferguson to chair the FTC, which became effective after the Inauguration, and that he would be nominating Mark Meador to become an FTC Commissioner, filling Lina Khan's seat.[2] Commissioner Khan departed the FTC on January 31, 2025. Even with Commissioner Khan's departure, until Mr. Meador is confirmed, it may be difficult for the Trump Administration to implement major changes at the FTC. On March 18, 2025, President Trump took the unprecedented step to fire the two Democratic Commissioners: Rebecca Slaughter and Alvaro Bedoya. The legality of this action is likely to be challenged.

On December 17, 2024, Assistant Attorney General ("AAG") Jonathan Kanter resigned as the head of the Antitrust Division and Principal Deputy Assistant Attorney General Doha Mekki became Acting AAG. On December 4, 2024, President-elect Trump announced that he would nominate Gail Slater as the AAG for the Antitrust Division.[3] On January 21, 2025, Omeed Assefi, who was a criminal prosecutor in the Antitrust

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[1] Fed. Trade Comm'n: Press Release, *FTC Chair Welcomes Ferguson and Holyoak as FTC Commissioners, Congratulates Commissioner Slaughter on Confirmation to Another Term* (Mar. 8, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-chair-welcomes-ferguson-holyoak-ftc-commissioners-congratulates-commissioner-slaughter.

[2] Dave Michaels, *Trump Aims to Remake Federal Trade Commission With Two Picks*, WALL ST. J. (Dec. 10, 2024), https://www.wsj.com/politics/policy/trump-aims-to-remake-federal-trade-commission-with-two-picks-b9c51649. Mr. Meador served as an attorney with the FTC's Bureau of Competition for five years (2011 to 2016), at the DOJ for two years, and as counsel to U.S. Senator Mike Lee (R-Utah) from 2020 to 2023.

[3] Jody Godoy, *Trump Picks Gail Slater to Head Justice Department's Antitrust Division*, REUTERS (Dec. 4, 2024), https://www.reuters.com/world/us/trump-picks-gail-slater-lead-justice-departments-antitrust-division-2024-12-04/.

Division, became the acting AAG, pending Ms. Slater's confirmation; Mr. Assefi indicated that the Antitrust Division would not "relax[]" its enforcement stance in the new Administration.[4] In fact, on January 30, 2025, he authorized that a suit be filed to enjoin HPE's acquisition of Juniper Networks. On March 12, 2025, the Senate confirmed Gail Slater as the AAG.

As discussed further below, the DOJ's and the FTC's success rate in the cases brought during the Biden Administration was mixed, with some decisions indicating concern over the perceived disconnect between the theories of harm asserted by the agencies and "market realities." The DOJ continued not to accept *any* consents to addres concerns raised by a transaction outside of litigation, and the FTC did so on only rare occasions. The FTC reported that 43 transactions under its review since June 2, 2021 (when Chair Khan took office) were abandoned, with 30 of these deals being abandoned during the merger investigation. The DOJ similarly indicated that 26 transactions were abandoned by the transaction parties in deals reviewed by the DOJ during AAG Kanter's tenure at the Antitrust Division.

Both agencies were aggressive in their positions regarding the legality of board observance seats and the ability to "deputize" a board representative. The DOJ adopted an initiative to enforce the ban against "interlocking directorates," including investigating the placement of executives on boards of companies by private equity firms.[5] Over the last two years of the Biden Administration, the DOJ expressed concerns that board seats on rival companies in the same sector could influence those companies to act in ways that reduce vigorous competition and opened investigations involving a number of companies. In the last year alone, two directors and a director emeritus of Charter Communications resigned from the Warner Bros. Discovery board of directors, reportedly in response to a DOJ investigation.[6] On December 18, 2024, Tencent also removed two directors from Epic Games' board of directors and relinquished its unilateral right to appoint directors or observers to the Epic board after the DOJ expressed concerns.[7] In total, the DOJ reported that it had prevented or required companies to remove directors in competing companies in "at least two dozen companies."[8] In addition, as discussed below, in the *Exxon/Pioneer* and *Chevron/Hess* mergers,[9] the FTC

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[4] Josh Sisco & Zoe Tillman, *Former Trump DOJ Official Named Interim Antitrust Chief*, BLOOMBERG (Jan. 21, 2025), https://news.bloomberglaw.com/antitrust/former-trump-doj-official-named-interim-antitrust-chief.

[5] 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.

[6] Press Release, Warner Bros. Discovery, *Steven A. Miron and Steven O. Newhouse Stepping Down From Warner Bros. Discovery's Board of Directors* (Apr. 1, 2024), https://ir.wbd.com/news-and-events/financial-news/financial-news-details/2024/STEVEN-A.-MIRON-AND-STEVEN-O.-NEWHOUSE-STEPPING-DOWN-FROM-WARNER-BROS.-DISCOVERYS-BOARD-OF-DIRECTORS-2024-vOx0yuk59a/default.aspx. On April 19, 2024, John Malone resigned as director emeritus of the Charter Communications Board of Directors. Erik Pedersen, *John Malone Stepping Down as Director Emeritus at Charter*, DEADLINE (Apr. 19, 2024), https://deadline.com/2024/04/john-malone-exiting-charter-director-emeritus-1235890639/. The DOJ reports having expressed concerns under Section 8 of the Clayton Act. *See* U.S. Dep't of Justice: Press Release, *Two Warner Bros. Discovery Directors Resign After Justice Department Expresses Antitrust Concerns* (Apr. 1, 2024), https://www.justice.gov/opa/pr/two-warner-bros-discovery-directors-resign-after-justice-department-expresses-antitrust.

[7] Press Release, U.S. Dep't of Justice, *Tencent Removes Two Directors from Epic Games and Relinquishes Its Right to Unilaterally Appoint Directors or Observers in Response to Justice Department Scrutiny* (Dec. 18, 2024), https://www.justice.gov/opa/pr/tencent-removes-two-directors-epic-games-and-relinquishes-its-right-unilaterally-appoint.

[8] *Id.*

[9] Press Release, Fed. Trade Comm'n, *FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal* (May 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal;Press Release, Fed. Trade Comm'n, *FTC Order Bans Hess CEO from Chevron Board in Chevron-Hess Deal* (Sept. 30, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-order-bans-hess-ceo-chevron-board-chevron-hess-deal.

imposed certain board representation prohibitions as a condition to clearance of petroleum mergers in 2024.[10]

The agencies augmented their vigorous merger enforcement efforts with rulemaking, and other actions, consistent with the objectives articulated in President Biden's July 2021 Executive Order on Promoting Competition in the American Economy.[11] Some of the policy changes included President Biden's "whole-of-government" approach to competition policy that facilitated the review of proposed transactions and business conduct by a number of agencies and departments, including the Department of Labor ("DOL")[12] and the Department of Defense. For example, the "whole-of-government" approach was taken in the *Alaska Airlines/Hawaiian Airlines* combination. Although the DOJ cleared the transaction after an extensive investigation without formally imposing any conditions,[13] a few weeks later, the U.S. Department of Transportation cleared the same deal only after both airlines agreed to maintain, among other things, some routes and to preserve the value of loyalty points.[14]

In other actions, the cooperation and coordination between government entities seemed to hit some road bumps. For instance, on August 28, 2024, the DOJ, the DOL, the FTC, and National Labor Relations Board signed a Memorandum of Understanding ("MOU") to further communications and coordination, particularly during the review of mergers that may threaten competition in labor markets; a few weeks later, however, the FTC withdrew from the MOU.[15] On September 17, 2024, the Federal Deposit Insurance

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[10] On January 10, 2025, the DOJ and the FTC jointly filed a Statement of Interest in *Musk v. Altman*, a private suit that, among other things, claimed that defendant OpenAI, Inc. and related entities had violated Clayton Act Section 8 when Reid Hoffman and Deannah Templeton had held positions on OpenAI, Inc.'s Board of Directors. Statement of Interest of the United States and Fed. Trade Comm'n, No. 4:24-cv-04722-YGR (N.D. Cal. Jan. 10, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2323044openaimuskvaltmanamicusbrief.pdf. The Statement takes an expansive view of both Clayton Act Section 8 and Section 5 of the Federal Trade Commission Act, which the government seeks to, by analogy, apply to the California Unfair Competition Law. Both FTC Republican Commissioners concurred in the Statement with respect to Clayton Act Section 8, but not with respect to the FTC Act. Fed. Trade Comm'n, Concurring Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Statement of Interest Supporting Elon Musk, FTC Matter No. 2323044 (Jan. 8, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/musk-statement-of-interest-ferguson-holyoak-concurrence.pdf.

[11] Exec. Order No. 14,036, Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 9, 2021), https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf.

[12] *See* Memorandum of Understanding Between the U.S. Dep't of Labor and the Fed. Trade Comm'n at 1 (Aug. 30, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/23-mou-146_oasp_and_ftc_mou_final_signed.pdf (noting purpose to strengthen the agencies' "partnership through greater cooperation and coordination in information sharing, investigations and enforcement activity, training, education, research, and outreach" given their shared "interest in protecting and promoting competition in labor markets and promoting the welfare of American workers").

[13] Press Release, Alaska Airlines, *Review Period Under HSR Act Expires; Alaska Airlines Awaiting Next Steps with DOT* (Aug. 19, 2024), https://news.alaskaair.com/company/doj-review-period-under-hsr-act-expires-alaska-airlines-awaiting-next-steps-with-dot/. Alaska Airlines disclosed that it had entered into commitments with the State of Hawaii to "maintain the Hawaiian Airlines brands and local jobs, and to continue providing strong service between, and to and from the Islands." *Id.*

[14] Press Release, U.S. Dep't of Justice, *Justice Department and Department of Transportation Launch Broad Public Inquiry into the State of Competition in Air Travel* (Oct. 24, 2024), https://www.justice.gov/opa/pr/justice-department-and-department-transportation-launch-broad-public-inquiry-state; Press Release, U.S. Dep't of Transp., *USDOT Requires Alaska and Hawaiian Airlines to Preserve Rewards Value, Critical Flight Service as Merger Moves Forward* (Sept. 17, 2024), https://www.transportation.gov/briefing-room/usdot-requires-alaska-and-hawaiian-airlines-preserve-rewards-value-critical-flight.

[15] Press Release, Fed. Trade Comm'n, *FTC, DOJ Partner with Labor Agencies to Enhance Antitrust Review of Labor Issues in Merger Investigations* (Aug. 28, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/08/ftc-doj-partner-labor-agencies-enhance-antitrust-review-labor-issues-merger-investigations.

Corporation ("FDIC"), the U.S. Office of the Comptroller of the Currency ("OCC") and the DOJ issued policy changes on bank merger oversight, which included withdrawal of the DOJ/Federal Reserve System 1995 Bank Merger Guidelines. These actions ended over 30 years of cooperation among the bank regulatory agencies and created significant uncertainty regarding how bank mergers will be assessed.

There will likely be significant changes once the Trump Administration's leadership is fully in place, but what these changes will be remain unknown. If the first Trump Administration's conduct is indicative, we should continue to see active antitrust enforcement, particularly based on horizontal and vertical theories of harm, and resistance to behavioral remedies, but a willingness to consider divestitures as a means to resolve antitrust concerns raised by a strategic transaction. In addition, the statements issued with the various leadership announcements have stressed that the technology sector will remain an enforcement focus. Parties must continue to be prepared for antitrust scrutiny from the outset.

Furthermore, it is unclear what actions (particularly those taken in the waning days of the Biden Administration), if any, will be reversed by the new leadership. It appears that, at least for the foreseeable future, both the new HSR form and the 2023 Merger Guidelines will remain in effect.[16] Regardless of what changes may occur under the new Trump Administration, however, care still needs to be exercised in transactions that may raise concerns with competition authorities outside of the United States to ensure that the transaction parties' strategy, approach, and timing are coordinated globally and to remain attuned to developments as a result of recent leadership changes abroad.

I. FTC Merger Enforcement Activities

A. Overview

The FTC's appeal to the Ninth Circuit of the *Microsoft/Activision* district court decision remained pending at the outset of, and throughout, 2024.[17] In addition, a federal district court case challenging a multiyear series of consummated acquisitions by U.S. Anesthesia Partners, Inc. and Welsh, Carson, Anderson & Stowe ("Welsh Carson") remained pending at the beginning of 2024; on May 13, 2024, the federal district court dismissed the complaint against Welsh Carson, but kept the case alive against U.S. Anesthesia Partners.[18]

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[16] Press Release, Fed. Trade Comm'n, *Federal Trade Commission and Justice Department Release 2023 Merger Guidelines* (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines. Although FTC Commissioner Holyoak would have strongly considered revising the Merger Guidelines, FTC Chairman Ferguson did not favor restructuring the guidance process though he is "open to reforming" "some things in the guidelines." *See* Justin Wise, *GOP FTC Commissioner Says She'd Consider Undoing Merger Guidance*, BLOOMBERG LAW (Oct. 30, 2024), https://news.bloomberglaw.com/antitrust/gop-ftc-commissioner-says-shed-consider-repealing-merger-rules; Transcript, A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott, George Mason Univ. Mercatus Ctr. (June 13, 2024), https://www.mercatus.org/events/2024/06/conversation-ftc-commissioner-andrew-ferguson-hosted-alden-abbott ("I don't think we should get into a cycle where we are just rescinding guidelines every time the chairmanship changes hands. The guidelines will become useless to everyone if everyone thinks that they just embody the very particular preferences of a particular party.").

[17] On March 12, 2024, the FTC appointed a second ALJ, Jay L. Himes; on April 23, 2024, the FTC announced the appointment of a third ALJ, Dania L. Ayoubi. Fed. Trade Comm'n: Press Release, *FTC Announces Appointment of Jay L. Himes as New Administrative Law Judge* (Mar. 12, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-announces-appointment-jay-l-himes-new-administrative-law-judge; Press Release, Fed. Trade Comm'n, *FTC Announces Appointment of Dania L. Ayoubi as New Administrative Law Judge* (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-appointment-dania-l-ayoubi-new-administrative-law-judge. It has been decades since the FTC has had three ALJs.

[18] On January 17, 2025, the FTC settled a proposed administrative case with Welsh Carson under a consent decree that altered Welsh Carson's role in U.S. Anesthesia Partners. *See infra* note 169.

On January 25, 2024, the FTC challenged Novant Health's proposed acquisition of two North Carolina hospitals from Community Health Systems, Inc. ("CHS"); on June 5, 2024, the federal district court in North Carolina denied issuance of a preliminary injunction ("PI"), but, on June 18, 2024, the Fourth Circuit granted the injunction pending appeal; and the parties abandoned the transaction.

On February 26, 2024, the FTC challenged Kroger's proposed acquisition of Albertsons in federal district court in Oregon and in its administrative court. The FTC challenges were in addition to actions already brought by the Colorado Attorney General ("AG") and the Washington AG. The transaction parties filed an action in federal court in Ohio challenging the constitutionality of the FTC's administrative proceeding. On December 10, 2024, both the federal district court in Oregon and the Washington state court decided against the transaction parties. The next day, Albertson's sued Kroger for breach of contract and the parties abandoned the transaction.

On April 22, 2024, the FTC challenged Tapestry's proposed acquisition of Capri in both federal district court in New York and its administrative court. On October 24, 2024, the district court granted the FTC a PI, which the transaction parties initially appealed to the Second Circuit, but then chose to abandon the transaction.

On July 2, 2024, the FTC challenged Tempur Sealy's proposed acquisition of Mattress Firm in federal district court in Houston and in its administrative court. The transaction parties filed an action in the same federal court challenging the constitutionality of the FTC's administrative proceeding and requested that this action be assigned to the same judge as the PI case. On January 31, 2025, the district court judge denied the FTC's request for a PI.

The FTC entered into no consent decrees other than those dealing with board seats in two petroleum transactions. In addition, the FTC permitted Global Partners' purchase of Gulf Oil petroleum terminals only after the parties excluded a petroleum terminal in South Portland, Maine from the deal.[19] The FTC investigated a number of transactions that were ultimately abandoned due to antitrust concerns by the parties, but before the FTC formally acted to challenge the transaction.[20]

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[19] Press Release, Fed. Trade Comm'n, *FTC Statement on Amendment to Global Partners, Gulf Oil Acquisition* (Apr. 9, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-statement-amendment-global-partners-gulf-oil-acquisition.

[20] In January 2024, Bodycote plc, the world's leading provider of heat treatment and specialist thermal processing services, announced that it was cancelling its acquisition of rival heat treatment and metal finishing services company Metallurgical Group because the closing condition could not be satisfied. Press Release, Bodycote, *Acquisition update and announcement of £60m share buyback programme* (Jan. 22, 2024), https://www.bodycote.com/press-releases/press-release-2024/acquisition-update-and-announcement-of-60m-share-buyback-programme/. On January 31, 2024, the FTC issued an official statement regarding the January 29, 2024 abandonment of the Amazon/iRobot transaction. Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of Amazon's Proposed Acquisition of iRobot* (Jan. 31, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/statement-regarding-termination-amazons-proposed-acquisition-irobot (the FTC indicated that its investigation "focused on Amazon's ability and incentive to favor its own products . . . and associated effects on innovation, entry barriers, and consumer privacy" and it "revealed significant concerns about the transaction's potential competitive effects."). On March 23, 2024, Qualcomm Inc. abandoned its proposed acquisition of Autotalks Ltd due to FTC concerns that the combination might harm competition in markets for vehicle-to-everything chipsets and related products used in automotive safety systems. Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of Qualcomm's Proposed Acquisition of Autotalks* (Mar. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/statement-regarding-termination-qualcomms-proposed-acquisition-autotalks. On March 23, 2024, Choice Hotels International abandoned its hostile

B. FTC Litigation Challenges

1. *Microsoft Was Allowed to Consummate Its Activision Deal as the FTC Continued Its Appellate Court Challenge*

As detailed below, Microsoft Corp. ("Microsoft") closed on its acquisition of Activision Blizzard, Inc. ("Activision") 20 months after announcing the deal. The closing occurred only after Microsoft won a preliminary injunction proceeding in the United States, agreed to behavioral conditions with the European Commission ("EC"), and reinitiated the United Kingdom ("UK") review after offering structural relief. Undeterred by the deal's closing, the FTC appealed the denial of the PI to the Ninth Circuit and kept alive its administrative proceeding.

The FTC sued to block Microsoft's acquisition of Activision in its administrative court on December 8, 2022, but did not bring its PI action for over another six months.[21] Although Microsoft, like Activision, developed gaming content, it did so for its own use only, and the primary concerns of the antitrust agencies were vertical in nature: whether by acquiring Activision, a leading video game developer with strong gaming franchises, Microsoft would be able to suppress competitors to its Xbox gaming consoles and its developing subscription content and cloud-gaming business.

On February 8, 2023, the UK's Competition and Markets Authority ("CMA") published provisional findings that raised concerns for both console gaming and cloud-gaming services.[22] Although the CMA dropped its console concerns on April 26, 2023, the agency issued an order to block the transaction, finding that the deal would substantially lessen competition in the nascent

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tender offer for Wyndham Hotels & Resorts due to the FTC's serious competition questions; both companies compete for hotel franchises of "quality affordable lodging." Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of Choice Hotel's Proposed Takeover of Wyndham Hotels & Resorts* (Mar. 12, 2024), https:/www.ftc.gov/news-events/news/press-releases/2024/03/statement-regarding-termination-choice-hotels-proposed-takeover-wyndham-hotels-resorts. On May 21, 2024, the FTC praised Altus Group's abandonment of its acquisition of Situs Group's REVS business, which the FTC stated was its closest rival for valuation management services. Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of Altus Group's Proposed Acquisition of Situs Group's Commercial Real Estate Valuation Services Business* (May 21, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/statement-regarding-termination-altus-groups-proposed-acquisition-situs-groups-commercial-real. As of June 2024, the FTC reported that at least 37 deals had been abandoned due to the FTC raising antitrust concerns since Chair Khan had joined the Commission. Ben Brody & Chris May, *US FTC under Khan has notched 37 deal abandonments following merger investigations*, MLEX (June 13, 2024), https://mlexmarketinsight.com/news/insight/us-ftc-under-khan-has-notched-37-deal-abandonments-following-merger-investigations. On September 18, 2024, the FTC issued a statement regarding WillScot Holdings Corporation's abandonment of its proposed acquisition of rival modular and portable rental company McGrath RentCorp on antitrust grounds. Press Release, Fed. Trade Comm'n, *FTC Statement Regarding WillScot's Decision to Abandon Proposed $3.8 Billion Acquisition of Competitor McGrath RentCorp* (Sept. 18, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-statement-regarding-willscots-decision-abandon-proposed-38-billion-acquisition-competitor.

[21] 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. The Commission's vote to issue the complaint was three-to-one, with Commissioner Christine Wilson dissenting. During the FTC's investigation, the transaction parties produced nearly three million documents and sat for 15 investigational hearings. *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1082 (N.D. Cal. 2023) (hereinafter, the "*Microsoft* Decision").

[22] Press Release, CMA, *Microsoft/Activision Deal Could Harm UK Gamers* (Feb. 8, 2023), https://www.gov.uk/government/news/microsoft-activision-deal-could-harm-uk-gamers.

cloud gaming service market.[23] The CMA found insufficient Microsoft's promises to make those games widely available on rival cloud-gaming platforms and unacceptable because enforcement of these arrangements would require regulatory oversight.

Microsoft and Activision appealed the CMA's decision to the UK's Competition Appeal Tribunal ("CAT"). Microsoft argued that the CMA had made errors in its assessment.[24] The CAT only reviews a CMA decision based on a "judicial review" standard, *i.e.*, whether the CMA acted illegally, irrationally, or improperly. If the CAT found there was an issue with the CMA's decision, then it would send the case back to the CMA for it to reconsider its ruling. The CAT reacted to the timing deadlines in the Microsoft/Activision merger agreement: over the objections of the CMA,[25] the CAT set the matter on an accelerated timetable for a six-day hearing within a two-week period, commencing July 24, 2023.

On May 15, 2023, the EC cleared the transaction based on a commitment to license rival consoles and cloud gaming services—*i.e.*, the remedy that had been rejected by the CMA.[26] The EC's in-depth market investigation established that: Microsoft "would not be able to harm rival consoles and rival multi-game subscription services," and "would have no incentive to refuse to distribute Activision's games to Sony," then the leading consoles distributor worldwide and within the European Economic Area ("EEA").[27] Even if Microsoft did decide to withdraw Activision games from PlayStation, this would not significantly harm competition in the consoles market, according to the EC, because Sony would be able to offer other games to "fend off" attempts to lessen its competitive advantage. Even without this transaction, Activision would not have made its games "available for multi-game subscription services," due to its fear of potential cannibalization of its individual game sales.[28]

The EC concluded that, without remedies, Microsoft would be able to harm competition in the distribution of games via cloud- game streaming services, thereby strengthening its place in the PC operating systems market. If Microsoft made Activision's games exclusive to its Games Pass Ultimate cloud gaming service, competition in the distribution of games via the cloud would be reduced. This would also be the case if Microsoft "hinder[ed] or degrade[d] the streaming of Activision's games on PCs using operating systems other than Windows."[29] Microsoft offered a 10-year comprehensive license in the EEA. In direct contrast to the UK, the EC expressly viewed

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[23] Press Release, CMA, *Microsoft/Activision Deal Prevented to Protect Innovation and Choice in Cloud Gaming* (Apr. 26, 2023), https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming.

[24] Summary of Application Under Section 120 of the Enterprise Act 2002, *Microsoft Corp. v. CMA*, Case No. 1590/4/12/23 (CAT May 26, 2023), https://www.catribunal.org.uk/sites/cat/files/2023-06/2023.06.22_1590_Directions_Order.pdf.

[25] Order, *Microsoft Corp.* v. *CMA*, Case No. 1590/4/12/23 (CAT June 12, 2023), https://www.catribunal.org.uk/sites/cat/files/2023-06/2023.06.22_1590_Directions_Order.pdf. The CMA had argued for an October 2025 trial date to provide the regulator sufficient time to prepare, citing the scale and the complexity of the case. *See* Tr. of Case Mgmt. Conference, *Microsoft Corp. v. CMA*, Case No. 1590/4/12/23 (CAT May 30, 2023), https://www.catribunal.org.uk/sites/cat/files/2023-06/2023.05.30_1590%20Microsoft%20v%20CMA%20Transcript%20of%20CMC1.pdf.

[26] Press Release, Eur. Comm'n, *Mergers: Commission Clears Acquisition of Activision Blizzard by Microsoft, Subject to Conditions* (May 14, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705.

[27] *Id.*

[28] *Id.*

[29] *Id.*

that, with this remedy, the transaction would provide an opportunity to spur development of cloud gaming. The EC undertaking contemplated the appointment of an "independent trustee" to monitor implementation of Microsoft's pledge to provide rival cloud services with access to *Call of Duty*.

On June 12, 2023, the FTC filed a complaint in the U.S. District Court in the Northern District of California seeking a temporary restraining order ("TRO") and PI to prevent Microsoft from consummating the acquisition pending the ALJ's review of the transaction.[30] The district court granted the TRO. Given the July 18, 2023 termination date in the merger agreement, the district court ordered a five-day expedited preliminary hearing on the FTC's PI motion, to commence on June 22, 2023. The district court also ordered the parties to submit their final Proposed Findings of Fact and Conclusions of Law on June 30, 2023.

On July 10, 2023, Judge Jacqueline Scott Corley denied the PI, citing a lack of evidence to support the FTC's assertions. First, the court pointed out that "unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share'. . . . In vertical merger cases, . . . 'the government must make a fact-specific showing that the proposed merger is likely to be anticompetitive. Once the *prima facie* case is established, the burden shifts to the defendant to present evidence that the *prima facie* case inaccurately predicts the relevant transaction's probable effect on future competition, or to sufficiently discredit the evidence underlying the *prima facie* case.' "[31] "This Court does not resolve conflicts in the evidence, the question is simply whether the FTC has met its burden of showing a likelihood of success on the merits . . . before the ALJ in the administrative proceedings."[32]

The court explored all four relevant markets alleged by the FTC: (1) high-performance consoles (Xbox and Sony PlayStation); (2) multigame content subscription services; (3) cloud gaming; and (4) a combined library subscription services and cloud gaming market. As to the first of these markets, the court indicated that "[i]f the Court was the final decisionmaker on the merits, it would likely find Nintendo Switch part of the relevant market.[33] But it is not. Instead, on a 13(b) preliminary injunction, the FTC need only make a "tenable showing that the relevant market" is Gen 9 consoles. Given the plethora of internal industry documents and the acknowledged differences, the FTC has met its preliminary injunction burden to show the Switch is not included in the relevant market."[34] The court also agreed that the consoles market does not include PCs. "As to the FTC's additional markets . . . , while the Court questions whether—as Defendants

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[30] Complaint, *FTC v. Microsoft Corp.*, No. 3:23-cv-02880-JSC (N.D. Cal. June 12, 2023), https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/FTC-v-Microsoft/FTCComplaint.pdf. The matter was reassigned to Judge Jacqueline Scott Corey, who had already been assigned a private suit, *DeMartini v. Microsoft Corp.*, No. 22-cv-08991-JSC, brought by a group of gamers seeking an injunction of the Microsoft/Activision merger. Judge Corey determined that the matters were related following a judicial referral. *See* Referral Case Order, *FTC v. Microsoft Corp.*, No. 3:23-cv-02880-JSC (N.D. Cal. June 13, 2023).

[31] *See* note 21, *supra*, *Microsoft* Decision, at 1084 (quoting *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019)).

[32] *Id.* at 1085.

[33] *Id.* at 1087.

[34] *Id.* (citation omitted).

posit—these are simply alternative ways of playing console, PC, and mobile games, the Court assumes without deciding they are each their own product market when considered singly or in combination."[35]

As to geographic market, Judge Corey found that the evidence suggested that the relevant market for competition is the United States. The court rejected the defendants' arguments for a broader market as "unpersuasive," except for multigame content library subscription services and cloud gaming, which are closer calls, but the court assumed without deciding that the geographic market is the United States for these markets as well.[36]

The court characterized the FTC's theory of harm as "the combined firm may deprive rivals—primarily Sony—of a fair opportunity to compete in the above-defined markets by foreclosing an essential supply—*Call of Duty*. In other words, *Call of Duty* is so popular, and has such a loyal and dedicated following, competition will be substantially lessened in the console, content library subscription, and cloud gaming markets unless Microsoft's rivals have at least equal access to this popular video game."[37] The court rejected that the FTC need only show that the transaction is likely to increase the ability and/or incentive of the merged firm to foreclose rivals. Instead, the court determined that, under Section 7 of the Clayton Act, the government must show *both* the ability *and* incentive to foreclose rivals *and* also a reasonable probability that "competition would probably be substantially lessened *as a result of the withholding*."[38]

Judge Corey cited several reasons why the record pointed to a lack of incentives for Microsoft to foreclose Sony PlayStation from *Call of Duty.* First, Microsoft's commitment to maintain *Call of Duty* on its existing platforms and even expand its availability were "inconsistent with an intent to foreclose."[39] Second, the "deal plan evaluation model," as presented to Microsoft's board in support of the Activision purchase price, relied on PlayStation sales and other non-Microsoft platforms "post-acquisition," as well as the development of mobile content; again, the court noted, this plan's modeling was "inconsistent with an incentive to foreclose."[40] Additionally, the court noted that, "[d]espite the completion of extensive discovery in the FTC administrative proceeding, including production of nearly 1 million documents and 30 depositions, the FTC ha[d] not identified a single document" that contradicted Microsoft's public "commitment to make *Call of Duty* available on PlayStation (and Nintendo Switch)."[41]

Next, the decision discussed the ability of gamers to play across multiple platforms, described as "cross-play" or "cross-platform" gaming, was an essential part of *Call of Duty*'s financial success and thus created another incentive to leave *Call of Duty* on PlayStation. Microsoft recognized that "irreparable reputational harm" would occur if it foreclosed *Call of Duty* from PlayStation.[42] Finally, the FTC had not identified any instance in which an established multiplayer, multiplatform game with cross-play had been withdrawn from millions of gamers and made

[35] *Id*. (citation omitted).

[36] *Id*. at 1088.

[37] *Id*. at 1089.

[38] *Id*. at 1090 (emphasis added).

[39] *Id*. at 1091.

[40] *Id*.

[41] *Id*.

[42] *Id*. at 1092.

exclusive. The court summarized that "[a]ll of the above evidence points to no incentive to foreclose *Call of Duty*—a 20-year multi-platform franchise—from Sony PlayStation."[43]

The court then addressed whether Microsoft's binding offers to access had relevance to its *prima facie* burden. The FTC characterized these offers as a "proposed remedy" that may not be considered until the remedy phase, *i.e.*, after a Section 7 of the Clayton Act liability finding. The court found that the case law that directly addressed the issue contradicted the FTC's position. Next, the court addressed and rejected the FTC's contention that Microsoft's offer was insufficient, based on the testimony of the PlayStation CEO, who opposed the merger. The court noted that, before the merger, Sony had paid Activision for *exclusive* marketing rights that allowed Sony to market *Call of Duty* on PlayStation and restricted Xbox's ability to do the same. After the merger, the combined firm would not agree to such restrictions and, in addition, consumers would be able to utilize the cloud, rather than having to buy a console, and to play the game on their device of choice, including on the Nintendo Switch. These merger-specific changes are "[p]erhaps bad for Sony. But good for *Call of Duty* gamers and future gamers."[44] The court also rejected the economic modeling presented by the FTC's expert, Professor Robin Lee, regarding the economic benefits of making *Call of Duty* exclusive to Xbox.

The FTC also raised, and the court rejected, that the merger will decrease innovation because game developers and publishers would not want to work with Microsoft based on Sony's reluctance to share its intellectual property with Microsoft. The court found these concerns not merger-specific and failed to take into account all the other developers that might now be incentivized to collaborate with Xbox or one of its studios. The court concluded that protecting Sony's decision to delay collaboration was not procompetitive.

Finally, the court addressed the FTC's arguments on reply (and not in its original moving papers) of partial foreclosure, *e.g.*, the possibility that Microsoft would release *Call of Duty* later on PlayStation rather than on Xbox or have a *Call of Duty* Christmas character in the Xbox version but not the PlayStation version, or technologically degrade the players' experience on one console versus another. The FTC, however, provided no expert testimony to support a finding that the combined firm would have the incentive to engage in such conduct.

Based on this record, the court found that the "FTC ha[d] not shown a likelihood of success on its theory [that] the merger may substantially lessen competition" in the relevant high-performance console market due to the combined firm having the ability and incentive to foreclose *Call of Duty* from PlayStation.[45] The court did not focus on Activision's other "AAA" content because the FTC's evidence focused on this one game; the FTC did not offer evidence that if *Call of Duty* remained multiplatform in the console market, making the other content exclusive to Xbox would probably substantially lessen competition in that market.

The court briefly discussed the remaining markets and found that the record did not raise a serious question as to whether *Call of Duty* Game Pass Exclusivity would probably substantially lessen competition in the subscription services market. Rather, the court found that the merger would have the "procompetitive effect of expanding access to *Call of Duty*" and would give

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[43] *Id*. at 1093.

[44] *Id*.

[45] *Id*. at 1097.

consumers a "new, lower cost way to play the game day and date."[46] The record showed that Activision, on its own, would not have put its content on subscription services "because it would cannibalize individual sales."[47] The court also rejected foreclosure concerns in a cloud streaming market, finding instead that Microsoft's agreements with five cloud-streaming providers who before the merger had no access to Activision's content, meant that competition in the cloud-streaming market would be enhanced post-merger. The FTC argued that the cloud-streaming competitors based outside the United States should not be considered because their cloud services are not effective for U.S. consumers. The court relied on Microsoft's evidence to the contrary and would not deem these agreements irrelevant to the FTC's *prima facie* showing. The court concluded that it "cannot ignore this factual reality. The combined firm will probably not have an incentive to breach these agreements and make Activision content exclusive to xCloud."[48]

The court similarly rejected the FTC's argument that it had established a likelihood of success under "the *Brown Shoe* functional liability factors" in showing that the proposed merger's "very nature and purpose" is anticompetitive, that there is a "trend toward concentration in the industry," and that the merger would "increase entry barriers in the Relevant Markets."[49] The FTC maintained that the proposed merger's purpose is to transform an independent "platform-agnostic" supplier into one captive to Microsoft; the court stated that this would be true in any vertical merger and did not explain why it demonstrates an anticompetitive purpose.[50] The court found equally flawed the FTC's reliance on a trend toward further concentration since it too did not explain how this trend is anticompetitive here; Microsoft's investment in game developers and publishers would allow for increased innovation in content.

In sum, the court found that the FTC had not: (1) "raised serious questions" regarding whether the proposed merger was likely to substantially lessen competition in any relevant market and (2) demonstrated a "likelihood of ultimate success" as to its claims based on a vertical foreclosure theory.[51] The court further stated that "even if the FTC had met its burden, the balance of equities did not fall in its favor."[52] There is no planned dismantling of operations and, by pre-existing contract, there will be no foreclosure of *Call of Duty* pending the ALJ's decision.

The court modified the TRO to dissolve on July 14, 2023, unless the FTC obtained a stay pending appeal from the Ninth Circuit to permit the FTC to appeal its decision.[53] On July 12, 2023, the FTC noticed its appeal of the district court's decision and, on July 13, 2023, filed emergency motions in both the district court and the Ninth Circuit seeking a stay of the district

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[46] *Id*. at 1098.

[47] *Id*.

[48] *Id*. at 1099.

[49] *Id*. (internal quotations omitted).

[50] *Id*.

[51] *Id*. at 1100.

[52] *Id*.

[53] *Id*. at 1101.

court's decision pending appeal.[54] Both the district court and the Ninth Circuit denied these emergency motions.[55]

On July 17, 2023, the CAT announced that it had agreed to a joint application to adjourn Microsoft's appeal against the CMA's April 2023 prohibition decision.[56] The CMA extended its deadline to August 29, 2023 to issue a final order on the proposed merger to allow it to consider Microsoft's "detailed and complex submission" pleading in its case, including the details of the "material changes in circumstance and special reasons" why the CMA should not issue an order to reject the deal.[57] CAT Justice Marcus Smith adjourned the appeal conditioned on the CMA submitting evidence that there had been a "change of circumstances" or a "special reason" that warrants the adjournment.[58]

On July 16, 2023, Microsoft publicly announced that it had signed a binding agreement to keep *Call of Duty* on PlayStation following the transaction.[59] Upon motion of the transaction parties, the ALJ withdrew the proceeding from adjudication on July 20, 2023. On July 19, 2023, Microsoft and Activision extended the termination date to October 18, 2023 to complete the transaction in order to provide additional time to gain regulatory approval in the UK.[60]

On August 22, 2023, the CMA confirmed its April 2023 decision to block the transaction, rejecting arguments that it should overturn its original prohibition because of developments since the original decision.[61] Simultaneously, the CMA opened a new investigation into a restructured proposal by Microsoft under which Microsoft would not acquire the cloud streaming rights to all current and future Activision games released during the next 15 years outside of the EEA; instead, the cloud streaming rights would be divested to Ubisoft Entertainment and Ubisoft would pay

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[54] Plaintiff's Notice of Appeal, *FTC v. Microsoft*, No. 3:23-cv-02880-JSC (N.D. Cal. July 12, 2023); Plaintiff FTC's Rule 62(d) Motion for Injunction Pending Appeal, *FTC v. Microsoft*, No. 3:23-cv-02880-JSC (N.D. Cal. July 13, 2023); Motion for an Injunction Pending Appeal of the FTC, *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir. July 13, 2023).

[55] Order Denying Plaintiff's Motion for Injunction Pending Appeal, *FTC v. Microsoft*, No. 3:23-cv-02880-JSC (N.D. Cal. July 13, 2023); Order, *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir. July 14, 2023).

[56] Ruling on Second Application to Adjourn the Substantive Hearing, *Microsoft Corp. v. CMA*, Case No. 1590/4/12/23 (CAT July 17, 2023), https://www.catribunal.org.uk/sites/cat/files/2023-07/2023.07.18_1590_Ruling%20%28Second%20Adjournment%20Application%29.pdf.

[57] CMA, Notice of Extension, Anticipated Acquisition by Microsoft Corporation of Activision Blizzard, Inc. (July 14, 2023), https://assets.publishing.service.gov.uk/media/64ae72e0fe36e0000d6fa75f/Notice_of_extension_.pdf.

[58] Ruling on Second Application to Adjourn, *supra* note 56.

[59] Rohan Goswani & Jordan Novet, *Microsoft and Sony Sign Deal to Keep Activision's Call of Duty on PlayStation*, CNBC (July 16, 2023), https://www.cnbc.com/2023/07/16/microsoft-and-sony-sign-deal-to-keep-activisions-call-of-duty-on-playstation.html.

[60] Press Release, Activision Blizzard, Inc., *Activision Blizzard Announces Second Quarter 2023 Financial Results* (July 19, 2023), https://www.businesswire.com/news/home/20230717625669/en/Activision-Blizzard-Announces-Second-Quarter-2023-Financial-Results; https://www.cnbc.com/2023/07/19/microsoft-activision-agree-to-extend-deal-deadline-to-oct-18.html; Ryan Browne, *Microsoft and Activision Agree to Extend $69 Billion Deal Deadline in Wait for UK Approval* (July 19, 2023), https://www.cnbc.com/2023/07/19/microsoft-activision-agree-to-extend-deal-deadline-to-oct-18.html. The companies also agreed to increase the termination fee from $3 billion if the deal had been terminated after August 8, 2023, to $3.5 billion and $4.5 billion if the transaction is terminated, respectively, before August 29, 2023 and after September 15, 2023.

[61] Press Release, CMA, *Microsoft Submits New Deal for Review After CMA Confirms Original Deal Is Blocked* (Aug. 22, 2023), https://www.gov.uk/government/news/microsoft-submits-new-deal-for-review-after-cma-confirms-original-deal-is-blocked.

Microsoft through a one-time payment and a market-based wholesale pricing mechanism, including an option to price based on usage. The CMA had until October 18, 2023 to complete its review of this new proposal. On October 13, 2023, the CMA announced that it had, in Phase I, accepted Microsoft's undertakings in lieu of reference and closed the matter.[62]

Although the Ubisoft deal excluded the EEA, the EU reacted to the announcement by stating that it would assess the impact that the sale of the non-EEA cloud streaming rights may have on the commitments accepted by the Commission.[63] The Commission also raised the possibility that a new EU notification and review may be necessary. The EC reportedly emailed companies to ask for feedback regarding the Ubisoft deal. Ultimately, the EC took no further action.

Microsoft closed on the acquisition on October 13, 2023. Meanwhile, the FTC continued its appeal of the district court decision denying its request and indicated that it would hold a trial in its administrative proceeding 21 days after the appellate decision was issued.[64] The Ninth Circuit's hearing occurred on December 6, 2023.[65] The FTC told the three-judge panel that the district court judge applied the wrong standard when it denied the PI. Specifically, the FTC alleged that, under *Warner*,[66] the FTC was entitled to a PI if it showed serious questions as to the antitrust merits. In addition, counsel for the group of gamers in the related *DeMartini* case also opposed the transaction. They told the panel that the district court had misapplied the Clayton Act when it required that plaintiff show "immediate, irreparable harm."[67] Microsoft's counsel responded that the district court had applied the proper standards and that the FTC's case was built on the idea that a single game made by a single company is the key to competition in the dynamic gaming industry, "which the lower court rejected after hearing from 16 witnesses, along with reviewing numerous depositions and documents."[68]

2. *Novant Abandoned its Acquisition of CHS Hospitals After Winning at District Court but Being Enjoined by Appeals Court*

On January 25, 2024, the Commission issued an administrative complaint and authorized the filing of a preliminary injunction action in the District of North Carolina, alleging Novant's proposed acquisition to acquire Lake Norman Regional Medical Center ("Lake Norman") and Davis Regional Medical Center ("Davis") from CHS.[69] The FTC alleges that the combination of

[62] CMA, *Decision on Acceptance of Undertakings in Lieu of Reference, Anticipated Acquisition by Microsoft Corporation of Activision Blizzard, Inc. (excluding Activision Blizzard's Non-EEA Cloud Streaming Rights)* (Oct. 13, 2023), https://assets.publishing.service.gov.uk/media/652863e32548ca0014ddf20b/Full_text_decision__final_acceptance_of_UILs_.pdf.

[63] *EU Antitrust Regulators to Assess Impact of Microsoft's UK Activision Remedy*, REUTERS (Aug. 22, 2023), https://www.reuters.com/markets/deals/eu-antitrust-regulators-assess-impact-microsofts-uk-activision-remedy-2023-08-22/.

[64] Order Returning the Matter to Adjudication, *In the Matter of Microsoft Corp.*, FTC Dkt. No. 9412 (Sept. 26, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/608644.2023.09.25_d09412_-_order_returning_matter_to_adjudication.pdf.

[65] Craig Clough, *9th Circ. Mulls Failed Bids to Pause Microsoft's Activision Buy*, LAW360 (Dec. 6, 2023), https://www.law360.com/articles/1774141/9th-circ-mulls-failed-bids-to-pause-microsoft-s-activision-buy.

[66] *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156 (9th Cir. 1984).

[67] *Clough*, *supra* note 65.

[68] *Id.*

[69] Press Release, Fed. Trade Comm'n, *FTC Sues to Block Novant Health's Acquisition of Two Hospitals from*

hospitals would raise prices and reduce incentives to invest in quality and innovative care in North Carolina's Eastern Lake Norman Area ("ELN Area").

Novant is one of the largest hospital systems in North Carolina, and, according to the FTC, is also one of the most expensive systems in North Carolina. It operates Huntersville Medical Center, which serves more patients than any other hospital in the ELN Area. Lake Norman is 11 miles away from Huntersville. Davis is a behavioral hospital in the ELN Area. The FTC alleges that, post-merger, Novant would control almost 65% of the market for inpatient general acute care services in the ELN Area. In contrast to the *Hackensack Medical Center/HCA* and *Louisiana Children's* mergers (in which the State authorities supported the transaction), the North Carolina State Treasurer, Dale R. Folwell, indicated that the acquisition will eliminate competition and harm the public interest.[70] Treasurer Folwell also expressed concern that Novant's purchase as a "non-profit" hospital will cause the loss of state and local tax dollars.

The transaction parties denied that ELN is a separate geographic market in the Greater Charlotte area. The parties also denied that Lake Norman competes closing with Huntersville and that Lake Norman drives Novant to offer more competitive reimbursement rates and to invest in improving the quality of its healthcare. The parties asserted as an affirmative defense the weakened competitor and/or flailing firm defenses, and that the transaction is therefore procompetitive and will directly benefit patients, including those in the most vulnerable areas of the Greater Charlotte area. Finally, the parties asserted a number of constitutional defenses to the FTC's process.

The district court held a seven-day trial with 23 witnesses (including four experts) from May 1 to May 7, 2024. In defense of the transaction, Novant argued that it was the "last best hope" to save the two CHS hospitals.[71] It indicated that, due to high staff turnover, Davis was forced to stop all acute care services in 2022 and transition to exclusively behavioral health services; Lake Norman is a bad hospital with low quality and low occupancy that is struggling and declining.[72] Moreover, Novant argued that the merger will be procompetitive because it will enable Novant to compete better with Atrium as it expands its presence in the area. The FTC argued that the transaction will result in insurance companies and customers being charged Novant's higher prices and state and local governments receiving millions of dollars less in tax revenues once the hospitals are owned by a "non-profit" hospital system. In addition, the FTC posits that CHS could make additional investments or enter into partnerships with other healthcare companies if the transaction is enjoined.

On June 5, 2024, District Court Judge Kenneth D. Bell denied the PI.[73] The court found that the FTC's most narrow geographic market definition limited to ELN ignored commercial reality because it excludes the significant number of patients living in the area but being treated at other

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Community Health Systems (Jan. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-sues-block-novant-healths-acquisition-two-hospitals-community-health-systems.

[70] Amicus Curiae Brief of North Carolina Treasurer Dale R. Folwell in Support of the FTC, *FTC v. Cmty. Health Sys., Inc.*, No. 5:24-CV-28-KDB-SCR (W.D.N.C. Apr. 15, 2024), https://www.law360.com/articles/1825833/attachments/0.

[71] Hayley Fowler, *Future Is 'Bleak' If Judge Rejects Novant Merger, Court Hears*, LAW360 HEALTHCARE AUTHORITY (May 1, 2024), https://www.law360.com/healthcare-authority/articles/1831863/future-is-bleak-if-judge-rejects-novant-merger-court-hears.

[72] *FTC v. Cmty. Health Sys., Inc.*, 736 F. Supp. 3d 335, 344 (W.D.N.C. 2024), *vacated as moot*, 2024 U.S. App. LEXIS 18846 (4th Cir. July 24, 2024).

[73] *Id.*

hospitals in the broader Center City/Northern Charlotte Region. This broader market is highly concentrated, with Novant's market share alone exceeding 30%. Therefore, the FTC had established a *prima facie* case that the merger may substantially lessen competition, shifting the burden to the defendants to rebut the FTC's case regarding the probable effects of the merger.

The court found that "unique circumstances" are present here that "undermine the predictive value of the government's statistics."[74] There was clear evidence, which the FTC does not appear to have disputed, that Davis would close absent the transaction. The court found that "[k]eeping Davis open is clearly in the public interest because its closure would eliminate critically needed inpatient psychiatric services."[75] Likewise, the court noted that Lake Norman's loss of important service lines had detracted from the hospital's ability to compete adequately in the region. Without the deal, Lake Norman's competitive position would further erode to the point where it would most likely close in the future as well. Importantly, Atrium Health, Novant's main competitor, is building a 30-bed hospital between Huntersville and Lake Norman and has indicated that it plans to expand the size of the hospital. The court found that the proposed transaction would not only revitalize the Davis hospital, but enhance competition between Novant and Atrium.

Judge Bell denied the FTC's request for an injunction pending appeal on June 11, 2024, but did extend the TRO until June 21, 2024, to provide the FTC with time to seek an injunction from the Fourth Circuit. On June 14, 2024, the FTC filed an emergency motion to enjoin Novant from completing the transaction pending appeal. The FTC focused on the acquisition of Lake Norman by Novant, noting that the district court had failed to consider whether CHS could have improved the facility and ignored evidence showing that the hospital is profitable and has good quality ratings.

On June 10, 2024, the FTC granted a joint motion to delay the start of the administrative hearing until July 26, 2024.

On June 18, 2024—in a two-to-one decision—a panel of the Fourth Circuit granted the FTC's motion for an injunction pending appeal.[76] In a dissenting opinion, Judge Wilkinson expressed concerns for how a financially hard-pressed healthcare facility would be able to survive the timing of the administrative process, that he could not find the trial court's fact-finding "to be clearly erroneous," and stressed that the "public interest would be facilitated by helping these hospitals find the financial infusion they need to survive."[77] The transaction parties, however, abandoned the transaction immediately following the issuance of the injunction.

3. *Kroger/Albertsons Merger Enjoined and Parties Abandon Deal*

On February 26, 2024, the FTC voted three-to-zero to challenge Kroger Company's ("Kroger") acquisition of Albertsons Companies, Inc. ("Albertsons"), the largest proposed supermarket merger in U.S. history.[78] The State Attorneys General of Arizona, California, Illinois, Maryland,

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[74] *Id.* at 370.

[75] *Id.* at 374.

[76] Order, *FTC v. Novant Health, Inc.*, No. 24-1526 (4th Cir. June 18, 2024), https://www.ca4.uscourts.gov/opinions/241526R1.U.pdf.

[77] *Id.* at 3.

[78] Press Release, Fed. Trade Comm'n, *FTC Challenges Kroger's Acquisition of Albertsons* (Feb. 26, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons.

Nevada, New Mexico, Oregon, and Wyoming and the District of Columbia joined in the PI action filed in the U.S. District Court for the District of Oregon.[79]

The FTC indicated that the transaction "will eliminate fierce competition between Kroger and Albertsons, leading to higher prices for groceries and other essential household items for millions of Americans. The loss of competition will also lead to lower quality products and services, while also narrowing consumers' choices for where to shop for groceries. For thousands of grocery store workers, Kroger's proposed acquisition of Albertsons would immediately erase aggressive competition for workers, threatening the ability of employees to secure higher wages, better benefits, and improved working conditions."[80] The complaint alleges that, in hundreds of communities, the merger "would create a single supermarket with market shares so high as to be presumptively unlawful under the antitrust laws."[81] The two supermarket chains also offer additional services to attract supermarket customers, such as fuel stations and pharmacies. "By leveraging these networks and services, Kroger and Albertsons compete head-to-head across multiple dimensions."[82]

The FTC alleged that the relevant product market is "supermarkets," which is described as "offer[ing] consumers convenient 'one-stop shopping' for food and grocery products. . . ." Compared to other types of food retailers, supermarkets typically have a broad and deep product assortment of tens of thousands of stock-keeping units in a variety of package sizes. As well as a deep inventory of those items, "[s]upermarkets . . . typically have at least 10,000 square feet of selling space."[83] Supermarkets recognize other supermarkets as a distinct type of retailer. The FTC alleged that, under the "hypothetical monopolist" test, the relevant market would not include club stores (*e.g.*, Costco, Sam's Club), limited assortment stores (*e.g.*, Aldi, Lidl), premium natural and organic stores (*e.g.*, Whole Foods), dollar stores, e-commerce retailers (*e.g.*, Amazon.com), or grocery delivery services (*e.g.*, Instacart, DoorDash). The FTC complaint delineated as relevant geographic markets specific metropolitan areas or rural geographies. As a result, the FTC alleged that there are more than 1,500 Kroger and Albertsons supermarkets in the specified geographic areas that exceed the new Merger Guidelines concentration thresholds of: (i) a merger increase of HHI of more than 100 points, and (ii) combined market shares that exceed 30 percent and/or post-merger HHI that exceeds 1,800. The FTC further indicated that "[e]ven if the non-

[79] On January 15, 2024, the Washington State Attorney General filed suit in King County Superior Court challenging the Kroger/Albertsons transaction nationally. Press Release, Wash. State Office of the Atty. Gen., *AG Ferguson Files Lawsuit to Block Kroger-Albertsons Merger* (Jan. 15, 2024), https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-block-kroger-albertsons-merger; Judge Marshall Ferguson set the case for trial commencing September 16, 2024. Press Release, Wash. State Office of the Atty. Gen., *Judge rules AG Ferguson challenge to Kroger-Albertsons merger will continue* (Apr. 26, 2025), https://www.atg.wa.gov/news/news-releases/judge-rules-ag-ferguson-challenge-kroger-albertsons-merger-will-continue. On February 14, 2024, the Colorado Attorney General also had filed suit in Denver District Court challenging the transaction in Colorado alone. Press Release, Colorado Atty. Gen., *Colorado Attorney General Phil Weiser files lawsuit to block proposed Kroger/Albertsons merger* (Feb. 14, 2024), https://coag.gov/2024/colorado-attorney-general-phil-weiser-files-lawsuit-to-block-proposed-kroger-albertsons-merger/; Judge Andrew Luxon granted the State's motion for a preliminary injunction and scheduled a trial to run from September 30 to October 18, 2024. *See* Leah Nylen, Bloomberg, *Colorado Judge Temporarily Halts Kroger-Albertsons Merger* (July 25, 2024), https://www.bloomberg.com/news/articles/2024-07-25/colorado-judge-temporarily-halts-kroger-albertsons-merger.

[80] Press Release, Fed. Trade Comm'n, *supra* note 78.

[81] Complaint ¶ 38, *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN (D. Or. Feb. 25, 2024).

[82] *Id.* ¶ 42.

[83] *Id.* ¶ 44.

supermarket retail formats . . . are included . . . the proposed acquisition is still presumptively unlawful in most of the identified geographic markets."[84] The FTC asserted that the proposed transaction would eliminate head-to-head competition between the two chains, including pricing competition, product quality competition, store condition and customer service competition, and pharmacy services competition, thereby harming consumers in these markets.

This case marked the most aggressive attack of a merger to date based on labor concerns. In a press release, Henry Liu, Director of the FTC's Bureau of Competition, indicated, "[e]ssential grocery store workers would also suffer under this deal, facing the threat of their wages dwindling, benefits diminishing, and their working conditions deteriorating."[85] The press release further explains:

> Kroger and Albertsons are the two largest employers of union grocery labor in the United States. They actively compete against one another for workers. The two companies also try to poach grocery workers from each other, especially in local markets where they overlap. Currently, most workers for both supermarket chains are members of the United Food and Commercial Workers ("UFCW") union. Today, UFCW and other unions leverage the fact that Kroger and Albertsons are separate and competing companies. Unions push for both supermarket chains to negotiate better employment terms for union grocery workers, especially when negotiating over collective bargaining agreements ("CBAs"). A combined Kroger/Albertsons, however, would gain increased leverage over workers and their unions—to the detriment of workers, the FTC alleges. The combined Kroger[/]Albertsons would have more leverage to impose subpar terms on union grocery workers that slow improvements to wages, worsen benefits, and potentially degrade working conditions. In some regions, such as in Denver, the combined Kroger/Albertsons would be the only employer of union grocery labor. Union grocery workers ability to leverage the threat of a boycott or strike to negotiate better CBA terms would also be weakened.[86]

The complaint asserted union grocery labor in each of the local areas in which both parties negotiated CBAs as a separate relevant market. The transaction parties negotiate with the same local unions and the combined firm will purportedly have a market share of union grocery labor over 30% and the merger increases the HHI of the market by more than 100 points. In many of the local CBA areas, the parties purportedly have a combined share of union labor exceeding 65%.[87] The FTC posited that the elimination of current head-to-head competition for union grocery labor also makes the transaction unlawful.[88] The merger would thereby weaken union grocery workers' ability to leverage the threat of a boycott or strike to negotiate better CBA terms.

The FTC further attacked the divestiture proposal that Albertsons had entered into with C&S Wholesale Grocers, LLC ("C&S") that at the time of complaint involved 413 stores and assets in 17 states and D.C. on the grounds that the package contains insufficient assets, the lengthy transition period contains anticompetitive entablements, and that C&S is not a suitable buyer.

The transaction parties countered that the "Commission's claims are premised entirely on the Commission's distortion and willful ignorance of basic but critical facts." First, the parties

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[84] *Id.* ¶ 57.

[85] Press Release, Fed. Trade Comm'n, *FTC Challenges Kroger's Acquisition of Albertsons* (Feb. 26, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons.

[86] *Id.*

[87] Complaint, *supra* note 81, ¶ 68.

[88] *Id.* ¶ 69.

criticized the narrowly defined set of competitors: The competitive set should include traditional grocery stores, club stores, big box retailers, and discounters, as well as Amazon's e-commerce platform. Second, the parties stated that the Commission entirely ignored the impact of the proposed divestment to C&S. Third, the parties indicated that the "union grocery labor" product market asserted is unprecedented and completely ignores the labor market in which they compete, which includes non-union as well as non-grocery retailers. In addition, the merger would purportedly *increase*—not decrease—the union's bargaining power.

On April 22, 2024, the transaction parties announced that they had agreed to sell to C&S an additional 166 stores (bringing the total to 579 stores), as well as Kroger's Haggen banner, the Albertsons' banner in Arizona and Colorado, the Signature and O Organics private label brands, increased distribution capacity and expanded transition services.[89] This sweetened package was intended to respond to concerns raised by the federal and state antitrust agencies. For instance, in Colorado, the revised divestiture package left only 14 stores in the state, with Kroger licensing the Safeway brand to C&S and pledging to rebrand its retained stores.

The trial before U.S. District Judge Adrienne Nelson commenced on August 26, 2024 and ended on September 13, 2024.[90] Chief ALJ D. Michael Chappell issued a scheduling order that had discovery ending before the district court trial and the ALJ hearing commencing on July 31, 2024, a rare instance where a merger trial commenced before a decision on the request for a PI.[91] On May 29, 2024, the Commission, in a three-to-two vote along party lines, denied a request by Kroger and Albertsons to stay the administrative court proceeding until after the federal court decided whether to issue the PI.[92] On July 12, 2024, Chief ALJ Chappell, however, granted a request to stay the proceeding until the federal district court case is decided.[93]

On August 14, 2024, the State AGs of Alabama, Georgia, Iowa and Ohio filed an *amicus* brief (the "States' Amicus Brief") in the federal district court challenge.[94] The States' Amicus Brief took

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[89] Press Release, The Kroger Co. & Albertsons Companies, Inc., *Kroger, Albertsons Companies and C&S Wholesale Grocers, LLC Announce an Updated and Expanded Divestiture Plan* (Apr. 22, 2024), https://ir.kroger.com/news/news-details/2024/Kroger-Albertsons-Companies-and-CS-Wholesale-Grocers-LLC-Announce-an-Updated-and-Expanded-Divestiture-Plan/default.aspx.

[90] Danielle Kaye, N.Y. TIMES, *Kroger's Nearly $25 Billion Merger Is Bad for Shoppers, F.T.C. Says* (Aug. 26, 2024), https://www.nytimes.com/2024/08/26/business/economy/ftc-kroger-albertsons-merger-court.html; Kristine de Leon, The Oregonian, *Kroger, Albertsons wrap up defense of $25B merger in court, but case is headed for overtime* (Sept. 13, 2024), https://www.oregonlive.com/business/2024/09/kroger-albertsons-wrap-up-defense-of-25b-merger-in-court-but-case-is-headed-for-overtime.html.

[91] Scheduling Order, *In the Matter of The Kroger Co.*, FTC Dkt. No. 9428 (Mar. 30, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/610057_-_scheduling_order.pdf.

[92] Order Denying Respondents' Motion for Continuance of Evidentiary Hearing, *In the Matter of The Kroger Co.*, FTC Dkt. No. 9428 (May 29, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/d09428commorderdenyingmtncontinuanceforweb.pdf; Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of The Kroger Co.*, FTC Dkt. No. 9428 (May 29, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commn-holyoak-kroger-continuance-dissent-2024.05.29.pdf.

[93] Order on Respondents' Motion to Recess the Evidentiary Portion of the Part 3 Administrative Hearing, FTC Dkt. No. 9428 (July 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/611203_-_order_on_motion_to_recess_the_evidentiary_hearing.pdf.

[94] Brief of Amici Curiae from the States of Ohio, Alabama, Georgia, and Iowa in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, *FTC v. The Kroger Co.*, No. 3:24-cv-00347-AN (D. Or. Aug. 14, 2024), ECF 239-1, https://www.law360.com/articles/1869911/attachments/0.

issue with the FTC's market definition that excludes non-supermarket grocery retailers. In addition, the AGs stated that the acquisition will be procompetitive. Finally, the AGs indicated that the divestiture of the stores to C&S in communities where Kroger and Albertsons compete would eliminate any unilateral anticompetitive effects.

On August 19, 2024, Kroger initiated an action in the U.S. District Court for the Southern District of Ohio to enjoin the FTC's administrative proceeding, arguing that the FTC's use of an administrative tribunal and a separate federal court action violates constitutional protections.[95] This case became moot when, as discussed below, the transaction parties abandoned the transaction.

On December 10, 2024, Judge Nelson issued her opinion and order granting the PI. First, Judge Nelson determined that *Starbucks Corp. v. McKinney*[96] does not alter the more favorable standard accorded the FTC in PI actions under Section 13(b) of the FTC Act.[97] Second, the court found that supermarkets are distinct from other grocery retailers as they "offer a larger selection of fresh and non-perishable items, a one-stop shopping experience that appeals to a particular consumer's preference to meet all their grocery needs in one location, and a customer service focus with deli, bakery, meat, and other specialized departments."[98] Although large format retailers are an alternative market definition, e-commerce retailers, *e.g.*, Amazon.com, should not be included in the market for traditional supermarkets since they have a "substantially different business model," by "offering a massive number of SKUs, largely in non-grocery items, for shipping or delivery only."[99] Third, the relevant geographic market is a local area drawn around each of the stores. Applying the Hypothetical Monopolist Test ("HMT"), the FTC's economist, Dr. Nicholas Hill, found 2,062 local supermarkets markets and 2,503 local large format stores markets in which the transaction parties overlap.[100] The defendants' economist, Dr. Mark Israel, unsuccessfully challenged the use of the HMT in favor of an "actual monopolist test," on the grounds that the alternative test "does not attempt to predict the changes that would occur as a result of a change in the market."[101]

Next, Judge Nelson endorsed the application of the market concentration test endorsed by the 2023 Merger Guidelines, but also considered the results under the 2010 Merger Guidelines. As a result, 2,785 large format store markets under the 2023 Merger Guidelines and 911 markets under the 2010 Merger Guidelines would be presumptively illegal; and 1,922 supermarket markets and 1,574 supermarket markets, would have been presumptively illegal under the 2023 and 2010 Merger Guidelines, respectively. Based on these market concentrations, the court found that the plaintiffs had met their *prima facie* burden.

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[95] Complaint for Declaratory and Injunctive Relief, *The Kroger Co. v. The Fed. Trade Comm'n*, No. 1:24-cv-00438-DRC (S.D. Ohio Aug. 19, 2024), https://www.law360.com/articles/1871449/attachments/0; Press Release, The Kroger Co., *Kroger Files Motion to Enjoin the FTC's Administrative Merger Challenge* (Aug. 19, 2024), https://ir.kroger.com/news/news-details/2024/Kroger-Files-Motion-to-Enjoin-the-FTCs-Administrative-Merger-Challenge/default.aspx.

[96] 602 U.S. 339 (2024) (courts must apply the four-part *Winter* test when considering a PI motion under the National Labor Relations Act).

[97] *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN, 2024 U.S. Dist. LEXIS 223077, 2024 WL 5053016, at *2 (D. Or. Dec. 10, 2024).

[98] *Id.* at *11.

[99] *Id.* at *12.

[100] *Id.* at *13.

[101] *Id.* at *14.

Fourth, the court found that the showing of elimination of head-to-head competition bolsters their case with additional evidence of loss of substantial competition between defendants. The court rejected defendants' arguments that the true competition is Walmart, followed by other mass retailers. To the contrary, both the qualitative and quantitative evidence reportedly shows that defendants engage in substantial head-to-head competition, and, as a result, the proposed merger would likely lead to unilateral competitive effects.

Next, the court considered three primary arguments on rebuttal: (1) that other competitors will aggressively expand, constraining the parties' market power; (2) that efficiencies will mitigate the anticompetitive effects; and (3) that the proposed divestiture will mitigate the proposed merger's anticompetitive effects. The court found the limited, conflicting, and somewhat speculative evidence regarding the ease of entry and expansion insufficient to show that entry of new competitors in either of the relevant markets will be timely, likely, and sufficient to mitigate the anticompetitive effects of the market. As to the efficiencies, defendants promised to make a $1 billion price investment should the merger occur. This price investment would be from price reductions on certain key grocery items in Albertsons stores over a period of four years. Defendants also stated that they intend to spend $1.3 billion on improving acquired Albertsons stores and warehouses and another $1 billion annually on improving employee wages, training and benefits. The court stated that while it had "no doubt that defendants would honor their promise, this type of guarantee cannot rebut a likelihood of anticompetitive effects. . . ."[102]

Finally, defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger as part of their rebuttal evidence. The divestiture must replace the competitive intensity lost as a result of the merger. Of the markets Dr. Hill found were presumptively unlawful using his HHI analysis, more than 113 do not have a single divested store. Even assuming a perfectly successful divestiture in which no sales are lost or stores closed, Dr. Hill found that the merger would still be presumptively unlawful in 551 large format stores markets. This number increases to 716 large format stores if it is assumed that the divested stores lose 30% of their sales. For the supermarkets market, 1,002 markets would remain presumptively unlawful assuming a perfect divestiture, 1,035 markets if 10% of sales were lost, 1,276 if 30% of sales are lost, and 1,347 markets if 50% of sales are lost. Also, if 30% of divested stores close, 710 large format stores markets are presumptively unlawful; if 50% close, that number increases to 860 markets. For the supermarkets market, 1,310 markets are presumptively unlawful assuming 10% of stores close, 1,410 if 30% are closed; and 1,520 if 50% of stores close. Even Dr. Israel found a large number of markets in which the merger remained unlawful with the divestitures. Moreover, the court raised concerns about C&S's ability to replace the overall competitive intensity lost as a result of the merger of two significantly larger firms. The temporary right to use the private label brands, when private label brand equity is important to grocery retailers, is another deficit in the divestiture package. Similarly, the temporary rights to loyalty programs, and the need to implement its own programs and for customers to re-enroll in the new program, makes the divestiture buyer vulnerable to having defendants target its customers after the merger. C&S would need to build warehouses and distribution centers. The package does not convey or provide support for other aspects of grocery retail, such as retail media capabilities. The court also found that there were serious concerns about C&S's ability to run a large-scale retail grocery business that can successfully compete against the combined business. In addition, C&S would remain

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[102] *Id.* at *24.

interdependent with the merged firm for many years under the transition services agreement ("TSA"). For instance, Kroger will provide sales forecasting data and a base pricing plan to C&S for a period of time during the transition.

In sum, the court found that Plaintiffs had "successfully established that the 'supermarkets' and 'large format stores' markets are relevant antitrust markets and that the proposed merger would substantially lessen competition in those markets due to the resulting changes in market concentration and loss of head-to-head competition in those markets due to the resulting changes in market concentration and loss of head-to-head competition. Defendants' rebuttal evidence is not sufficient to overcome plaintiffs' *prima facie* case. For these reasons, plaintiffs have met their burden of persuasion and are likely to succeed on the merits."

The court then looked separately at the claim that the proposed merger would substantially lessen competition for union grocery store labor. Defendants argued that under the plain text of the Clayton Act, the Act should not apply to labor markets and antitrust laws should not be used to forbid or constrain the existence of labor unions or their bargaining markets. In the alternative, defendants argued that the labor theory is not cognizable because it falls into an implicit antitrust exemption for labor activity. The court rejected that an implicit exemption for labor activity where there is no attempt to circumvent labor law by using antitrust law to regulate an agreement between union and employer. While the court does not need to make a decision regarding these claims, it provided a brief analysis of the arguments without finding that there is sufficient evidence to independently support granting a PI on this basis. Union grocery compensation is meaningfully different, and higher, than non-union grocery compensation. "Much like with cross-shopping and share of wallet spending in the consumer product markets, the fact that some workers move between union and non-union or non-grocery jobs does not necessarily indicate that a submarket for union grocery labor does not exist. . . . Despite competition for employees between union and non-union employers, and between grocery retailers and other businesses, it is clear that at least some workers prefer union grocery work because of its distinct wages and benefits, seniority accrual, and an interest in customer service or the skills needed to operate a specialized department. For those workers, union grocery jobs are 'uniquely attractive.' "[103] The court indicated that "[b]ased on the limited evidence presented," "the proposed union grocery labor market . . . is a plausible relevant market," in which defendants "monitor each other's union negotiations and sometimes try to hire each other's employees"[104]

Plaintiffs presented evidence that the major grocery unions engage in "whipsaw bargaining and strikes" against defendants by negotiating with at least two employers at one time. The court found that "[d]efendants are strongly incentivized to avoid a strike" and described "[o]ne way that defendants avoid the threat of strikes is by entering into mutual strike assistance agreements," in which they agree that if a union calls a strike on one participating employer, then "the other employer will lock out their employees."[105] These arrangements give employers leverage because unions do not want to risk having many or all of their employees out on strike at the same time. Defendants argued that any loss of head-to-head competition or increase in market concentration would not lead to harm because defendants already can bargain together and enter into these

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[103] *Id.* at *34.

[104] *Id.* at *34–*35.

[105] *Id.* at *36–*37.

mutual strike assistance agreements. The court indicated that, at this stage, the plaintiffs had failed to establish a *prima facie* case that the proposed merger would substantially lessen competition for union grocery labor.

4. *FTC Successfully Challenged the Tapestry/Capri Transaction*

On April 22, 2024, the FTC voted unanimously to bring an administrative hearing and a lawsuit in the Southern District of New York challenging Tapestry, Inc.'s ("Tapestry") acquisition of Capri Holdings Limited ("Capri").[106] The transaction would combine three allegedly close competitors—Tapestry's Coach and Kate Spade brands and Capri's Michael Kors brand. According to the FTC, the deal would thereby eliminate direct head-to-head competition between these brands and give Tapestry a "dominant share of the 'accessible luxury' handbag market."[107] The FTC cited to the bags' physical attributes of being made with high-quality materials largely in Asia. The complaint asserted that many Tapestry and Capri "accessible luxury" handbag consumers are either working-class or middle-class, as opposed to shoppers for "true luxury" bags, who are more affluent.[108]

In addition, the FTC alleged that the transaction "threatens to eliminate the incentive for the two companies to compete for employees and could negatively affect employees' wages and workplace benefits."[109] The FTC claimed that the combined firm would create an employer with anticompetitive buying power and harm workers in the luxury style industry, particularly hourly laborers who are non-unionized. Finally, the FTC alleged that Tapestry had engaged in serial acquisitions to "entrench" Tapestry's stronghold, making it "harder for new brands to both enter [the market] and have a meaningful presence."[110] Based on the FTC's market definition and market shares, the combination would purportedly result in a company that accounted for greater than 50% of the accessible luxury handbag market.

The transaction parties argued that the FTC's legal theory and market definition were premised on inaccurate assumptions about how luxury fashion designers compete. The FTC believed there were only three options for a consumer seeking a high-quality handbag in what the FTC ultimately settled on as an "accessible luxury" handbag market: Coach, Kate Spade, and Michael Kors. In fact, there are well over 150 handbag brands, across prices and bag types, that compete with Tapestry and Capri in the United States today. New brands and competitors are shifting to online sales, marketing, and product placement to rapidly build brand value and win sales. Long-standing brands continue to compete aggressively. Michael Kors's struggles over several years demonstrated the challenge to stay fresh and relevant among robust competitors. Tapestry sought to acquire Capri to reinvigorate consumer perception of the brand to increase demand, expand sales, and deliver product to more consumers.

Tapestry pointed out in its Answer that it "first used the phrase 'accessible luxury' over 20 years ago as part of marketing efforts and continued to use the phrase, generally in marketing, including

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[106] Press Release, Fed. Trade Comm'n, *FTC Moves to Block Tapestry's Acquisition of Capri* (Apr. 22, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-moves-block-tapestrys-acquisition-capri.

[107] *Id*. The FTC indicated that Tapestry had derived this term to describe "quality leather and craftsmanship handbags at an affordable price." *Id*. Coach had created the term over 20 years ago to define a space between "mass market" and "true luxury."

[108] Complaint ¶ 3, *FTC v. Tapestry, Inc.*, No. 1:24-cv-3109-JLR (S.D.N.Y. Apr. 22, 2024).

[109] *Id*.

[110] *Id*. ¶ 78.

as a way to convey that its handbags and other products were high quality, yet approachable."[111] This, Tapestry argued, is not a product market for antitrust purposes. Rather, this proposed market definition was "incomplete, unrealistic, and vague." In contrast, in an "all handbag" market, the parties had only a 17% share. Tapestry claimed, therefore, that the "merged entity would not have power to harm consumers," particularly given Michael Kors declining sales and the increasing sales and shares of competing products.[112] Finally, the transaction parties asserted that "[t]here is no legal support for the theory that the loss of head-to-head competition, absent an undue concentration in a properly defined market, can violate Section 7 of the Clayton Act."[113]

U.S. District Court Judge Jennifer L. Rochon held a seven-day trial from September 9 to September 17, 2024. The administrative proceeding was scheduled to begin September 25, 2024. On May 24, 2024, Tapestry and Capri filed a motion with the Commission to delay the commencement of the administrative proceeding until 20 days after the district court decided the PI. On July 22, 2024, the Commission—in a three-to-two decision split along party lines—denied this motion. The administrative hearing was ultimately reset, however, to begin on December 9, 2024.

On October 24, 2024, Judge Rochon issued a 169-page decision granting the FTC's PI. The court found that there was a cognizable distinct submarket for "accessible luxury" handbags, with brands being a fundamental attribute of a handbag. In the court's view, "the conclusion most consonant with the evidence is that handbag consumers *do* purchase brands."[114] Evidence cited during the trial noted the commonly recognized accessible luxury brands included Coach, Kate Spade, Michael Kors, Tory Burch, Marc Jacobs, and Longchamp.[115] Some industry members include Kirk Geiger and Loffler Randall. Louis Vuitton, Bottega Veneta, Burberry, Chanel, Celine, Hermes, Dior, Prada, Gucci, Fendi, Ferragamo, Loewe, Yves Saint Laurent are luxury brands. Commonly identified mass-market brands include Zara, H&M, Steve Madden, Tommy Hilfiger, Gap, Calvin Klein, Abercrombie & Fitch, and private-label brands.[116]

In addition, applying the four *Brown Shoe* indicia,[117] the court indicated that the "accessible luxury" market has different traits that set it apart from "mass market" (also referred to as "fast fashion" or "opening price point") and "true luxury" (also referred to as "luxury," "pure luxury," "pinnacle luxury," "traditional luxury," "European luxury," and "traditional European luxury") handbags: Most accessible luxury brands, including Coach and Michael Kors, were more likely to be produced in Southeast Asia, while true-luxury bags were mostly made in European countries, such as France and Italy. In the handbag industry, there are reportedly two common ways of describing a handbag's price: the manufacturer's suggested retail price ("MSRP" or the "ticket price") and the average unit retail price (the "AUR" or the "out-the-door price"). The court determined that accessible luxury handbags were distinct in that: the category is defined by bags

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[111] Defendant Tapestry, Inc.'s Answer and Defenses at 16, *FTC v. Tapestry, Inc.*, No. 1:24-cv-3109-JLR (S.D.N.Y. May 16, 2024).

[112] *Id.* at 8.

[113] *Id.* at 9.

[114] *FTC v. Tapestry, Inc.*, No. 1:24-cv-3109-JLR, ___ F. Supp. 3d ___, 2024 U.S. Dist. LEXIS 202258, 2024 WL 4647809, at *11 (S.D.N.Y. filed Nov. 1, 2024).

[115] *Id.* at *21.

[116] *Id.* at *22.

[117] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

with a cost on average of about $100 to $1,000 AUR, and heavily rely on discounting (*e.g.*, a gap between MSRP and AUR). In contrast, mass-market handbags generally are priced below $100, and true-luxury handbags are priced above $1,000. True-luxury brands discount their bags less frequently and offer few (if any) handbags for sale at outlets.

Moreover, the court was not troubled by there being "some exceptions to a general trait,"[118] because it is permissible to apply the *Brown Shoe* indicia "holistically, and especially considering the highly compelling evidence of industry recognition"[119] of this market. According to the court, "the evidence in the record shows that most accessible-luxury handbags are sold between $100 and $1,000, and the prices and pricing tactics for these handbags materially distinguish them from mass-market and true-luxury handbags. This finding supports the FTC's proposed product market."[120] This term also appeared in the defendants' and other industry members' SEC filings and was used in calls with investors, emails, internal analyses, internal presentation and slide decks, and other materials.[121] Thus, the court found that the FTC does not need to use bright-line rules to outline a legally cognizable market or one without "rigid lines."

The court also found the FTC's economist, Loren Smith, to be persuasive. Dr. Smith analyzed cross-body bags, satchels, shoulder bags, and totes as a "cluster market." Defendants argued that the cluster market should include more silhouettes—clutches, wristlets, backpacks, and belt bags. The court indicated that adding these silhouettes would not alter the results. Dr. Smith then used the NPD data for "bridge" and "contemporary" categories to be in his candidate market. As a result, his analysis consisted of over 200 handbag brands. His analysis compared the aggregate-diversion for all of these brands and compared the actual diversion ratios from Coach, Kate Spade, and Michael Kors. The actual diversion ratios were based on four surveys. The results showed that the diversion ratios were much higher for these three brands than the threshold aggregate-diversion ratio.

The court found unpersuasive defendant's critiques of Dr. Smith's use of the NPD data to define a relevant market or the surveys. Similarly, the court rejected defendants' suggestions that cross-shopping by consumers—*e.g.*, the fact that consumers may own handbags from mass-market, accessible-luxury, and true-luxury brands—disproved the existence of distinct handbag submarkets.

Dr. Smith's report depicted combined post-merger market shares of 58.7%, "well over 30% and thus creat[ing] a presumption of anticompetitive effects."[122] The same was true with respect to HHIs: post-merger HHI would be 3,646, with the merger-induced change in HHI of 1,449. Defendants countered that Dr. Smith's market-share calculations were flawed because they:
(1) failed to account for preowned handbag sales; (2) excluded all handbags categorized as "designer," "moderate," and "better" by NPD; (3) excluded brands that NPD does not track; and (4) utilized unreasonable estimates and projections of sales data for a significant number of brands for which Dr. Smith only had NPD data. These critiques did not alter the court's decision. "Dr. Smith's market-share and market-concentration calculations may not be perfect. But they need not

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[118] *FTC v. Tapesty,* at *24.

[119] *Id.* at *24.

[120] *Id.* at *19.

[121] *Id.* at *20.

[122] *Id.* at *38.

be. . . . Here, particularly in light of the high market-share and HHI figures, the Court is convinced that the FTC 'should prevail, notwithstanding uncertainty about the defendant[s'] exact share.' "[123]

The Court then rejected the potential mitigating arguments presented by the defendants: (1) existing and potential competitors would not constrain the post-merger Tapestry's market power because entry and expansion would "not be timely, likely, and sufficient in its magnitude, character, and scope to constrain Tapestry";[124] (2) Tapestry's emphasis on brand autonomy to ensure that competition among Coach, Kate Spade, and Michael Kors would continue would be contrary to corporate-wide profit maximization principles;[125] (3) the transaction claimed rationales of improving demand for Michael Kors handbags and driving increased sales were merely an "efficiencies defense," which defendants had failed to establish;[126] and (4) the alleged "discretionary" nature of handbags would not defeat an attempt by Tapestry to raise prices.[127]

The court also found compelling the evidence that the merging parties "repeatedly identify each other as significant competitors" and "respond to each other's pricing and marketing strategies."[128] The ordinary course documents cited by the court included statements by Kate Spade and Michael Kors executives accusing the other's brand of driving down prices.[129] The court concluded that "compelling and significant ordinary-course evidence indicates that Defendants are particularly close competitors,"[130] and that the unilateral anticompetitive effects were "corroborated by quantitative evidence."[131] Dr. Smith's merger simulation also indicated that the merger would result in $365 million in "consumer harm" annually, thereby evidencing that the "merger will likely lead to unilateral anticompetitive effects."[132]

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[123] *Id.* at *42 (citing AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 929d).

[124] *Id.* at *44. The court found that two especially significant types of barriers to entry are related to (1) supply chain, and (2) data and marketing.

[125] *Id.* at *51. The Court indicated that under the law there is a legal principle of corporate-wide profit maximization, with strong economic incentives for corporate divisions to cooperate to maximize overall profit. *Id.* at *54.

[126] The court indicated that this line of advocacy is simply an efficiencies defense for which the defendants failed to prove the necessary elements. *Id.* at *57. The claimed revitalization of Michael Kors was found to not be merger specific because defendants did not show that it "cannot be achieved by either company alone." *Id.* The decision noted that Michael Kors is already undergoing a brand transformation.

[127] Judge Rochon indicated that "[n]ot only are handbags important to women in many aspects of their lives. . . . Dr. Smith accounted for the possibility that certain consumer's next-best option in the event of a price increase was not in a handbag in the sensitivity case . . ." and his candidate market still passed the test. *Id.* at *61. The court later, in the "balancing of the equities" section, added that "[d]ownplaying the importance of handbags as nonessential discretionary items that consumers can simply choose not to buy if the price is too high ignores that handbags are important to many women, not only to express themselves through fashion but to aid in their daily lives—from supporting their career aspirations by transporting their work materials home or inspiring confidence in professional settings, to holding important personal items such as medications or personal hygiene products, to carrying a young child's snacks or toys. Plaintiffs often prevail in Section 7 cases involving consumer goods that are arguably less essential." *Id.* at *69.

[128] *Id.* at *62.

[129] *Id.* at *65.

[130] *Id.* at *67.

[131] *Id.*

[132] *Id.* at *68.

Although the decision discussed the dispute between the parties regarding what the FTC must do to establish a "likelihood of ultimate success,"[133] ultimately the court indicated it need not resolve this dispute "[b]ecause the FTC prevails under either standard."[134] The court found that the FTC had made a "clear showing" of a likelihood of ultimate success on the merits and that the FTC had "prove[n] that it is likely to succeed in convincing a federal court of appeals that the transaction violates Section 7."[135]

On October 28, 2024, the transaction parties filed an interlocutory appeal with the Second Circuit and the next day they sought expedited proceedings.[136] The appeal asserted that the district court's opinion "conflicts with the law, facts, and common-sense economics,"[137] ignores the highly differentiated nature of the products, and "settled precedent that products sold at a spectrum of prices and quality cannot be differentiated into separate markets."[138] Nor, according to the transaction parties, did the court consider the alternatives that consumers would have post-closing to paying more for Michael Kors handbags, which "misapprehends the commercial realities of the fashion industry."[139]

On November 14, 2024, the transaction parties decided to abandon the deal instead of awaiting the appeal's outcome.[140]

5. *FTC Loses Tempur Sealy/Mattress Firm Merger Challenge*

On July 2, 2024, the FTC unanimously voted to challenge the acquisition of the largest U.S. bedding retailer, Mattress Firm Group, Inc. ("Mattress Firm"), by the world's largest mattress supplier, Tempur Sealy International, Inc. ("Tempur Sealy").[141] A Statement of Commissioner Melissa Holyoak pointed to "substantial evidence generated by staff's thorough investigation, especially the parties' own ordinary-course documents" as supporting the decision to challenge the transaction.[142] The FTC issued an administrative complaint and filed a PI action in the U.S. District Court for the Southern District of Texas, alleging that Tempur Sealy will have the ability

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[133] *Id.* at *60. The FTC had asserted that it satisfies its burden if "it raises serious questions about the antitrust merits that warrant thorough investigation in the first instance by the FTC." *Id.* at *5; the Defendants indicated that this interpretation "cannot be squared with the statute's text, has not been adopted by the Second Circuit, and is wrong under" the Supreme Court's recent decision *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1575–76 (2024). *Id.*

[134] *Id.* at *5.

[135] *Id.* at *69.

[136] Notice of Interlocutory Civil Appeal, No. 24-2848 (2d Cir. Oct. 28, 2024); Defendants-Appellants' Emergency Motion for Expedited Proceedings, *FTC v. Tapestry, Inc.*, No. 24-2848 (2d Cir. Oct. 29, 2024), Notice of Interlocutory Civil Appeal, No. 24-2848 (2d Cir. Oct. 28, 2024).

[137] Emergency Motion, *supra* note 136, at 1.

[138] *Id.* at 5.

[139] *Id.*

[140] Press Release, Tapestry, Inc., *Tapestry, Inc. Announces Termination of Merger Agreement With Capri Holdings Limited* (Nov. 14, 2024), https://tapestry.gcs-web.com/news-releases/news-release-details/tapestry-inc-announces-termination-merger-agreement-capri.

[141] Press Release, Fed. Trade Comm'n, *FTC Moves to Block Tempur Sealy's Acquisition of Mattress Firm* (July 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm.

[142] Fed. Trade Comm'n, Statement of Comm'r Melissa Holyoak, *In the Matter of Tempur Sealy Int'l, Inc. and Mattress Firm Grp. Inc.*, Matter No. 2310016 (July 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/tempur-sealy-mattress-firm-statement-of-commissioner-holyoak-7-02-2024.pdf.

and the incentive to suppress competition and raise prices for mattresses once it acquires Mattress Firm.

The FTC alleged that the combination of "Tempur Sealy's manufacturing and supply operations with Mattress Firm's vast retail footprint" would give the combined company "enormous power at multiple parts of the mattress supply chain."[143] The FTC asserted that rival "mattress suppliers—which are predominately American manufacturers employing thousands of workers—are likely to lose access to the single most important retail channel, significantly impairing their ability to compete and potentially leading competing suppliers to reduce output, close factories, and lay off workers."[144] In contrast to other recent vertical challenges that focused on input-foreclosure, this case involves customer-foreclosure theories.

Mattress Firm is the only bricks-and-mortar ("BAM") multi-vendor retailer with a national footprint that offers a wide range of mattresses covering all but the most expensive price points. This includes what the FTC indicated the mattress industry refers to as "premium mattresses"—a category that purportedly is above entry-level mattresses and comprises the remaining mattresses other than the most expensive ones. According to the FTC, no other BAM retailer possesses the same combination of scale, product assortment, reputation, and sales expertise as Mattress Firm. Multi-vendor mattress special retailers such as Mattress Warehouse, Mancini's Sleepworld, and Denver Mattress, are reportedly local or regional companies with a limited BAM geographic presence and, in some cases, inferior delivery capabilities.

The FTC alleged the acquisition would particularly harm competition across the "premium mattress market," which are predominantly sold through BAM furniture stores and mattress specialty stores, the largest of which is Mattress Firm. The acquisition would purportedly enable Tempur Sealy "to dominate the market," and by "cutting off or degrading rivals' access" to Mattress Firm, and "could result in higher mattress prices, decreased product quality and choice, or reduced innovation."[145] Rival suppliers include Serta Simmons Bedding, the next-largest supplier after Tempur Sealy, and Resident Home LLC. The FTC asserted that, regardless of which method Tempur Sealy uses to foreclose or otherwise disadvantage its rivals, it would profit, competition would suffer, and consumers would pay more.

The transaction parties offered divestitures during the DOJ review, including divestiture of retail stores and a commitment to reserve some of Mattress Firm's slots for third-party premium mattresses. The FTC complaint asserted that these divestitures were insufficient to alleviate competitive harm. In addition, as with other recent cases, the FTC included a "labor" element to its concerns: by significantly impairing rivals' ability to compete, the acquisition could force rivals to close manufacturing plants in Arizona, Colorado, Georgia, North Carolina, Ohio, Utah, and Wisconsin.

Tempur Sealy immediately responded that the "FTC's perspective does not reflect all relevant facts and laws. The bedding industry is competitive with a vast selection of products, brands, price points and purchasing channels available to consumers. . . . Mattress Firm represents only a small fraction of the retail market, with thousands of brick-and-mortar stores and numerous online

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[143] Press Release, *supra* note 142.

[144] *Id.*

[145] *Id.*

options."[146] Tempur Sealy also argued that labor unions have not opposed the deal. Tempur Sealy indicated that it also had offered "appropriate commitments" to the FTC, such as maintaining Mattress Firm as a multi-branded retailer, working toward "post-merger supply agreements" with numerous suppliers, and offering a "guaranteed slot commitment for third-party manufacturers."[147] It also confirmed that it had proposed divesting certain stores and supporting infrastructure.[148]

In their answers to the FTC's administrative challenge, the transaction parties asserted that, while the complaint alleged potential harm to a tiny handful of mattress manufacturers who use Mattress Firm, the truth is that handful is just Serta Simmons. Moreover, the complaint focused on a limited and ill-defined slice of the mattress industry: premium mattresses. The parties asserted that there are thousands of mattress retailers, a prevalence of online sales, and many "premium" brands that rely mostly on their own retail operations. Mattress suppliers can also sell directly to customers. Tempur Sealy's internal transaction analyses assumed that Mattress Firm would remain a multi-brand retailer. Mattress Firm indicated that it "is not essential to any mattress manufacturer, nor to ensure that the mattress manufacturing segment remains competitive."[149] Tempur Sealy argued that it also has no incentive to upend the strategy that has made Mattress Firm successful. In prior transactions, Tempur Sealy had kept the retailers multi-branded. The answers also alleged that the Commission's exercise of rulemaking, prosecutorial, and adjudicative powers violates the separation of powers doctrine and Article III of the U.S. Constitution, the administrative proceedings are unconstitutionally insulated from Presidential oversight in violation of the separation-of-powers doctrine and Article II of the U.S. Constitution, and the administrative proceedings violate the Fifth Amendment's Due Process Clause.

On July 16, 2024, Eastern District of Texas Judge Charles R. Eskridge III set the PI hearing to begin on November 14, 2024. On July 19, 2024, Chief ALJ D. Michael Chappell issued a scheduling order for the administrative case that contemplated the trial commencing on December 4, 2024.[150] Judge Chappell indicated that the parties should try to get an earlier hearing date before the district court and, if that cannot be done, the parties should file a joint motion requesting a delay of the administrative proceeding. ALJ Chappell also asked the parties at the scheduling conference whether the parties could potentially settle their differences without litigation; both parties indicated that they had not reached a consensus on a settlement. On August 21, 2024, Judge Eskridge moved up the trial date by two days—to November 12, 2024.

On September 23, 2024, Tempur Sealy announced plans to divest its Sleep Outfitters subsidiary—which included 103 specialty mattress retail stores and area distribution centers—as well as 73 Mattress Firm retail locations, to MWSO Holdings Co. LLC, d/b/a Mattress

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[146] Press Release, Tempur Sealy Int'l, Inc., *Tempur Sealy International Issues Statement on U.S. Federal Trade Commission Challenge of Proposed Acquisition of Mattress Firm* (July 2, 2024), https://investor.tempursealy.com/news-releases/news-release-details/tempur-sealy-international-issues-statement-us-federal-trade; *see also* Sangita Shah, FTC Challenges Tempur Sealy-Mattress Firm, The Deal (July 3, 2024), https://pipeline.thedeal.com/article/00000190-77e7-dbc4-a9b2-ffe729500000/deal-news/regulation/ftc-challenges-tempur-sealy-mattress-firm.

[147] Press Release, Tempur Sealy, *supra* note 146.

[148] *Id.*

[149] Answer and Defenses of Respondent Mattress Firm Group Inc., *In the Matter of Tempur Sealy Int'l, Inc.*, FTC Dkt. No. 9433 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/611161.2024.07.09_-_mattress_firm_-_part_iii_answer.pdf.

[150] Scheduling Order, *In the Matter of Tempur Sealy Int'l, Inc.*, FTC Dkt. No. 9433 (July 19, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/611265.2024.07.19_scheduling_order.pdf.

Warehouse.[151] Under this proposed divestiture, Tempur Sealy would continue to supply its Tempur-Pedic Stearns & Foster and Sealy products to the divested stores.

On October 4, 2024, Tempur Sealy and Mattress Firm commenced a civil action in the Southern District of Texas seeking an injunction of the FTC's administrative proceedings against them and a declaration that the administrative proceedings violated Article III of the U.S. Constitution.[152] The complaint asserted that Article III of the Constitution allows only federal courts to make decisions regarding "private rights," such as "life, liberty and property."[153]

The trial before Judge Eskridge began on November 12, 2024. During closing arguments on December 16, 2024, Judge Eskridge drilled Tempur Sealy's counsel on the adequacy of Tempur Sealy's commitment to reserve 20% of slots at Mattress Firm stores for third-party mattress manufacturers, which is, according to Judge Eskridge, a 15% reduction from the *status quo*. The court suggested that Tempur Sealy's promise would "be more compelling if it was formalized in a binding contract or via a court stipulation."[154] Judge Eskridge also questioned the FTC on why, if Tempur Sealy had been able to overcome being kicked out of Mattress Firm stores and found alternatives to sell its products, he should not conclude "that it shows you can compete and succeed without Mattress Firm."[155]

On December 27, 2024, Tempur Sealy increased its commitment "[t]o address the Court's concern, Defendants now commit to the Court that, for five years post-closing, Mattress Firm will maintain the current percentage of third-party premium ($1,500+) slots (the 'Slot Commitment')."[156] On December 30, 2024, the court gave the FTC until January 8, 2025 to address how the commitment could be enforced and whether the duration is adequate; Judge Eskridge also ordered the FTC to submit a statement by January 10, 2025 to clarify "(i) the identity and authority of the decisionmaker or decisionmakers, and (ii) whether the FTC wishes to maintain or withdraw this action from further consideration."[157]

On January 31, 2025, the district court ruled for the transaction parties, denying the FTC's request for a PI. The FTC did not appeal this decision, and the parties closed the transaction.

C. Consent Decrees

The FTC entered into two proposed consents involving proposed transactions pre-litigation in 2024: (1) Exxon/Pioneer (petroleum companies);[158] and (2) Chevron/Hess (petroleum companies).[159]

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[151] Press Release, Tempur Sealy Int'l, Inc., *Tempur Sealy Provides Update on Proposed Mattress Firm Acquisition* (Sept. 23, 2024), https://investor.tempursealy.com/news-releases/news-release-details/tempur-sealy-provides-update-proposed-mattress-firm-acquisition.

[152] Complaint, *Tempur Sealy Int'l Inc. v. FTC*, No. 4:24-cv-03764 (S.D. Tex. Oct. 4, 2024).

[153] *Id.* ¶ 28.

[154] Ilana Kowarski, *Judge in Tempur Sealy case interrogated US FTC, defense during closings*, MLEX (Dec. 17, 2024), https://www.mlex.com/mlex/articles/2274775.

[155] *Id.*

[156] Ilana Kowarski, *Judge in Tempur Sealy case vows to assess new defense remedy, allow US FTC reply*, MLEX (Dec. 30, 2024), https://www.mlex.com/mlex/articles/2278062/judge-in-tempur-sealy-case-vows-to-assess-new-defense-remedy-allow-us-ftc-reply.

[157] Letter from the Court to the Parties at 1–2, *FTC v. Tempur Sealy Int'l, Inc.*, No. 24-cv-02508 (Dec. 29, 2024), ECF 485.

[158] Press Release, Exxon Mobil Corp., *ExxonMobil completes acquisition of Pioneer Natural Resources* (May 3,

In addition, on April 9, 2024, the FTC announced that it "was pleased" that Global Partners had revised its Gulf Oil terminal purchase to exclude a petroleum terminal in South Portland, Maine, which the FTC considered to be a threat to competition.[160]

D. Other FTC Challenges

1. *FTC Challenge of Consummated Acquisitions by U.S. Anesthesia Partners, Inc. Continued; Case Against Welsh, Carson, Anderson & Stowe Settled*

On September 21, 2023, the FTC brought a suit in the Southern District of Texas charging U.S. Anesthesia Partners, Inc. ("USAP") and Welsh, a private equity firm, of engaging in a multiyear anticompetitive scheme to consolidate anesthesiology practices in Texas, driving up the price of anesthesia services provided to Texas patients, and boosting their own profits.[161] Welsh created USAP in 2012, and through its investment in USAP—which varied between 23% and 50.2% over the relevant period—purportedly engaged in a "roll-up" scheme, buying nearly every large anesthesia practice in Texas. In total, the FTC alleges that the scheme involved over a dozen practices, 1,000 doctors, and 750 nurses. USAP reportedly supported its "roll-up" strategy by "entering or maintaining price-setting arrangements" with other, independent anesthesia groups

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2024), https://corporate.exxonmobil.com/news/news-releases/2024/0503_exxonmobil-completes-acquisition-of-pioneer-natural-resources. On May 2, 2024, the FTC conditioned clearance of Exxon's acquisition of Pioneer on Exxon's agreement to: (1) bar Pioneer's CEO from its board because he had allegedly made previous efforts to coordinate oil production levels with other oil producers and OPEC; (2) bar for five years from the board other Pioneer officials, except those specifically named by the FTC; and (3) undertake certain Clayton Act Section 8 attestation and reporting obligations for 10 years. Press Release, Fed. Trade Comm'n, *FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal* (May 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal. Republican Commissioners Holyoak and Ferguson dissented from the decision, alleging that the FTC had improperly leveraged its merger enforcement authority to extract a consent for behavior that is not tied to the merger itself. Fed. Trade Comm'n, Joint Dissenting Statement of Commissioner Melissa Holyoak and Commissioner Andrew N. Ferguson, *In the Matter of ExxonMobil Corp.*, FTC File No. 241-0004 (May 2, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneermh-afstmt.pdf. In addition, the FTC reportedly referred the matter to the DOJ for further investigation of potentially criminal conduct. Sabrina Valle & Liz Hampton, *US Greenlights Exxon-Pioneer Deal, Alleges Shale Founder Colluded with OPEC*, REUTERS (May 2, 2024), https://www.reuters.com/markets/deals/us-ftc-order-bans-exxon-mobil-pioneer-natural-resources-deal-2024-05-02/.

[159] Press Release, Fed. Trade Comm'n, *FTC Order Bans Hess CEO from Chevron Board in Chevron-Hess Deal* (Sept. 30, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-order-bans-hess-ceo-chevron-board-chevron-hess-deal. The FTC alleged that John Hess, the CEO of Hess Corp., had engaged in secretive talks with OPEC that may have contributed to inflated prices. In a three-to-two vote, the FTC required that Chevron stipulate that Hess would not join the Chevron Board of Directors, alleging in the complaint that appointment "could heighten the risk of harm to competition, including meaningfully increasing the risk of industry coordination." As in the *Exxon/Pioneer* matter (discussed *supra* note 158), FTC Commissioner Andrew Ferguson issued a Dissenting Statement pointing to the fact that the combination does not violate Clayton Act Section 7 and that the FTC's theory rested on a series of implausible and unsupported assumptions that fell "well short of pleading a violation of the Clayton Act." Fed. Trade Comm'n, Dissenting Statement of Commissioner Andrew N. Ferguson, *In the Matter of Chevron Corp. and Hess Corp.*, FTC File No. 241-0008, https://www.ftc.gov/system/files/ftc_gov/pdf/chevron-hess-ferguson-statement_0930.pdf.

[160] Press Release, Fed. Trade Comm'n, *FTC Statement on Amendment to Global Partners, Gulf Oil Acquisition*, (Apr. 9, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-statement-amendment-global-partners-gulf-oil-acquisition.

[161] Press Release, Fed. Trade Comm'n, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas* (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

that shared key hospitals in Houston and Dallas. Under these arrangements, USAP charged its fees for the services even though the services were provided by these independent groups that had been charging lower prices. Finally, the complaint alleges that USAP and Welsh entered into a market allocation agreement with another large anesthesia services provider.

The FTC indicated that USAP is now the dominant provider of anesthesia services in Texas and in many of its major metropolitan areas, including Houston and Dallas. It is at least four times larger than the second-largest group in Houston; six times larger than the second-largest group in Dallas; and nearly seven times larger than the second-largest group in all of Texas. It is also one of the most expensive, with reimbursement rates that are double the median rate of other anesthesia providers in Texas. The FTC seeks the issuance of a permanent injunction for engaging in similar and related conduct in the future and such other equitable relief, including structural relief, to redress and prevent recurrence of this conduct.

USAP responded the same day with a press release that "refuted" the FTC's allegations:

> Texas is an extremely competitive environment in healthcare, generally, and in anesthesia, in particular. USAP competes with both large and small anesthesia groups and individual anesthesiologists across the state. All USAP practices are clinically independent and locally governed by physician owners who have control of all clinical decisions. In USAP's unique model, these specialist clinicians are able to focus on patients while supported by a robust technical and business infrastructure that enhances rather than detracts from patient care.
>
> The FTC alleges that USAP's acquisitions in Texas gave USAP outsized market power, which impacted prices to health plans. In actuality, no anesthesia practice has "power" over health plans—many of which dwarf USAP and any physician group in size, revenue, and profits. In Texas, USAP's commercial prices—which are negotiated with and agreed to by each health plan—have increased modestly over the years and, which adjusted for inflation, have remained essentially flat.
>
> The reimbursements USAP receives for care are consistent with industry practice and are reasonable and necessary to support a viable medical practice and rising labor costs. USAP's average annual net rate increases from major health plans are modest and in line with national benchmarks. In addition, USAP's quality programs, clinical protocols and data-driven approaches support improved outcomes, which ultimately bring significant value to the healthcare delivery system and help to reduce the total cost of care to health plans. USAP has an in-network strategy and repeatedly has successfully negotiated long-term renewals with our health plans in Texas and across the country.[162]

The defendants filed motions to dismiss on November 20, 2023[163] and the FTC filed its opposition briefs on January 19, 2024.[164] On May 13, 2024, Judge Kenneth Hoyt dismissed the

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[162] Press Release, U.S. Anesthesia Partners, *U.S. Anesthesia Partners Refutes Federal Trade Commission's Misguided Allegations* (Sept. 21, 2023), https://www.usap.com/news-and-events/news/us-anesthesia-partners-refutes-federal-trade-commissions-misguided-allegations.

[163] U.S. Anesthesia Partners, Inc., Motion to Dismiss the FTC's Complaint, *FTC v. U.S. Anesthesia Partners, Inc.*, No. 23-cv-03560 (S.D. Tex. Nov. 20, 2023); Welsh Carson Entities' Motion to Dismiss, *FTC v. U.S. Anesthesia Partners, Inc.*, No. 23-cv-03560 (S.D. Tex. Nov. 20, 2023).

[164] Plaintiff FTC's Opposition to U.S. Anesthesia Partners, Inc.'s Motion to Dismiss No. 23-cv-03560 (S.D. Tex. Jan. 19, 2024); Plaintiff FTC's Opposition to Welsh Carson Entities' Motion to Dismiss No. 23-cv-03560 (S.D. Tex. Jan. 19, 2024).

claims against Welsh, while allowing the case to proceed against USAP.[165] The court noted that because Welsh had scaled back its investment in USAP in 2017, the claims against it did not meet the statutory requirement that Section 13(b) be used on firms that are violating or are about to violate the law. The court indicated that the FTC had not cited any support for finding "a minority noncontrolling investor—however hands-on"—liable under Section 13(b).

USAP filed an interlocutory appeal of the district court's denial of its motion to dismiss the FTC's complaint against it.[166] USAP asserted that the FTC's suit exceeded "clear statutory and constitutional limits" on the FTC's ability to seek injunctions outside of its administrative proceedings by only bringing an enforcement action in federal district court. The FTC filed an opposed motion to dismiss appeal for lack of jurisdiction and USAP's inability to show that it will suffer any cognizable harm if its arguments were not reviewed immediately.[167] On August 15, 2025, the Fifth Circuit dismissed the appeal for lack of jurisdiction: "nothing will prevent Appellant from presenting its arguments to this court after a final judgment has been issued in this matter."[168] The case against USAP continued to proceed in federal court.

On January 17, 2025—the last business day of the Biden Administration—the FTC announced, pursuant to a five-to-zero vote, a settlement with Welsh resolving a potential second antitrust case against it, this time in administrative court.[169] The allegations in this action are substantially identical to that filed previously in federal district court. Under the consent order, Welsh agreed to limit its involvement with USAP to its current holdings, relinquished a board seat and its position as Chair of the board of directors, and to notify the FTC of any proposed future acquisitions and investments in anesthesia and other hospital-based physician practices nationwide. The consent also granted the FTC certain discovery rights in its federal court case against USAP.

The three democratic Commissioners—FTC Chair Khan and Commissioners Slaughter and Bedoya—issued a statement, focusing on the "serial acquisitions" by "private equity firms" and their "use of 'buy-and-build' strategies, where a portfolio company buys a firm . . . and then 'rolls-up' of smaller competitors."[170] The statement asserted that by consolidating power gradually and incrementally through a series of smaller deals, firms have sidestepped antitrust review. The statement pointed to the Biden Administration's Section 5 policy statement, the 2023 Merger Guidelines, combined with the soon-to-be-implemented HSR notification form changes that "mitigat[e] blind spots and allow[] enforcers to spot roll-ups at their inception," as updates to its

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[165] *FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-03560, 2024 U.S. Dist. LEXIS 85714 (S.D. Tex. May 13, 2024).

[166] Defendant-Appellant U.S. Anesthesia Partners, Inc.'s Notice of Appeal, *FTC v. U.S. Anesthesia Partners, Inc.*, No. 24-20270 (5th Cir. June 17, 2024).

[167] Motion of the FTC to Dismiss Interlocutory Appeal for Lack of Jurisdiction, *FTC v. U.S. Anesthesia Partners, Inc.*, No. 24-20270 (5th Cir. July 19, 2024).

[168] Order, *FTC v. U.S. Anesthesia Partners, Inc.*, No. 24-020270, 2024 U.S. App. LEXIS 31638, at *7–*8 (5th Cir. Aug. 15, 2024).

[169] Press Release, Fed. Trade Comm'n, *FTC Secures Settlement with Private Equity Firm in Antitrust Roll-Up Scheme Case* (Jan. 17, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-secures-settlement-private-equity-firm-antitrust-roll-scheme-case.

[170] Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya at 3, *In the Matter of Welsh, Carson, Anderson & Stowe*, FTC File No. 201-0031 (Jan. 17, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/welsh-carson-consent-lk-statement.pdf.

enforcement tools.[171] According to the statement, the settlement "builds upon these significant programmatic advances in addressing serial acquisitions."[172] The statement further asserted that the order is notable for its novel private equity remedies. To ensure that Welsh Carlson "cannot evade" the order's provisions, "the order is drafted so that each of the provisions apply both to Welsh Carson's existing private equity funds as well as any investment vehicles, funds or otherwise, that the firm may form in the future."[173] The statement concludes by arguing that including these provisions "establishes a valuable blueprint for future Commission orders involving financially sophisticated actions."[174]

Republican FTC Commissioners Ferguson and Holyoak issued their own concurring statement. They label the order as "a routine law-enforcement matter embodying a traditional approach to competition law," rather than Chair Khan's statement, which "suggest[ed] that this case is extraordinary because it involves 'private equity' and 'serial acquisitions.' "[175] This statement further labelled the reference to the 2023 Merger Guidelines as a "red herring" and concluded by arguing "[t]he public should disregard my Democratic colleagues' rather clumsy attempt to make a run-of-the-mill enforcement matter seem like an avant-garde application of novel provisions of the 2023 Guidelines."[176]

2. *FTC Enforcement Action Against 7-Eleven Remains Pending*

On December 4, 2023, the FTC sued 7-Eleven, Inc. and its parent ("7-Eleven") in federal district court in the District of Columbia for allegedly violating a 2018 FTC consent order when it acquired a fuel outlet in St. Petersburg, Florida without providing the Commission prior notice.[177] 7-Eleven entered into the 2018 consent order in connection with its acquisition of more than 1,000 retail fuel outlets with attached convenience stores from Sunoco. The consent barred 7-Eleven from acquiring Sunoco fuel outlets in specific local markets, including in the local market surrounding the St. Petersburg location in the Tampa, Florida metropolitan area, and required it to provide the FTC with notice before acquiring any interest in specific third-party retail fuel outlets in certain local markets for a period of 10 years. The FTC alleged that the fuel outlet acquired by 7-Eleven was specifically named in an exhibit as requiring prior notice to the FTC.

7-Eleven reportedly does not dispute that it violated the prior notice provision of the 2018 consent order. After acquiring the St. Petersburg outlet, 7-Eleven tore it down, rebuilt it, and began operations at the site in May 2020. The FTC also cited the failure to disclose the acquisition of the outlet in periodic compliance reports as another violation. The FTC asserted that, in response to its violation of the Consent Order and at the Commission's urging, 7-Eleven sold the St. Petersburg outlet to a third party four years after it had illegally acquired the outlet. The FTC also alleged that

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[171] *Id*. at 4.

[172] *Id*.

[173] *Id*. at 5.

[174] *Id*.

[175] Fed. Trade Comm'n, Concurring Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak at 1, *In the Matter of US Anesthesia Partners/Guardian Anesthesia*, FTC File 201-0031 (Jan. 17, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/welsh-carson-ferguson-statement-final.pdf.

[176] *Id.* at 2.

[177] Press Release, Fed. Trade Comm'n, *FTC Sues 7-Eleven for Anticompetitive Acquisition in Violation of 2018 Consent Order* (Dec. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-sues-7-eleven-anticompetitive-acquisition-violation-2018-consent-order.

7-Eleven's removal of a competitor from the market benefitted its other locations in that market, and likely allowed 7-Eleven to generate additional profits from higher fuel prices. Citing 7-Eleven's bad faith, the FTC sought a maximum civil penalty of $77,535,640.

On February 5, 2024, 7-Eleven filed a motion to dismiss, claiming that only the U.S. Attorney General can seek civil penalties on behalf of the FTC.[178]

II. DOJ Enforcement

The DOJ began 2024 by winning its *JetBlue/Spirit* case; although Jet Blue initially appealed this decision, it subsequently abandoned the transaction.[179] The DOJ and ASSA/ABLOY filed pleadings with the court disputing the work to be undertaken by the Monitor, at ASSA/ABLOY's expense, under the final judgment entered into by the parties to resolve concerns regarding ASSA/ABLOY's acquisition of Spectrum Brands.[180]

In November 2024, the DOJ filed a PI action in the federal district court of Maryland against UnitedHealth Group's ("UHG") acquisition of home health and hospice rival Amedisys. In addition, the DOJ announced the abandonment of several transactions that were terminated because of antitrust concerns.[181] These included, in July 2024, UHG's abandonment of its proposed acquisition of Stewardship Health Group Inc. as well as a second acquisition of an unnamed physician group. AAG Kanter issued a statement indicating that these provider deals "raised questions about quality of care, cost of care and working conditions for doctors, nurses and other healthcare providers."[182]

In the final days of the Biden Administration, the DOJ brought a PI action seeking to block American Express Global Business Travel's proposed acquisition of corporate travel rival CWT

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[178] Defendants' Motion to Dismiss, *FTC v. Seven & I Holdings Co.*, No. 1:23-cv-03600, ECF 22 (D.D.C. Feb. 5, 2024).

[179] On March 4, 2024, JetBlue and Spirit announced that they had terminated their merger agreement, indicating that "they had come to the decision that they probably couldn't overcome the legal and regulatory hurdles." Alison Sider, *JetBlue and Spirit Airlines Call Off Merger Deal*, WALL ST. J. (Mar. 4, 2024), https://www.wsj.com/business/airlines/jetblue-airways-scraps-3-8-billion-takeover-of-spirit-airlines-e1d014b0.

[180] *See* Justin Wise, *DOJ, Assa Abloy Reach Deal on Scope of Antitrust Monitor's Probe*, BLOOMBERG LAW (July 26, 2024), https://news.bloomberglaw.com/antitrust/doj-assa-abloy-reach-deal-on-scope-of-antitrust-monitors-probe. At a June 2024 hearing, Judge Anna C. Reyes of the D.C. District Court had voiced concern about the scope of the Government's investigation and criticized the monitor's budget as "insane."

[181] On March 28, 2024, Fresh Express Acquisition LLC abandoned its proposed acquisition of Dole plc's Fresh Vegetable division. The DOJ's concerns focused on "competition in the packaged salad market." Press Release, U.S. Dep't of Justice, *Fresh Express Abandons Proposed Acquisition of Dole's Packaged Salad Business in Response to Antitrust Division's Concerns* (Mar. 28, 2024), https://www.justice.gov/opa/pr/fresh-express-abandons-proposed-acquisition-doles-packaged-salad-business-response-antitrust. On April 22, 2024, TopBuild abandoned its proposed acquisition of building insulation products rival Specialty Products & Insulation. Press Release, U.S. Dep't of Justice, *TopBuild Abandons Proposed Acquisition of SPI After Antitrust Division Concerns* (Apr. 22, 2024), https://www.justice.gov/opa/pr/topbuild-abandons-proposed-acquisition-spi-after-antitrust-division-concerns. In May 2024, Principal Deputy Assistant Attorney General Doha Mekki indicated that there had been "roughly 20 or so [deals] that have been abandoned" due to antitrust concerns since AAG Jonathan Kanter's appointment. Ben Brody, *Questions from US DOJ preceded roughly 20 deal abandonments under Kanter, Mekki says*, MLEX (May 2, 2024), https://www.mlex.com/mlex/articles/2154805/questions-from-us-doj-preceded-roughly-20-deal-abandonments-under-kanter-mekki-says.

[182] Press Release, U.S. Dep't of Justice, *UnitedHealth Group Abandons Two Acquisitions Following Antitrust Division Scrutiny* (July 25, 2024), https://www.justice.gov/opa/pr/unitedhealth-group-abandons-two-acquisitions-following-antitrust-division-scrutiny.

Holdings,[183] as well as a civil penalty action against private equity firm KKR, alleging serial and flagrant violations of the HSR Act.[184] In 2024, the DOJ did not enter into any consent decrees to resolve concerns about transactions; however, a number of acquisitions were reportedly abandoned by the transaction parties when faced with DOJ opposition.

A. DOJ Brought One New Court Challenge in 2024: The *United Health/Amedisys* Transaction

On November 12, 2024, the DOJ, along with the States of Maryland, Illinois, New Jersey, and New York, filed an action in the federal district court of Maryland challenging UHG's acquisition of Amedisys, Inc. ("Amedisys").[185] Since UHG's 2023 acquisition of LHC Group Inc. ("LHC"), UHG and Amedisys had been two of the largest home health and hospice providers in the United States. Furthermore, UHG and LHC are alleged to be fierce competitors for both home health services and hospice nurses. According to the complaint, after the acquisition, UHG's market share after the transaction would make the merger presumptively illegal (*i.e.*, in excess of 30%) in hundreds of local home health care markets in 23 states and the District of Columbia, dozens of local hospice markets in eight states, and hundreds of local markets for the home health and hospice nurse labor market in 24 states. In addition, the nation's three largest home health providers would be owned by the nation's two largest Medicare Advantage insurers—UHG with LHV and Amedisys, and Humana with Kindred (which it had purchased in 2021). The DOJ concluded that "[e]liminating competition between [UHG] and Amedisys would harm patients who receive home health and hospice services, insurers who contract for home health services, and nurses who provide home health and hospice services."[186]

To address some of the overlaps, UHG proposed to divest over 100 facilities to VitalCaring Group ("VitalCaring"). The complaint alleged that this divestiture would not alleviate harm in over 100 markets, and that VitalCaring has lower quality scores than either UHG or Amedisys, but has significant financial challenges, including a large legal judgment. VitalCaring had been operating for only three years and the planned divestiture acquisition would almost double its size.[187]

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[183] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Global Business Travel Group's Proposed Acquisition of CWT Holdings* (Jan. 10, 2025), https://www.justice.gov/opa/pr/justice-department-sues-block-global-business-travel-groups-proposed-acquisition-cwt#:~.

[184] Press Release, Fed. Trade Comm'n, *Justice Department Sues KKR for Serial Violations of Federal Premerger Review Law* (Jan. 15, 2025), https://www.justice.gov/opa/pr/justice-department-sues-kkr-serial-violations-federal-premerger-review-law. On January 30, 2025, the DOJ—now nominally under the Trump Administration's leadership—brought a PI action in the Northern District of California, seeking to enjoin HPE's acquisition of Juniper Networks.

[185] Complaint, *United States v. UnitedHealth Group Inc.*, No. 1:24-cv-03267-JKB (D. Md. Nov. 12, 2024), https://www.justice.gov/opa/media/1376671/dl.

[186] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block UnitedHealth Group's Acquisition of Home Health and Hospice Provider Amedisys* (Nov. 12, 2024) https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-groups-acquisition-home-health-and-hospice.

[187] Complaint, *supra* note 186, ¶ 11. On December 4, 2024, the Delaware Court of Chancery ruled that VitalCaring would need to share its future profits with Encompass Health and Enhabit, after finding that April Anthony, VitalCaring's chief executive officer, had breached her duty of loyalty to Encompass in the formation of VitalCaring and its subsequent dealings. *Enhabit, Inc. v. Nautic Partners IX, L.P.*, C.A. No. 2022-0837-LWW, 2024 WL 4929729 (Del. Ch. Dec. 2, 2024), https://courts.delaware.gov/Opinions/Download.aspx?id=372440. The complaint further criticized the divestiture by noting that in 2022 a Texas state court, in a related action, held that Ms. Anthony, while CEO of Encompass, "ran VitalCaring 'from the shadows,' and "in violation of her contractual duties to Encompass." Complaint, *supra* note 186, ¶ 12.

The complaint also seeks civil penalties in the amount of $51,744 against Amedisys for falsely certifying compliance with the second request under the HSR Act. Amedisys allegedly at the time of its sworn cortication failed to produce millions of documents or disclose the deletion of other documents.

UHG responded by claiming on the Optum website that "home health and hospice care are highly competitive markets and this transaction will enhance that . . . . In metropolitan areas with approximately 500,000 residents, there are an average of 26 agencies serving the metro area. Geographies such as these illustrate the highly fragmented nature of the home health industry and the numerous options available to patients for home health care."[188] Once combined, UHG and Amedisys would operate just a fraction of all the home health and hospice care markets nationally. This combination will not adversely impact services in the United States, with competition remaining strong across all metropolitan and county rural areas.[189]

On December 2, 2024, the Chancery Court in Delaware ordered VitalCaring and its PE investors to share future profits with Encompass Health and Enhabit, Inc.[190] As a result, UHG and Amedisys terminated their plans to divert certain medical centers to VitalCaring on January 3, 2025.[191] The impact of this termination on the DOJ's merger challenge is yet to be determined.

B. DOJ Consents

Breaking from decades of precedent, the DOJ entered into no consent decrees beginning in 2022, except for its settlement in *ASSA/ABLOY*, which occurred only after the case had been brought in federal district court challenging the deal.

III. Agencies Took Bold Steps to Reform Substantive and Procedural Enforcement

A. Adopted Radical Changes to the HSR Notification Form Pending at End of the Biden Administration

On June 27, 2023, the FTC unveiled proposed changes to the reporting obligations under the HSR Act.[192] If adopted as final rules, these changes would have materially increased filing burdens as well as hindered parties' ability to file and close quickly, even in non-problematic transactions. The 60-day notice and comment period were scheduled to end on August 28, 2023; however, the agencies extended that deadline to September 27, 2023.[193]

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[188] *Optum + Amedisys: Improving home health care for patients and families*, Optum (last visited Jan. 23, 2024), https://www.improvinghomecare.com/. *See also* Andrew Cass, *UnitedHealth launches website to defend Amedisys deal*, BECKER'S PAYER ISSUES (Nov. 15, 2024), https://mail.beckerspayer.com/m-and-a/unitedhealth-launches-website-to-defend-amedisys-deal.html.

[189] *Id.*

[190] *See supra* note 188.

[191] Katherine Hamilton, *UnitedHealth and Amedisys End Sales of Medical Centers to VitalCaring*, WALL ST. J. (Jan. 8, 2025), https://www.wsj.com/health/healthcare/unitedhealth-and-amedisys-end-sales-of-medical-centers-to-vitalcaring-39f9dca2.

[192] Press Release, Fed. Trade Comm'n, *FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review* (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

[193] Press Release, Fed. Trade Comm'n, *FTC and DOJ Extend Public Comment Period by 30 Days on Proposed Changes to HSR Form* (Aug. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-doj-extend-public-comment-period-30-days-proposed-changes-hsr-form.

On October 10, 2024, the FTC, with the concurrence of the DOJ, announced the FTC's unanimous vote to adopt the final rule.[194] Though not as extensive and burdensome as originally proposed, these changes will increase parties' filing burdens and limit their ability to file quickly, even in non-problematic transactions. Absent judicial intervention, the final rule will become effective 90 days after it was published in the Federal Register (*i.e.*, February 10, 2025).[195] The FTC also announced that, once the final rule goes into effect, it will lift the three-and-a-half-year "temporary suspension" of granting early termination of the HSR waiting period in transactions not needing further agency investigation.

The final rule required the following additional information:

- descriptions of existing or potential horizontal overlaps *and* vertical or supply relationships between the filing parties, accompanied by extensive sales data, customer information, and licensing or supply arrangements;
- transaction-related documents created by or for "supervisory deal team leads,"[196] in addition to officers and directors;
- information regarding the parties' minority investors, including in all the entities directly or indirectly controlled by the parties (with some limitations, particularly for the target, *e.g.*, information regarding minority investors in the target who will no longer be investors following consummation of the transaction need not be provided);
- lists of officers and directors of the acquiring person and certain entities within the acquiring person who also serve as an officer or director of an entity that derives revenue in the same NAICS code or same industry as the target(s);[197]
- a narrative description with citations to documents produced with the HSR of all strategic rationales for the transaction that also addresses any inconsistencies with the transaction rationale(s) in documents included in the HSR filing;
- regularly prepared plans and reports provided to CEOs and all plans and reports provided to the parties' boards of directors that discuss market shares, competition, competitors, or markets for any overlapping product or service created within a year of filing;
- information regarding foreign government subsidies, as prescribed by the Merger Filing Fee Modernization Act of 2022;[198] and

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[194] Press Release, Fed. Trade Comm'n, *FTC Finalizes Changes to Premerger Notification Form* (Oct. 10, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form.

[195] Final Rule, Premerger Notification: Reporting and Waiting Period Requirements, 89 Fed. Reg. 89,216 (Nov. 12, 2024) (to be codified at 16 C.F.R pts. 801, 803), https://www.govinfo.gov/content/pkg/FR-2024-11-12/pdf/2024-25024.pdf.

[196] *Id.* at 89,279. The "supervisory deal team lead" is "the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer. . . . [If] the only individuals supervising the strategic assessment of the deal are already either an officer or director, filers can state that this is the case and identify an officer or director as the supervisory deal team lead." *Id.*

[197] The Final Rule limits this requirement to only the officers and directors of "those entities within the acquiring person that are responsible for the development, marketing, or sale of the products or services identified in the Overlap Description or the Supply Relationships Description, or directly or indirectly control or are controlled by the acquiring entity." *Id.* at 89,296–97.

[198] Merger Filing Fee Modernization Act. H.R. 3843, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3843, enacted as part of the Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 117th

- existing or pending procurement contracts from the Department of Defense or intelligence community.

The changes adopted in the final rule reflected a paradigm shift in the antitrust agencies' historical review and investigatory practices, placing the burden on filing parties to develop detailed explanations and analyses, and gather significant amounts of factual material, for almost every reportable transaction.[199]

On January 10, 2025 the Chamber of Commerce of the United States of America, Business Roundtable, American Investment Council, and Longview Chamber of Commerce ("Chamber") brought a civil action against the FTC in the Eastern District of Texas challenging the legality of the new HSR form.[200] The complaint, among other things, alleged: (1) the new form exceeds the constraint imposed by the HSR Act on the kinds of information and documentation the FTC may demand in the initial notification; (2) no rational cost benefit analysis could have concluded that the additions to the form are justified; (3) at a minimum, on an individual basis, those particularly burdensome additions to the form are beyond the FTC's authority; (4) the FTC failed to adequately explain why it needed to embark on this unprecedented expansion of the form; and (5) the additions to the new form are arbitrary and capricious because they lack reasoned explanation of the FTC's rejection of far less burdensome alternatives available for addressing whatever may be "a genuine problem" with the current form. The Chamber sought a declaratory judgment that the new form is in excess of statutory authority, arbitrary, capricious, or otherwise contrary to law; either in whole or in part, an order setting aside the changes; and an order enjoining the FTC from enforcing the changes.

Despite the pending legal challenge and the transition in leadership, the new rules went into effect as scheduled on February 7, 2025.

B. FTC Settled HSR Act Violations with Large Civil Penalty

On September 18, 2024, the FTC settled with Ryan Cohen, an activist investor and current CEO and chairman of GameStop, for his failure to file a required HSR Act notification in connection with open market purchases of Wells Fargo voting securities. Despite no allegation that Cohen had previously violated the HSR Act, the FTC imposed a civil penalty of nearly $1 million.[201]

While Cohen's holdings of Wells Fargo were always far below 10 percent, the FTC nevertheless determined that his acquisitions were not eligible for the "investment only" exemption. The DOJ, which filed the civil antitrust suit on the FTC's behalf, cited Cohen's "periodic communications with WF's leadership regarding suggestions to improve WF's business and to advocate for a potential board seat," to conclude that his written self-advocacy to join the board demonstrated an intent to participate "in the formulation, determination, or direction of the basic business decisions" of Wells Fargo, which is contrary to a passive investment-only intent.[202]

Cong., H.R. 2617 (2022), https://www.congress.gov/bill/117thcongress/house-bill/2617.

[199] "801.30" transactions, *i.e.*, tender offers and acquisitions of voting securities from third parties, are not subject to many of the new filing requirements.

[200] *Chamber of Commerce of the USA v. FTC*, C.A. No. 6:25-cv-009 (E.D. Tex. Jan. 10, 2025).

[201] Press Release, Fed. Trade Comm'n, *GameStop CEO Ryan Cohen to Pay Nearly $1 Million Penalty to Settle Antitrust Law Violation* (Sept. 18, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/gamestop-ceo-ryan-cohen-pay-nearly-1-million-penalty-settle-antitrust-law-violation.

[202] Competitive Impact Statement, *USA v. Ryan Cohen*, No. 1 :24-cv-02670-RLJ (D.D.C. Sept. 18, 2024),

Although the FTC has historically considered a number of factors, including, among other things, whether the violation "was the result of understandable or simple negligence," in determining whether to seek civil penalties for a HSR Act violation. While the FTC acknowledged that Cohen's violation was "inadvertent" and made no suggestion that he had previously violated the HSR Act, the complaint alleged that his failure to file was "not excusable negligence," given "the scope of Cohen's open market acquisitions"—each of which required him "to decide affirmatively and actively to acquire voting securities." The FTC's settlement with Cohen is among the steepest penalties ever imposed on an individual investor for a first-time violation.

C. Revised Bank Mergers Policies Finally Released

1. *Overview*

In a coordinated series of announcements on September 17, 2024, the DOJ, the FDIC, and the OCC each issued final revisions to their bank merger policies. Notably absent was the Federal Reserve Board. The announced changes follow more than three years after the issuance of the Biden Administration's 2021 Executive Order on Promoting Competition in the American Economy initiative. These revised policies appear to have few substantive changes; although these revisions will change the review of bank mergers on the margins, they do not fundamentally shift bank merger policy. It remains to be seen how these changes will be implemented and whether three decades of close coordination among the banking regulators will be disrupted.[203]

The June 2021 Executive Order "encouraged" the Attorney General, in consultation with the heads of the Federal Reserve Board, the FDIC and the OCC, "to review current practices and adopt a plan, not later than 180 days after the date of this order, for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956."[204] The related fact sheet made a number of negative and, in some cases, misleading observations about bank M&A, with little factual support, including that bank M&A raises costs for consumers, restricts credit to small businesses and harms low-income communities.

The DOJ withdrew the 1995 Bank Merger Guidelines and indicated that it will instead rely on the 2023 Merger Guidelines—which apply to all other industries—in evaluating the competitive effects of bank mergers.[205] The DOJ also issued a three-page "banking addendum" to be used together with the 2023 Merger Guidelines for bank mergers.[206] The 1995 Bank Merger Guidelines appear to continue to govern the Federal Reserve's competitive review of bank mergers. The Federal Reserve System, which had jointly issued the 1995 Guidelines, did not join in, or issue any statements, regarding the withdrawal of the Guidelines.

The addendum highlighted the unique statutory scheme under which bank mergers are evaluated, noting that the DOJ's "review process is only one part of the statutory scheme . . .

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https://www.ftc.gov/system/files/ftc_gov/pdf/Cohen-CIS-filed.pdf/.

[203] David S. Neill, Christina C. Ma & Emily E. Samra, *Divergence, Disorder, and the Future of Bank Merger Review*, THE ANTITRUST SOURCE (Dec. 2024), https://www.americanbar.org/content/dam/aba/publications/antitrust/source/2024/december/divergence-disorder-future-bank-merger-review.pdf.

[204] Exec. Order No. 14,036, Promoting Competition in the American Economy, *supra* note 11.

[205] Press Release, U.S. Dep't of Justice, *Justice Department Withdraws from 1995 Bank Merger Guidelines* (Sept. 17, 2024), https://www.justice.gov/opa/pr/justice-department-withdraws-1995-bank-merger-guidelines.

[206] U.S. Dep't of Justice, 2024 Banking Addendum to 2023 Merger Guidelines (Sept. 17, 2024), https://www.justice.gov/atr/media/1368576/dl.

focuse[d] only on the competitive factors involved in a bank merger," whereas the banking agencies consider "other statutory factors" in reviewing bank merger applications, including the "convenience and needs of the community," which may override competitive concerns.[207] At the same time, and unlike in nonbank antitrust challenges, the DOJ has an automatic stay to stop any bank merger that was approved by a bank regulatory agency unless the parties can show that the DOJ's complaint is frivolous. If the DOJ challenges a merger approved by the banking regulators, a court must consider the same statutory factors as the banking regulators and not focus simply on antitrust considerations.

2. *OCC*

The OCC's final rule and policy statement documented its existing practices in reviewing bank mergers, rather than to institute changes. The OCC eliminated the streamlined business combination application and listed the attributes of bank merger transactions that support approval and those that raise regulatory concerns. The OCC clarified that when an application contains all of the listed positive indicators, it will "tend to withstand scrutiny more easily and [be] more likely to be approved expeditiously."[208] The OCC clarified that there is a middle category of transactions that do not feature all of the indicators that support approval but also have none of the indicators that raise supervisory or regulatory concerns, and that many of these transactions would nonetheless be approved. The agency also stated that the indicators of regulatory or supervisory concern do not preclude OCC approval of an application.

The final rule does not address the OCC's competition factor review "[g]iven complexities of the competition factor review and the involvement of the Department of Justice."[209]

3. *FDIC*

The FDIC has limited authority to review proposed mergers between banks, reducing the impact of many of the changes in the new FDIC statement of policy. The FDIC only has jurisdiction to approve a bank merger application where the FDIC is the primary federal regulator of the resulting bank. Of the 20 largest banks, the FDIC is the primary federal regulator of only two of them. The FDIC's final statement is similar to the DOJ's approach and sets a higher bar for mergers to meet the "convenience and needs" of the community. The FDIC expects that a bank merger will enable the resulting bank "to better meet the convenience and the needs of the community to be served than would occur absent the merger"—that is, the combined bank must meet the convenience and needs of its community above and beyond simply aggregating the performance of the two merger partners.[210]

The FDIC's final statement appears to place more authority with the FDIC board itself, requiring applications that "do not warrant a favorable finding on one or more statutory factors" to be elevated to the FDIC board for additional review and final disposition.

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[207] *Id*. at 2–3.

[208] OCC, Final Rule, Business Combinations Under the Bank Merger Act, 89 Fed. Reg. 78,207, 78,218 (Sept. 25, 2024), https://www.govinfo.gov/content/pkg/FR-2024-09-25/pdf/2024-21560.pdf.

[209] *Id*. at 78,209.

[210] FDIC, Final Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 79,125, 79,127 (Sept. 27, 2024), https://www.govinfo.gov/content/pkg/FR-2024-09-27/pdf/2024-22189.pdf.

IV. Conclusion

Antitrust policy and enforcement remained in the political limelight throughout the Biden Administration. Even absent passage of legislation to alter materially the merger review standards and HSR rule changes, the DOJ and the FTC continued to be very active in investigating and undertaking enforcement actions in mergers. Particularly hot areas included nascent/potential competition, especially in high technology/pharma areas, vertical transactions, and digital/data sectors. More broadly, some of the policy changes may have a lasting effect in the next Administration.

Heightened antitrust enforcement conditions existed—and will likely continue to 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 consider these trends when negotiating their deal terms and adopting their regulatory strategies.