

MERGER ANTITRUST LAW

Unit 5: H&R Block/TaxACT

Classes 10-14

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September 20, 2025

DOJ Merger Challenges

FEDERAL COURT INJUNCTIONS

CLAYTON ACT

Clayton Act § 15. Restraining violations; procedure

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

FEDERAL RULES OF CIVIL PROCEDURE

Rule 65. Injunctions and Restraining Orders

- (a) Preliminary Injunction.
 - (1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.
 - (2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
- (b) Temporary Restraining Order.
 - (1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
 - (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result

to the movant before the adverse party can be heard in opposition;
and

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

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

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

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

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

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

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

- (A) state the reasons why it issued;
- (B) state its terms specifically; and
- (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

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

- (A) the parties;
- (B) the parties' officers, agents, servants, employees, and attorneys;
and
- (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

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

H&R Block/TaxACT

EX-99.1 3 c60723exv99w1.htm EX-99.1

Exhibit 99.1

**H&R BLOCK®****News Release****H&R BLOCK ANNOUNCES AGREEMENT TO ACQUIRE TAXACT DIGITAL TAX PREPARATION BUSINESS**

- Cash purchase price of \$287.5 million
- More than 5 million tax filers used TaxACT solutions last season
- Estimated to add \$0.05 to earnings per share if closed by calendar year end

For Immediate Release: Oct. 13, 2010

KANSAS CITY, Mo. — H&R Block (NYSE: HRB) announced today it has signed a definitive merger agreement to acquire all of the outstanding shares of 2SS Holdings, Inc., developer of TaxACT digital tax preparation solutions, for \$287.5 million in cash.

The company plans to combine its H&R Block At Home digital business and the acquired TaxACT business, into a single unit led by the TaxACT management team, but continue to offer both brands in the market place.

“This transaction is a significant step for H&R Block in a segment that is strategically important. This will provide us with innovative growth-oriented leadership to accelerate our digital tax offerings and results.” said Alan Bennett, president and chief executive officer of H&R Block. “I am looking forward to working with the TaxACT management team on developing our multi-brand digital strategy for the future.”

TaxACT has approximately 70 full time associates and is headquartered in Cedar Rapids, Iowa. More than 5 million tax filers used TaxACT last season through online, desktop download and professional software, with the vast majority of those clients filing online.

Lance Dunn, president of TaxACT, said, “The entire team is excited by the opportunity to partner with H&R Block. We are committed to providing a tremendous value for customers by continuing to offer the TaxACT Free Federal Edition.”

H&R Block estimates the transaction would add \$0.05 to earnings per share in its fiscal year ending April 30, 2011, assuming the transaction closes by the end of the current calendar year. The purchase will be funded by excess available liquidity from cash-on-hand or short-term borrowings. Completion of the transaction is subject to the satisfaction of customary closing conditions, including the expiration of the applicable waiting period under the Hart-Scott-Rodino Act.

Conference Call

At 9 a.m. Eastern time on Thursday, October 14, the company will host a conference call for analysts, institutional investors and shareholders. To access the call, please dial the number below approximately five to ten minutes prior to the scheduled starting time:

U.S./Canada (877) 247-6355 or International (706) 679-0371
Conference ID: 10673363

The call also will be webcast in a listen-only format for the media and public. The link to the webcast can be accessed directly at <http://investor-relations.hrblock.com>.

A replay of the call will be available beginning at 9:30 a.m. Eastern time on Oct. 14, and continuing until Nov. 5, 2010, by dialing (800) 642-1687 (U.S./Canada) or (706) 645-9291 (International). The conference ID is 10673363. The webcast will be available for replay beginning on Oct. 15 at <http://investor-relations.hrblock.com>

Forward Looking Statements

This announcement may contain forward-looking statements, which are any statements that are not historical facts. These forward-looking statements are based upon the Company's current expectations and there can be no assurance that such expectations will prove to be correct. Because forward-looking statements involve risks and uncertainties and speak only as of the date on which they are made, the Company's actual results could differ materially from these statements. These risks and uncertainties relate to, among other things, uncertainties regarding the Company's ability to attract and retain clients; meet its prepared returns targets; uncertainties and potential contingent liabilities arising from our former mortgage loan origination and servicing business; uncertainties in the residential mortgage market and its impact on loan loss provisions; uncertainties pertaining to the commercial debt market; competitive factors; the Company's effective income tax rate; litigation defense expenses and costs of judgments or settlements; uncertainties regarding the level of share repurchases; and changes in market, economic, political or regulatory conditions. Information concerning these risks and uncertainties is contained in Item 1A of the Company's 2010 annual report on Form 10-K and in other filings by the Company with the Securities and Exchange Commission. The Company does not undertake any duty to update any forward-looking statements, whether as a result of new information, future events, or otherwise.

About H&R Block

H&R Block Inc. (NYSE: HRB) is one of the world's largest tax services providers, having prepared more than 550 million tax returns worldwide since 1955. In fiscal 2010, H&R Block had annual revenues of \$3.9 billion and prepared more than 23 million tax returns worldwide, utilizing more than 100,000 highly trained tax professionals. The Company provides tax return preparation services in person, through H&R Block At Home™ online and desktop software products, and through other channels. The Company is also one of the leading providers of business services through RSM McGladrey. For more information, visit our Online Press Center at www.hrblock.com.

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Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, MAY 23, 2011
WWW.JUSTICE.GOV

AT
(202) 514-2007
TDD (202) 514-1888

JUSTICE DEPARTMENT FILES ANTITRUST LAWSUIT TO STOP H&R BLOCK INC. FROM BUYING TAXACT

Deal Would Substantially Reduce Competition in Sale of Digital Do-It-Yourself Tax Preparation Products and Result in Higher Prices and a Reduction in Innovation and Quality

WASHINGTON — The Department of Justice filed a civil antitrust lawsuit today to block the proposed acquisition by H&R Block Inc. of TaxACT, a digital do-it-yourself tax preparation software provider. The department said that the proposed deal would substantially lessen competition in the growing U.S. digital do-it-yourself tax preparation software market, resulting in higher prices and reduced innovation and quality for products that are used annually by millions of American taxpayers.

The Department of Justice's Antitrust Division filed its lawsuit in U.S. District Court in Washington, D.C., to prevent H&R Block from acquiring 2SS Holdings Inc., an entity within TA IX L.P. and the maker of TaxACT.

Between 35 and 40 million taxpayers use digital software products, either on the provider's website or uploaded onto the taxpayers' computers, to prepare and file their federal and state income taxes. Currently, three companies account for 90 percent of all sales of digital do-it-yourself tax preparation products, and the acquisition would combine H&R Block and TaxACT, respectively the second- and third-largest providers of digital do-it-yourself tax preparation products, the department said.

"The combination of H&R Block and TaxACT would likely lead to millions of American taxpayers paying higher prices for digital do-it-yourself tax preparation products," said Christine Varney, Assistant Attorney General in charge of the Department of Justice's Antitrust Division. "In addition, TaxACT has aggressively competed in the digital do-it-yourself tax preparation market with innovations such as free federal filing. If this merger is allowed to proceed, that type of innovation will be lost."

On Oct. 13, 2010, H&R Block agreed to purchase 2SS Holdings in a transaction valued at \$287.5 million.

According to the department's complaint, H&R Block's acquisition of 2SS Holdings would eliminate a company that has aggressively competed with H&R Block and disrupted the

U.S. digital do-it-yourself tax preparation market through low pricing and product innovation. By ending the head-to-head competition between TaxACT and H&R Block, American taxpayers would be left with only two major digital do-it-yourself tax preparation providers. This would lead to higher prices, lower quality, and reduced innovation. In addition, by taking control of the TaxACT business, which has been a maverick in the market, it would be easier for H&R Block to coordinate on prices, quality, and other business decisions with the other remaining industry leader – Mountain View, Calif.-based Intuit, which makes personal finance programs such as Quicken and TurboTax – the department said.

The complaint includes statements from H&R Block presentations and emails, such as:

- A primary benefit for H&R Block in acquiring TaxACT is: “Elimination of competitor.”
- In discussing the potential acquisition of TaxAct, one of the “[s]trategic [o]pportunities” of the acquisition is: “Acquire TaxACT and eliminate the brand to regain control of industry pricing and further price erosion.”
- The rationale for launching the H&R Block’s free online product was “[t]o match competitor offerings and stem online share loss to Intuit and TaxACT.”
- “Retail volume at Staples [is] at risk due to introduction of TaxACT [r]etail software on combined display.”

The department also alleges that by eliminating TaxACT, a significant, disruptive and aggressive competitor, the acquisition would likely substantially lessen competition between H&R Block and Intuit by facilitating coordination between them. H&R Block would likely degrade TaxACT’s free product and H&R Block and Intuit would increase the prices for their paid products. An internal H&R Block email said, “The other possible strategic consideration is that Intuit and HRB together would have 84% of the digital market and we both obviously have great incentive to keep this channel profitable.”

H&R Block is a Missouri corporation headquartered in Kansas City, Mo. H&R Block is one of the world’s largest tax service providers, utilizing more than 100,000 trained tax professionals. The company, with its H&R Block At Home products, is the second largest provider of digital do-it-yourself tax preparation products. In its fiscal year 2010, ending April 30, 2010, H&R Block prepared more than 23 million tax returns worldwide and earned revenues of more than \$3.8 billion. Its digital do-it-yourself tax preparation product was used in 2010 by more than 5.9 million customers to prepare and file their federal and state income tax returns.

2SS Holdings, the maker of the TaxACT digital do-it-yourself tax preparation products, is a Delaware corporation headquartered in Cedar Rapids, Iowa. 2SS Holdings is the third-largest digital do-it-yourself tax preparation product provider in the United States, and the second-largest provider of such products online through the Internet. TaxACT products were used in 2010 by more than 5 million customers to prepare and file their federal and state income tax returns.

TA IX L.P. is a limited partnership organized and existing under the laws of Delaware and headquartered in Boston. TA IX L.P. is the majority shareholder of 2SS Holdings.

#

11-661

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

H&R BLOCK, INC., *et al.*,

Defendants.

Civil Action No. 11-00948 (BAH)

ORDER

This matter comes before the Court on the plaintiff's motion for a permanent injunction against the acquisition of 2SS Holdings, Inc. ("TaxACT") by H&R Block, Inc. ("HRB"). Upon consideration of all the evidence before the Court, including documents and factual and expert testimony presented at an evidentiary hearing, the applicable law, and the parties' legal memoranda and arguments, the Court finds that the proposed acquisition of TaxACT by HRB violates Section 7 of the Clayton Act, 15 U.S.C. § 18, for the reasons explained in the accompanying Memorandum Opinion.¹ Accordingly, it is hereby

ORDERED that, for the reasons explained in the accompanying Memorandum Opinion, the plaintiff's motion for a permanent injunction is GRANTED; and it is further

ORDERED that HRB and any parent, affiliate, subsidiary, or division thereof are enjoined and restrained, pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, from acquiring any stock, assets, or other interest, directly or indirectly, in defendant TaxACT; and it is further

¹ The accompanying Memorandum Opinion has been filed under seal to enable the parties to review it and to redact any confidential business information. Once the parties have had an opportunity to redact any confidential information, the Memorandum Opinion will be filed on the public docket.

ORDERED that the defendants take any and all necessary steps to prevent any of their domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, and joint ventures from completing such acquisition, and from taking any steps or actions in furtherance thereof; and it is further

ORDERED that the defendants return all confidential information received directly or indirectly from one another and destroy all notes relating to such information; and it is further

ORDERED that the parties to this case shall review the Memorandum Opinion that accompanies this Order and shall redact any confidential business information that should not be disclosed publicly. The parties shall jointly contact Chambers on or before November 4, 2011 with any recommended redactions.

DATED: October 31, 2011

/s/ *Beryl A. Howell*

BERYL A. HOWELL
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. 11-00948 (BAH)

H&R BLOCK, INC., *et al.*,

Defendants.

MEMORANDUM OPINION¹

Last year, approximately 140 million Americans filed tax returns with the Internal Revenue Service (“IRS”). Paying taxes is a fundamental civic duty in our democracy. Taxes pay for the government to carry out its constitutionally mandated functions and enable the government to give force to the laws and policies adopted by the people of the United States through their elected representatives. Despite the necessity of taxes to fund our government and to sustain services that many citizens depend upon, the task of preparing a tax return brings joy to the hearts of few. Many find it to be a complex and tedious exercise. Fortunately, various businesses offer different products and services designed to assist taxpayers with preparing their returns. These tax preparation businesses principally include accountants, retail tax stores, and digital tax software providers – all of which provide important services to the American taxpayer. In this case, the United States, through the Antitrust Division of the Department of Justice, seeks to enjoin a proposed merger between two companies that offer tax software

¹ The Court provided this Memorandum Opinion to the parties in final form on October 31, 2011, but public release was delayed to ensure that no confidential business information that had been submitted under seal was released. Based on input from the parties, confidential business information has been redacted from the opinion, with such redactions reflected by the insertion of the text “{redacted}.” In some instances, redacted confidential business information has been replaced by more general language that reflects the same underlying concepts without revealing the confidential business information. Such substitutions are indicated by braces surrounding the substituted text.

products – H&R Block and TaxACT – on the grounds that the merger violates the antitrust laws and will lead to an anticompetitive duopoly in which the only substantial providers of digital tax software in the marketplace would be H&R Block and Intuit, the maker of the popular “TurboTax” software program. After carefully considering all of the evidence, including documents and factual and expert testimony, the applicable law, and the arguments before the Court, the Court will enjoin the proposed merger for the reasons explained in detail below.

* * *

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I. BACKGROUND

A. Overview

The United States, through the Antitrust Division of the Department of Justice (the “DOJ,” the “government,” or the “plaintiff”), filed this action on May 23, 2011. The DOJ seeks to enjoin Defendant H&R Block, Inc. from acquiring Defendant 2SS Holdings, Inc. (“TaxACT”), which sells digital do-it-yourself tax preparation products marketed under the brand name TaxACT. Compl. ¶ 10. H&R Block (“HRB”) is a Missouri corporation headquartered in Kansas City, Missouri. *Id.* ¶ 9. 2SS Holdings, or TaxACT, is a Delaware corporation headquartered in Cedar Rapids, Iowa. *Id.* ¶ 10. Defendant TA IX, L.P. (“TA”), a Delaware limited partnership headquartered in Boston, Massachusetts, owns a two-thirds interest in TaxACT. *Id.* ¶ 11.

As noted above, approximately 140 million Americans filed tax returns with the IRS in 2010. *Id.* ¶ 1. Broadly speaking, there are three methods for preparing a tax return. The “pen and paper” or “manual” method includes preparation by hand and with free, electronically fillable forms available on the IRS website. A second method, known as “assisted” preparation, involves hiring a tax professional – typically either a certified public accountant (“CPA”) or a specialist at a retail tax store. HRB operates the largest retail tax store chain in the United States. Cobb, TT, 9/19/11 a.m., at 37. The companies Jackson-Hewitt and Liberty Tax Service also operate well-known retail tax stores. Finally, many taxpayers now prepare their returns using digital do-it-yourself tax preparation products (“DDIY”), such as the popular software product “TurboTax.” DDIY preparation is becoming increasingly popular and an estimated 35 to 40 million taxpayers used DDIY in 2010. GX 19 at 3; *see also* GX 27.²

² In this opinion, the Court will use the abbreviations “GX”, “GTX”, “DX”, and “DTX” to refer to the government’s exhibits, the government’s trial exhibits, the defendants’ exhibits, and the defendants’ trial exhibits, respectively.

The three most popular DDIY providers are HRB, TaxACT, and Intuit, the maker of TurboTax. According to IRS data, these three firms accounted for approximately 90 percent of the DDIY-prepared federal returns filed in tax season 2010.³ GX 27. The next largest firm is TaxHawk, also known as FreeTaxUSA, with 3.2 percent market share, followed by TaxSlayer, with 2.7 percent. *Id.* The remainder of the market is divided among numerous smaller firms. *Id.* Intuit accounted for 62.2 percent of DDIY returns, HRB for 15.6 percent, and TaxACT for 12.8 percent. *Id.* DDIY products are offered to consumers through three channels: (1) online through an internet browser; (2) personal computer software downloaded from a website; and (3) personal computer software installed from a disk, which is either sent directly to the consumer or purchased by the consumer from a third-party retailer. GX 629 at 11. In industry parlance, DDIY products provided through an internet browser are called “online” products, while software applications downloaded onto the user’s computer via the web or installed from a disk are referred to as “software” products. *See id.*

The proposed acquisition challenged in this case would combine HRB and TaxACT, the second and third most popular providers of DDIY products, respectively. According to the government, this combination would result in an effective duopoly between HRB and Intuit in the DDIY market, in which the next nearest competitor will have an approximately 3 percent market share, and most other competitors will have less than a 1 percent share. GX 27. The government also alleges that unilateral anticompetitive effects would result from the elimination of head-to-head competition between the merging parties. Compl. ¶ 45.

“TT” refers to trial testimony. “PFF” refers the plaintiff’s proposed findings of fact. “DFF” refers to the defendants’ proposed findings of fact.

³ The denomination of different years in the tax industry can be somewhat confusing. Tax returns are typically due in the month of April following the relevant tax year. Thus, each “tax season” refers to the period when returns for the prior “tax year” are generally completed. For example, “tax season 2010” refers to returns filed primarily in early 2010, corresponding to income earned in “tax year 2009.”

Thus, the DOJ alleges that because the proposed acquisition would reduce competition in the DDIY industry by eliminating head-to-head competition between the merging parties and by making anticompetitive coordination between the two major remaining market participants substantially more likely, the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18. *Id.* ¶¶ 40-49. Accordingly, the government seeks a permanent injunction blocking HRB from acquiring TaxACT. *Id.* ¶¶ 53-55.

On July 6, 2011, the Court entered a scheduling order in this case that provided for an expedited schedule of fact and expert discovery and briefing on the government's anticipated motion to enjoin the transaction. Joint Scheduling and Case Mgmt. Order, ECF No. 30. On August 1, 2011, the DOJ filed a motion for preliminary injunction against the merger, which was fully briefed by August 18, 2011. The parties subsequently agreed to forego the preliminary injunction phase and proceed directly to a trial on the merits of this action. TT, 9/6/11 a.m., at 8-9.

On September 2, 2011, the Court held a pre-trial conference. On September 6, the Court began a nine-day bench trial that was held on September 6, 7, 8, 9, 12, 13, 15, 19, and 20. Eight fact witnesses and three expert witnesses testified at the hearing. The parties presented testimony from additional witnesses by affidavit and deposition. Each side submitted over 800 exhibits, totaling many thousands of pages. Following the conclusion of the evidentiary phase of the trial, the Court gave the parties approximately two weeks to submit post-trial memoranda and proposed findings of fact, which were filed on September 28, 2011. ECF Nos. 98-99. The Court then heard closing arguments on October 3, 2011.

The government's motion to enjoin HRB's acquisition of TaxACT is presently before the Court. For the reasons explained in this opinion, the Court grants the government's motion.

Before proceeding to a discussion of the relevant legal standards governing this case, the Court will provide additional background regarding the parties, their proposed transaction, and the tax preparation industry in general.

B. The Merging Parties

HRB is a Missouri corporation with its principal place of business in Kansas City, Missouri. Compl. ¶ 9; Defs.' Answer, ECF No. 31, ¶ 9. HRB provides both assisted tax preparation services and DDIY products through separate business units. Bennett, TT, 9/6/11 a.m., at 106. HRB offers its DDIY products for consumers under the brand name "H&R Block At Home" (formerly known as "TaxCut"). GX 629 at 9.

In 2011, HRB's DDIY products generated {significant} revenue. GX 296-2. For the same period, HRB sold approximately 6.69 million DDIY units to consumers. GX 296-2. Separately, in 2011, HRB's assisted tax preparation business generated approximately \$2.7 billion in revenue (based on 14,756,000 U.S. tax returns at an average fee of \$182.96, as reported in HRB's 2011 Annual Report). GX 532 (Cobb Dep.) at 32; GX 565 at 19.

2SS Holdings, Inc. ("2SS") is a Delaware corporation with its principal place of business in Cedar Rapids, Iowa. Compl. ¶ 10; Defs.' Answer ¶ 10. 2SS owns 2nd Story Software, Inc., which offers DDIY products under the brand name "TaxACT." GX 629 at 8-9.

In the fiscal year ending April 30, 2011, TaxACT products generated approximately {half as much revenue as H&R Block}. GX 151 at 6. In the same year, consumers used TaxACT to electronically file approximately 5 million federal tax returns. GX 151 at 3-4.

TA IX, L.P. ("TA") is a private equity firm organized under the laws of Delaware with its headquarters in Boston, Massachusetts. Compl. ¶ 11; Defs.' Answer ¶ 11. In December of 2004, TA purchased a majority interest in 2SS for \$85 million, and as a result TA has majority

control of 2SS Holdings and 2nd Story Software. GX 55 (Greif Dep.) at 72-73; GX 28-3.

C. The History Of TaxACT And The Proposed Transaction

TaxACT was founded in 1998 by Lance Dunn and three others, with Mr. Dunn serving as president. Dunn, TT, 9/7/11 p.m., at 49-52. Before founding TaxACT, Mr. Dunn and the other co-founders of the company had worked at Parsons Technology, a software company that had created a DDIY tax preparation product called “Personal Tax Edge.” *Id.* at 49-52. In 1994, Intuit acquired Parsons Technology and continued to operate Personal Tax Edge as a separate product for approximately two years before merging it into its TurboTax product line. *Id.* at 51. Mr. Dunn testified that the business objective of founding TaxACT was “to make money selling value tax software which . . . was a category that did not exist at that time” because Intuit’s acquisition of Parsons Technology had eliminated Personal Tax Edge, which had previously occupied a value tax software niche. *Id.* at 52. Thus, TaxACT “recreated” the category or “niche that the Personal Tax Edge product line filled when it existed.” *Id.*

Over the years, TaxACT has emphasized high-quality free product offerings as part of its business strategy. *Id.* at 53. TaxACT initially offered a DDIY tax preparation product that made it free to prepare and print a federal tax return, but TaxACT charged a fee for electronic filing (“e-filing”) or preparation of a state tax return. *Id.* at 54. Thus, from the beginning, TaxACT’s business strategy relied on promoting “free” or “freemium” products, in which a basic part of the service is offered for free and add-ons and extra features are sold for a price.⁴ As Mr. Dunn put it, “Free is an integral part of the value model. And the beauty of it is it has universal appeal. Everybody likes something for free.” *Id.*

⁴ The business model of offering free products and then soliciting customers to purchase additional, related features or services is sometimes referred to as “freemium.” See GX 130 (“H&R Block Strategic Planning Working Session, April 16 & 17, 2010”) at 103 (“‘Freemium’ is a known market dynamic that has arisen in multiple product categories and will continue to grow.”).

Currently, TaxACT's free product offering allows customers to prepare, print, and e-file a federal tax return completely for free. *Id.* at 54; GX 28-10 at 5-7. TaxACT's "Deluxe" edition, which costs \$9.95, contains additional features, such as the ability to import data from a return filed the prior year through TaxACT. GX 55-26; Dunn, TT, 9/7/11 p.m., at 91-92; GX 28-10 at 5-7; GX 28 (Dunn. Dep.) at 219. Customers who use TaxACT to prepare a state tax return in addition to a federal return pay either \$14.95 for the state return in combination with the free federal product or \$17.95 for the state return in combination with the "Deluxe" federal product. GX 55-26; Dunn, TT, 9/8/11 a.m., at 49. TaxACT's prices have generally remained unchanged for the past decade. Dunn, TT, 9/7/11 p.m., at 91.

The parties first began discussing the potential acquisition of TaxACT by HRB in July 2009. Bowen, TT, 9/15/11 p.m., at 14. During the fall of 2009, teams from HRB and TaxACT met to discuss the possibilities for the potential acquisition and HRB performed due diligence on TaxACT. *See* DX 244 at 8-9; Bowen, TT, 9/15/11 p.m., at 19-23, 26; DX 9527 at 35.

Negotiations between the parties stalled in December 2009 and the proposed deal collapsed. Bowen, TT, 9/15/11 p.m., at 33. The CEOs of the two companies continued to discuss a potential acquisition through the spring of 2010, however. *Id.* at 34. Serious merger talks resumed in July 2010. *Id.* at 38-39; DX1005.

In October 2010, the HRB Board of Directors approved a plan for HRB to acquire TaxACT. DX 600 at 12-13; Bowen, TT, 9/15/11 p.m., at 59-60. On October 13, 2010, HRB entered into a merger agreement with 2SS and TA. GX 120 at 1. Under this agreement, HRB would acquire control of 2SS for \$287.5 million. GX 120 at 6; GX 119 at 1. HRB's stated post-merger plan is to maintain both the HRB and TaxACT brands – with the HRB-brand focusing on higher priced-products and the TaxACT brand focusing on the lower-priced products. *See*

Bennett, TT, 9/6/11 a.m., at 101-102; DX 1005 at 1. HRB plans {redacted} ultimately to rely on TaxACT's current technological platform and intends to give Mr. Dunn responsibility for running the combined firm's entire DDIY business operation from Cedar Rapids, Iowa. Dunn, TT, 9/8/11 p.m. (sealed), at 14-16; *see also* Bennett, TT, 9/6/11 a.m., at 110.

D. Free Products And The Free File Alliance

The evolution of TaxACT's free product offerings and the other free offerings in the DDIY market is important for understanding the claims in this case. The players in the DDIY market offer various "free" tax preparation products, but the features and functionality offered in these free products vary significantly, as do the ways in which these free products are ultimately combined with paid products to earn revenue. While the availability of some types of free product offers has long been a feature of the DDIY market, a spike in free offerings occurred during the last decade in parallel with the growth of e-filing.

As a matter of public policy, the IRS actively promotes e-filing because it has an interest in efficient and accessible tax return preparation and filing. The Internal Revenue Service Restructuring and Reform Act of 1998 set a goal of having eighty percent of individual taxpayers e-filing their returns by 2007. IRS Stip., ECF No. 80, ¶ 2. The IRS is close to achieving that goal and the IRS Oversight Board has recommended that the 80 percent benchmark be achieved by 2012. *Id.* According to stipulated facts attested to by IRS employees, in 2001, the IRS adopted an initiative "to decrease the tax preparation and filing burden of wage earners by providing greater access to free online tax preparation and filing options for a significant number of taxpayers." *Id.* ¶ 4. The IRS also determined that it could save a substantial amount of public money by encouraging filers to switch to e-filing, since e-filed returns are cheaper for the IRS to process. *Id.* ¶ 5.

The IRS determined that the most effective and efficient way to accomplish its goal of promoting access to free online tax preparation and filing options was to partner with a consortium of companies in the electronic tax preparation and filing industry. *Id.* ¶ 6; GX 297-D7 at E-2. In 2002, this consortium of companies formed Free File Alliance, LLC (“FFA”) in order to partner with the IRS on this initiative to promote free filing. IRS Stip. ¶ 6; GX 297-D7 at E-2. HRB, TaxACT, and Intuit are all members of the FFA, as are approximately fifteen smaller companies. *See* IRS Stip. ¶ 8; DX 328. On October 30, 2002, the IRS and the FFA entered into a “Free On-Line Electronic Tax Filing Agreement” to provide free online tax return preparation and filing to individual taxpayers. IRS Stip. ¶ 9. Pursuant to this agreement, members of the FFA would offer free, online tax preparation and filing services to taxpayers, and the IRS would provide taxpayers with links to those free services through a web page, hosted at irs.gov and accessible through another government website. *Id.* ¶ 12. HRB, TaxACT, and Intuit were among the original members to make free offers through the FFA. *Id.* ¶ 8.

“In 2003, the first year in which free services were available to taxpayers through the FFA, none of the FFA members offered free services to all taxpayers.” *Id.* ¶ 14. Rather, each “member set eligibility criteria. Most members, including H&R Block, TaxACT, and Intuit, used adjusted gross income (‘AGI’) as a way to define which taxpayers were eligible” for their offers of free federal tax return preparation services. *Id.* “For example, H&R Block offered free services to taxpayers with an AGI of \$28,000 or less.” *Id.* Some members that offered free federal return preparation services based on AGI also offered free services to taxpayers who met other conditions, such as eligibility to file a Form 1040EZ. *Id.* “Several members did not define eligibility based on AGI. Of the eleven FFA members that offered free services based on AGI, only TaxACT’s AGI-based offering was available to individuals with AGI over \$33,000.” *Id.*

Specifically, TaxACT made its free federal services available exclusively to taxpayers who had AGI over \$100,000 or were eligible to file a Form 1040EZ. *Id.*

In 2004, the second year in which free services for federal returns were available to taxpayers through the FFA, TaxACT introduced a new offer through the FFA that offered free preparation and e-filing of federal returns for all taxpayers regardless of AGI or other limitations (“free for all”). *See id.* ¶ 15; Dunn, TT, 9/7/11 p.m., at 65, 78. After TaxACT introduced a free-for-all offer through the FFA, other companies followed by introducing federal free-for-all offers of their own. Dunn, TT, 9/7/11 p.m., at 78 (“After we offered free for everyone in 2003, in 2004, a lot of companies offered free for everyone on the FFA.”).

According to Mr. Dunn’s testimony, after TaxACT made its FFA offer of a free federal product for all taxpayers, without any AGI or other limitations, other companies made efforts to restrict the wide availability of free offers on the FFA. *Id.* at 79. Specifically, according to Mr. Dunn, Intuit proposed that companies in the FFA collude by agreeing to restrict free offers. *Id.* Mr. Dunn and TaxACT opposed Intuit’s proposal and believed that it was “probably not legal for that group to restrain trade.” *Id.*

Subsequently, HRB, Intuit and others successfully lobbied the IRS to implement restrictions on the number of taxpayers that could be covered by a free offer through the FFA website. GX 28 (Dunn Dep.) at 114-15; GX 28-4; GX 35 at HRB-DOJ-00912870; GX 569 (DuMars Dep.) at 108, 112-113; Ernst, TT, 9/7/11 a.m., 26-27; GX 41 at 4; GX 25 (TaxHawk Decl.) ¶ 16. HRB desired these restrictions because, among other things, it was concerned about how free-for-all offers would affect the pricing structure for the industry and believed that such offers might undermine the company’s ability to generate money through the paid side of its DDIY business. Ernst, TT, 9/7/11 a.m., at 26-27; GX 531 (Ciaramitaro Dep.) at 60-62; *see also*

GX 41 at 4; GX 25 (TaxHawk Decl.) ¶ 16.

The IRS amended the FFA rules in October 2005 to prevent FFA members from making free-for-all offers. Dunn, TT, 9/7/11 p.m., at 78-79; Ernst, TT, 9/7/11 a.m., at 29; GX 42; GX 25 (TaxHawk Decl.) ¶ 16; GX 29 (Intuit Decl.) ¶ 9. Therefore, TaxACT could no longer make its free-for-all offer through the FFA.

In tax year 2005, in response to restrictions that the IRS imposed on the scope of offers that could be made through the FFA, TaxACT became the first DDIY company to offer all tax payers a free DDIY product for preparation of federal returns directly on its website. Dunn, TT, 9/7/11 p.m., at 79-80; GX 28 (Dunn Dep.) at 122-23. Today, free offers in various forms are an entrenched part of the DDIY market. Dunn, TT, 9/8/11 a.m., 85; Defs.' Opening Stmt., TT, 9/6/11 a.m., at 86-87.

II. STANDARD OF REVIEW

“Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits a corporation from acquiring ‘the whole or any part of the assets of another [corporation] engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.’” *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 180 (D.D.C. 2001) (quoting 15 U.S.C. § 18). “The United States is authorized by Section 15 of the Clayton Act to seek an injunction to block a pending acquisition.” *Id.* (citing 15 U.S.C. § 25). “The United States has the ultimate burden of proving a Section 7 violation by a preponderance of the evidence.” *Id.*

“To establish a Section 7 violation, plaintiff must show that a pending acquisition is reasonably likely to cause anticompetitive effects.” *Id.* (citing *United States v. Penn-Olin Chem.*

Co., 378 U.S. 158, 171 (1964)); *see also United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004). “Congress used the words ‘*may* be substantially to lessen competition’ (emphasis supplied), to indicate that its concern was with probabilities, not certainties.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). “Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future.” *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986).

“As this Circuit explained in *Heinz*, 246 F.3d at 715, the decision in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), sets forth the analytical approach for establishing a Section 7 violation.”⁵ *Sungard*, 172 F. Supp. 2d at 180.⁶ “The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition.” *Baker Hughes*, 908 F.2d at 982. To establish this presumption, the government must “show that the merger would produce ‘a firm controlling an undue percentage share of the relevant market, and [would] result [] in a significant increase in the concentration of firms in that market.’”

Heinz, 246 F.3d at 715 (quoting *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363

⁵ Two current Supreme Court justices, in their prior capacities as judges on the Court of Appeals, participated in the D.C. Circuit’s ruling in *Baker Hughes*. Then-Judge Clarence Thomas wrote the opinion and then-Judge Ruth Bader Ginsburg joined in it.

⁶ In their closing argument, the defendants chided the government for citing Clayton Act Section 7 cases brought by the Federal Trade Commission for the relevant standard to apply in this case rather than citing to *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990), a case brought by the DOJ. Since this Circuit’s FTC precedents themselves rely heavily on the analytical approach set forth in *Baker Hughes*, the defendants’ distinction on this point is ultimately of little import. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (“In *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990), we explained the analytical approach by which the government establishes a section 7 violation.”). While a lesser showing is required to obtain preliminary relief in an FTC preliminary injunction case, as opposed to a full merits trial like this case, the Court must apply the *Baker Hughes* analytical framework in either type of Section 7 case.

(1963)) (alterations in original). Once the government has established this presumption, the burden shifts to the defendants to rebut the presumption by “show[ing] that the market-share statistics give an inaccurate account of the merger’s probable effects on competition in the relevant market.” *Heinz*, 246 F.3d at 715 (internal quotation omitted). “If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.” *Id.* (quoting *Baker Hughes*, 908 F.2d at 983). Ultimately, “[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition.” *Baker Hughes*, 908 F.2d at 984.

III. DISCUSSION

A. The Relevant Product Market

“Merger analysis begins with defining the relevant product market.” *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) (citing *Brown Shoe*, 370 U.S. 294, 324 (1962)). “Defining the relevant market is critical in an antitrust case because the legality of the proposed merger[] in question almost always depends upon the market power of the parties involved.” *Id.* (quoting *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998)). Indeed, the relevant market definition is often “the key to the ultimate resolution of this type of case because of the relative implications of market power.”⁷ *Id.*

⁷ “A relevant market has two components: (1) the relevant product market and (2) the relevant geographic market. . . . The ‘relevant geographic market’ identifies the geographic area in which the defendants compete in marketing their products or services.” *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009). The parties have stipulated that the relevant geographic market in this case is worldwide. Joint Pre-Hearing Statement ¶ IX, C, 12. DDIY products are provided online and can be used by any individual worldwide – either within the United States or abroad – who needs to prepare and file a U.S. tax return. The products at issue in this case are not used for preparation of foreign tax returns. See Pl.’s Mot. For Prelim. Inj. at 29-30. The Court accepts the parties’ stipulation as to the relevant geographic market.

The government argues that the relevant market in this case consists of all DDIY products, but does not include assisted tax preparation or pen-and-paper. Under this view of the market, the acquisition in this case would result in a DDIY market that is dominated by two large players – H&R Block and Intuit – that together control approximately 90 percent of the market share, with the remaining 10 percent of the market divided amongst a plethora of smaller companies. In contrast, the defendants argue for a broader market that includes all tax preparation methods (“all methods”), comprised of DDIY, assisted, and pen-and-paper. Under this view of the market, the market concentration effects of this acquisition would be much smaller and would not lead to a situation in which two firms control 90 percent of the market. This broader view of the market rests primarily on the premise that providers of all methods of tax preparation compete with each other for the patronage of the same pool of customers – U.S. taxpayers. After carefully considering the evidence and arguments presented by all parties, the Court has concluded that the relevant market in this case is, as the DOJ contends, the market for digital do-it-yourself tax preparation products.

A “relevant product market” is a term of art in antitrust analysis. The Supreme Court has set forth the general rule for defining a relevant product market: “The outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe*, 370 U.S. at 325; *see also United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). In other words, courts look at “whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.” *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) (citation omitted); *see also Bon-Ton Stores*,

Inc. v. May Dep't Stores Co., 881 F. Supp. 860, 868 (W.D.N.Y. 1994) (citing *Hayden Pub. Co. v. Cox Broad. Corp.*, 730 F.2d 64, 71 (2d Cir. 1984)).

A broad, overall market may contain smaller markets which themselves “constitute product markets for antitrust purposes.”⁸ *Brown Shoe*, 370 U.S. at 325. “[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.” *Staples*, 970 F. Supp. at 1075. Traditionally, courts have held that the boundaries of a relevant product market within a broader market “may be determined by examining such practical indicia as industry or public recognition of the [relevant market] as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *FTC v. Whole Foods Market, Inc.* 548 F.3d 1028, 1037-38 (D.C. Cir. 2008) (Brown, J.) (quoting *Brown Shoe*, 370 U.S. at 325).⁹ See also *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 38 (D.D.C. 2009). These “practical indicia” of market boundaries may be viewed as evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986).

⁸ Courts have sometimes referred to such markets-within-markets as “submarkets.” See *Brown Shoe*, 370 U.S. at 325; *Whole Foods*, 548 F.3d at 1037-38 (Brown, J.). Other courts and commentators have criticized this “submarket” terminology as unduly confusing, however. See 5C PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 533, at 251 (3d ed. 2007) (“Courts sometimes describe the closest substitutes as a ‘submarket’ within a larger ‘market’ of less-close substitutes. Although degrees of constraint do in fact vary, the ‘market’ for antitrust purposes is the *one* relevant to the particular legal issue at hand.”) (internal citations omitted); *Geneva Pharms. Tech. Corp. v. Barr Labs, Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (“The term ‘submarket’ is somewhat of a misnomer, since the ‘submarket’ analysis simply clarifies whether two products are in fact ‘reasonable’ substitutes and are therefore part of the same market.”).

⁹ The D.C. Circuit’s decision in *Whole Foods* lacked a majority opinion. See *Whole Foods*, 548 F.3d at 1061 n.8 (Kavanaugh, J., dissenting). Judges Brown and Tatel filed separate opinions concurring in the judgment to reverse the District Court and Judge Kavanaugh, in dissent, would have affirmed. See *id.* at 1032 (Brown, J.); *id.* at 1041 (Tatel, J.); *id.* at 1051 n.1 (Kavanaugh, J., dissenting). Thus, in referring to the opinions in *Whole Foods*, the Court will indicate the name of the Judge whose opinion is cited.

An analytical method often used by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products. If so, those products may constitute a relevant market. *See* 5C PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (hereinafter, “Areeda & Hovenkamp”), ¶ 530a, at 226 (3d ed. 2007) (“[A] market can be seen as the array of producers of substitute products that could control price if united in a hypothetical cartel or as a hypothetical monopoly.”). This approach – sometimes called the “hypothetical monopolist test” – is endorsed by the Horizontal Merger Guidelines issued by the DOJ and Federal Trade Commission. *See Fed. Trade Comm’n & U.S. Dep’t of Justice Horizontal Merger Guidelines* (2010) (hereinafter, “Merger Guidelines”), § 4.1.1.¹⁰ In the merger context, this inquiry boils down to whether “a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products . . . likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market, including at least one product sold by one of the merging firms.” *Id.* The “small but significant and non-transitory increase in price,” or SSNIP, is typically assumed to be five percent or more. *Id.* § 4.1.2.

Thus, the question here is whether it would be hypothetically useful to have a monopoly over all DDIY tax preparation products because the monopolist could then profitably raise prices for those products by five percent or more; or whether, to the contrary, there would be no reason to monopolize all DDIY tax preparation products because substitution and price competition with other methods of tax preparation would restrain any potential DDIY monopolist from profitably raising prices. In other words, would enough DDIY users switch to the assisted or

¹⁰ The Merger Guidelines are not binding upon this Court, but courts in antitrust cases often look to them as persuasive authority. *See Staples*, 970 F. Supp. at 1081-82.

pen-and-paper methods of tax preparation in response to a five-to-ten percent increase in DDIY prices to make such a price increase unprofitable?

In evaluating the relevant product market here, the Court considers business documents from the defendants and others, the testimony of the fact witnesses, and the analyses of the parties' expert economists. This evidence demonstrates that DDIY is the relevant product market in this case.

1. The Defendants' Documents Show That DDIY Is The Relevant Product Market.

When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents. *See, e.g., Staples*, 970 F. Supp. at 1076; *CCC Holdings*, 605 F. Supp. 2d at 41-42. The government argues that the defendants' ordinary course of business documents in this case "conclusively demonstrate that competition with other [DDIY] firms drive Defendants' pricing decisions, quality improvements, and corporate strategy" for their own DDIY products—thus supporting the government's view of the relevant market. Pl.'s Post-Trial Mem. at 7. The defendants contend that the government has relied on "select, 'out-of-context' snippets from documents," and that the documents as a whole support the defendants' view that the relevant product market is all methods of tax preparation. Defs.' Post-Trial Mem. at 1. The Court finds that the documentary evidence in this case supports the conclusion that DDIY is the relevant product market.

Internal TaxACT documents establish that TaxACT has viewed DDIY offerings by HRB and TurboTax as its primary competitors, that it has tracked their marketing, product offerings, and pricing, and that it has determined its own pricing and business strategy in relation to those companies' DDIY products. *See* GX 295-16 ("Competitive Analysis" comparing the three companies); GX 102 (email explaining TaxACT is a "direct competitor" with HRB and Intuit's

products); GX 55 (Greif Dep.) at 137-38 (describing TaxACT's compilation of a routine, end-of-season competitive analysis that "typically" covers Intuit, HRB, and TaxACT). Confidential memoranda prepared by TaxACT's investment bankers for potential private equity buyers of TaxACT identify HRB and TurboTax as TaxACT's primary competitors in a DDIY market. See GX 7 (Greene Holcomb & Fisher "Confidential Memorandum") at 14 ("The Company's major competitors for both desktop and Internet-based income tax software and e-filing services include Intuit (the makers of TurboTax software) and H&R Block (the makers of TaxCut software)."); GX 134 (Deutsche Bank "Confidential Information Memorandum") at 17 ("The Company's two main competitors, Intuit and H&R Block. . ."); see also Dunn, TT, 9/7/11 p.m., at 97-104. These documents also recognize that TaxACT's strategy for competing with Intuit and HRB is to offer a lower price for what it deems a superior product. GX 7 at 14 ("Relative to its two major competitors, 2nd Story has positioned its product offerings as being of equal or higher quality, and completely fulfilling the needs of a vast portion of the potential market. It also pursues a pricing strategy that positions its products and services meaningfully below either Intuit or H&R Block, in some instances free.").

While, as defendants point out, parts of these TaxACT documents also discuss the broader tax preparation industry, these documents make clear that TaxACT's own view – and that conveyed by its investment bankers to potential buyers – is that the company primarily competes in a DDIY market against Intuit and HRB and that it develops its pricing and business strategy with that market and those competitors in mind. These documents are strong evidence that DDIY is the relevant product market. See *Whole Foods*, 548 F.3d at 1045 (Tatel, J.) ("[E]vidence of industry or public recognition of the submarket as a separate economic unit

matters because we assume that economic actors usually have accurate perceptions of economic realities.”) (internal quotation omitted).

Internal HRB documents also evidence HRB’s perception of a discrete DDIY market or market segment. HRB and its outside consultants have tracked its digital competitors’ activities, prices, and product offerings. See GX 28-19 (“2009 Competitive Price Comparison”); GX 118 (independent analyst’s report analyzing digital competitors as one of three separate categories of competitors); GX 61-8 at 1 (slide on competition in “digital market” identifying TurboTax and TaxACT as competitors); GX 199 (HRB “digital strategy update” Powerpoint tracking features and prices for TurboTax and TaxACT); GX 188 (HRB spreadsheet comparing HRB, TurboTax, and TaxACT prices for various product offerings). Documents from HRB’s DDIY business have also referred to HRB, TaxACT, and TurboTax as the “Big Three” competitors in the DDIY market. GX 61-3 (“OCS Offsite Competitive Intelligence Review of TS07”) at 5; GX 61-4 at 1 (email referencing request for data from consultant regarding “big 3 digital tax prep companies”); *see also* GX 70 (email from head of HRB’s digital business stating its “only real direct competitors are turbotax in san diego and taxact in cedar rapids” [sic]); Ernst, TT, 9/7/11 a.m., at 13-14. Finally, the documents show that, in connection with a proposed acquisition of TaxACT, HRB identified the proposed transaction as a way to grow its digital “market share” and has measured TaxACT’s market share in a DDIY market. GX 130 at 96-99; GX 21-37 (projections from 2009 for different potential scenarios for acquisition of TaxACT, including their effect on DDIY market share); *see also* Newkirk, TT, 9/7/11 a.m., at 95-96 (explaining GX 21-37). All of these documents also provide evidence that DDIY is a relevant product market.

The defendants acknowledge that “the merging parties certainly have documents that discuss each other and digital competitors generally, and even reference a digital market and the

‘Big Three,’” but contend this evidence is insufficient to prove a market. Defs.’ Post-Trial Mem. at 9. Rather, the defendants argue that the documents show that the relevant market is all methods of tax preparation, especially in light of documented competition between DDIY providers and assisted providers for the same overall pool of U.S. taxpayers who are potential customers. *See id.* 9-10; *see, e.g.*, DX 78 at 4 (Intuit document explaining 2011 strategic goal of acquiring tax store customers); GX 650 at 41 (Intuit document noting goal of acquiring tax store customers and specifically mentioning HRB). As discussed below, the Court disagrees and finds that the relevant product market is DDIY products.

2. The Relevant Product Market Does Not Include Assisted Tax Preparation Or Manual Preparation.

It is beyond debate – and conceded by the plaintiff – that all methods of tax preparation are, to some degree, in competition. Pl.’s Post-Trial Mem. at 8. All tax preparation methods provide taxpayers with a means to perform the task of completing a tax return, but each method is starkly different. Thus, while providers of all tax preparation methods may compete at some level, this “does not necessarily require that [they] be included in the relevant product market for antitrust purposes.” *Staples*, 970 F. Supp. at 1075. DDIY tax preparation products differ from manual tax preparation and assisted tax preparation products in a number of meaningful ways. As compared to manual and assisted methods, DDIY products involve different technology, price, convenience level, time investment, mental effort and type of interaction by the consumer. Taken together, these different attributes make the consumer experience of using DDIY products quite distinct from other methods of tax preparation. *See Whole Foods*, 548 F.3d at 1037-38 (Brown, J.) (noting that a “product’s peculiar characteristics and uses” and “distinct prices” may distinguish a relevant market) (citing *Brown Shoe*, 370 U.S. at 325); *see also, e.g.*, GX 130 at 140 (HRB internal analysis discussing convenience and price as factors differentiating DDIY and

assisted methods for consumers). The question for this court is whether DDIY and other methods of tax preparation are “reasonably interchangeable” so that it would not be profitable to have a monopoly over only DDIY products.

a. Assisted Tax Preparation Is Not In The Relevant Product Market.

Apart from the analysis of their economic expert, the defendants’ main argument for inclusion of assisted tax preparation in the relevant market is that DDIY and assisted companies compete for customers.¹¹ As evidence for this point, the defendants emphasize that Intuit’s marketing efforts have targeted HRB’s assisted customers. See DX 78 at 3 (Intuit document noting strategic goal to “Beat Tax Store[s]”). While the evidence does show that companies in the DDIY and assisted markets all generally compete with each other for the same overall pool of potential customers – U.S. taxpayers – that fact does not necessarily mean that DDIY and assisted must be viewed as part of the same relevant product market. DDIY provides customers with tax preparation services through an entirely different method, technology, and user experience than assisted preparation. As Judge Tatel explained in *Whole Foods*:

[W]hen the automobile was first invented, competing auto manufacturers obviously took customers primarily from companies selling horses and buggies, not from other auto manufacturers, but that hardly shows that cars and horse-drawn carriages should be treated as the same product market. That Whole Foods and Wild Oats have attracted many customers away from conventional grocery stores by offering extensive selections of natural and organic products thus tells us nothing about whether Whole Foods and Wild Oats should be treated as operating in the same market as conventional grocery stores. Indeed, courts have often found that sufficiently innovative retailers can constitute a distinct product market even when they take customers from existing retailers.

Whole Foods, 548 F.3d at 1048; see also *Staples*, 970 F. Supp. at 1074-80 (finding a distinct market of office supply superstores despite competition from mail-order catalogues and stores carrying a broader range of merchandise).

¹¹ The defendants’ primary argument for inclusion of both assisted and pen-and-paper in the relevant market is based upon their economic expert’s analysis of data derived from two consumer surveys commissioned by the defendants. The Court will analyze the arguments of the defendants’ expert economist separately below.

The key question for the Court is whether DDIY and assisted products are sufficiently close substitutes to constrain any anticompetitive DDIY pricing after the proposed merger. Evidence of the absence of close price competition between DDIY and assisted products makes clear that the answer to that question is no—and that DDIY is the relevant product market here. *See Swedish Match*, 131 F. Supp. 2d at 165 (“Distinct pricing is also a consideration” in determining the relevant product market) (citing *Brown Shoe*, 370 U.S. at 325). Significantly, despite some DDIY efforts to capture tax store customers, none of the major DDIY competitors sets their prices based on consideration of assisted prices. *See, e.g.*, Ernst, TT, 9/7/11 a.m., at 35 (HRB set its digital and assisted prices separately); {redacted} (Dep.) at 183:18-25 (explaining that {redacted} does not consider assisted pricing in setting prices because its prices are already “substantially less than both tax stores and most professionals”). Indeed, there are quite significant price disparities between the average prices of DDIY and assisted products. The average price of TurboTax, the most popular DDIY brand is approximately \$55. GX 293 (Intuit Dep.) at 21. The average price of HRB’s DDIY products is approximately \$25. GX 296-7 at 6. Overall, the DDIY industry average price is \$44.13. GX 121 at 57. In contrast, the typical price of an assisted tax return is significantly higher, in the range of \$150-200.¹² A 10 percent or even 20 percent price increase in the average price of DDIY would only move the average price up to \$48.54 or \$52.96, respectively – still substantially below the average price of assisted tax products. The overall lack of evidence of price competition between DDIY and assisted products supports the conclusion that DDIY is a separate relevant product market for evaluating this transaction, despite the fact that DDIY and assisted firms target their marketing efforts at the same pool of customers.

¹² *See* GX 128 (HRB “TS10 Market Dynamics” presentation) at 38 {redacted}; *see also id.* {redacted}; GX 293 (Intuit Dep.) at 21:9-14 (“The average price of a tax store is in the range of \$200.”); Bennett, TT, 9/6/11 p.m., at 100 (estimating \$150 range for assisted returns offered at Jackson Hewitt and HRB offices at Wal-Mart locations).

The defendants point to some evidence that HRB sets prices for certain assisted products to compete with DDIY. For example, defendants note that in 2009, HRB “reduced prices on its assisted tax preparation services to \$39 for federal 1040EZ preparation and \$29 for state tax preparation to compete with and {redacted}” to DDIY. DFF ¶ 77a. These are limited product offerings for which prices appear well below even the 25th percentile price for HRB’s assisted products. *See* GX 128 (HRB “TS10 Market Dynamics” presentation) at 38 (noting, for Tax Season 2010, that the 25th percentile for prices at HRB stores was {higher than DDIY}). Relatedly, the defendants’ claim that prices for assisted and DDIY products “significantly overlap” is not strongly supported and relies on a comparison of the most limited, low-end assisted products with DDIY products generally. *See* DFF ¶ 78b (citing tax year 2009 data that show that 14 percent of customers using name-brand tax stores paid \$50 or less and another 20 percent paid between \$51-100); *id.* ¶ 78c-d (quoting prices for Jackson Hewitt’s preparation of form 1040EZ, a simplified tax form, at Wal-Mart and for HRB’s Second Look service, which actually only double-checks an already completed tax return for errors). In sum, while defendants’ have identified isolated instances in which assisted product offerings are priced lower than the average prices for typical assisted products, they do not and cannot demonstrate that this is generally the case.

Testimony from HRB executives further supports treating DDIY as a relevant product market in evaluating this transaction. HRB’s DDIY and assisted businesses are run as separate business units. Bennett, TT, 9/6/11 a.m., at 106. Alan Bennett, who was the CEO of HRB in 2010 when the parties reached the proposed merger agreement, testified that “net-net,” he did not believe that HRB’s DDIY business had impacted its assisted business in terms of taking away

customers.¹³ *Id.* at 108; *see also* GX 1151 at 4 (HRB internal analysis stating “Online is not growing materially at the expense of assisted.”). Mark Ernst, HRB’s CEO from 2001 to 2007, also explained that, in his opinion based on research he reviewed while at HRB, the primary reason consumers switched between assisted and DDIY was because of “life events” that led to changes in tax status. Ernst, TT, 9/7/11 a.m., at 34-35.

Finally, defendants argue that their broad relevant market is appropriate because there is “industry movement toward ‘hybrid’ products that combine some elements of both digital and assisted tax preparation.” Defs.’ Post-Trial Mem. at 11. Based on the evidence presented at the hearing, however, it would be premature for the Court to identify any trend toward hybrid products. In fact, neither Intuit nor TaxACT presently offers a hybrid product and the defendants openly concede that HRB’s current hybrid product has had “somewhat limited success,” which defendants attribute to “technical issues” and a “lack of consistent marketing.” *Id.* at 11 n.16. {redacted} {T}he Court finds it unlikely that there will be a sufficiently large scale shift into these products in the immediate future to compel the conclusion that DDIY and assisted products make up the same relevant product market.

b. Manual Tax Preparation Is Not In The Relevant Product Market.

The defendants also argue that manual tax preparation, or pen-and-paper, should be included in the relevant product market. At the outset, the Court notes that pen-and-paper is not a “product” at all; it is the task of filling out a tax return by oneself without any interactive assistance. Even so, the defendants argue pen-and-paper should be included in the relevant product market because it acts as a “significant competitive constraint” on DDIY. Defs.’ Post-

¹³ By “net-net,” Mr. Bennett meant that while there is customer switching between the DDIY and assisted businesses, the total share of customers in each has been relatively stable over the past few years, such that Mr. Bennett could conclude that the two business lines “do not steal customers back and forth net.” Bennett, TT, 9/6/11 a.m., at 108.

Trial Mem. at 11. The defendants' argument relies primarily on two factors. First, the defendants' cite the results of a 2011 email survey of TaxACT customers. *See id.* For reasons detailed in the following section, the Court declines to rely on this email survey. Second, the defendants point to documents and testimony indicating that TaxACT has considered possible diversion to pen-and-paper in setting its prices. *See id.* at 11-12.

The Court finds that pen-and-paper is not part of the relevant market because it does not believe a sufficient number of consumers would switch to pen-and-paper in response to a small, but significant increase in DDIY prices. The possibility of preparing one's own tax return necessarily constrains the prices of other methods of preparation at some level. For example, if the price of DDIY and assisted products were raised to \$1 million per tax return, surely all but the most well-heeled taxpayers would switch to pen-and-paper. Yet, at the more practical price increase levels that trigger antitrust concern – the typical five to ten percent price increase of the SSNIP test – pen-and-paper preparation is unlikely to provide a meaningful restraint for DDIY products, which currently sell for an average price of \$44.13. GX 121 at 57.

The government well illustrated the overly broad nature of defendants' proposed relevant market by posing to the defendants' expert the hypothetical question of whether "sitting at home and drinking chicken soup [would be] part of the market for [manufactured] cold remedies?" Meyer, TT, 9/13/11 a.m., at 65. The defendants' expert responded that the real "question is if the price of cold medicines went up sufficiently, would people turn to chicken soup?" *Id.* As an initial matter, in contrast to the defendants' expert, the Court doubts that it would ever be legally appropriate to define a relevant product market that included manufactured cold remedies and ordinary chicken soup. This conclusion flows from the deep functional differences between those products. Setting that issue aside, however, a price has increased "sufficiently" to trigger

antitrust concern at the level of a five to ten percent small, but significant non-transitory increase in price. Just as chicken soup is unlikely to constrain the price of manufactured cold remedies sufficiently, the Court concludes that a SSNIP in DDIY would not be constrained by people turning to pen-and-paper. First, the share of returns prepared via pen-and-paper has dwindled over the past decade, as the DDIY market has grown. Bennett, TT, 9/6/11 a.m, at 118; GX 296 (Houseworth Dep.) at 66-68. Second, while pen-and-paper filers have been a net source of new customers for DDIY companies, both HRB and {redacted} executives have testified that they do not believe their DDIY products compete closely with pen-and-paper methods. {redacted} (Dep.) at 37:20-38:10; *see* GX 296 (Houseworth Dep.) 89-90. Third, courts in antitrust cases frequently exclude similar “self-supply” substitutes from relevant product markets. *See, e.g., FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190, 195 (D.D.C. 2000), *rev’d on other grounds*, 246 F.3d 708 (D.C. Cir. 2001) (noting that homemade baby food and breast milk should not be included in the jarred baby food market even though substitution was possible because “the Supreme Court’s interchangeability test refers to *products*.”); *CCC Holdings*, 605 F. Supp. 2d at 41-42 (excluding books that can be used to perform insurance loss valuations by hand from market for loss valuation software); *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 338 (S.D.N.Y. 2001) (excluding cash and checks from general purpose credit card market).

The main case the defendants rely on to show that “self-supply” substitutes should be included in the relevant market involved a consumer market consisting of vertically integrated companies and explicitly distinguished cases, such as this one, involving markets of individual consumers. In *United States v. Sungard Data Systems, Inc.*, Judge Huvelle found that disaster recovery computer systems developed internally by companies were in the same relevant product market as shared data recovery systems provided by outside vendors. *Sungard*, 172 F. Supp. 2d

at 187-89. The *Sungard* court, however, distinguished the case before it – which involved vertical integration – from the situation in *Heinz*, the case involving the market for jarred baby food, because “homemade baby food is not an aspect of vertical integration . . . [and] individual consumers cannot vertically integrate by producing a product that they would otherwise have to purchase.” *Id.* at 187 n.15. In finding that in-house computer systems were included in its relevant product market, the *Sungard* court cited the following example from Areeda & Hovenkamp ¶ 535e regarding vertical integration:

If iron ore is the relevant market and if shares are best measured there by sales, then internally used ore—so-called captive output—is part of the ore market even though it is not sold as such.

In measuring the market power of a defendant selling iron ore, the ore used internally by other firms constrains the defendant’s ability to profit by raising ore prices to monopoly levels. The higher ore price may induce an integrated firm to expand its ore production—to supply others in direct competition with the alleged monopolist or to expand its own steel production and thereby reduce the demand of other steel makers for ore, or both. Hence, captive output constrains the defendant regardless of whether integrated firms sell their ore to other steel makers previously purchasing from the defendant. In sum, the integrated firm’s ore output belongs in the market.

Id. at 186 n.14. This rationale for including “self-supply” in a relevant product market does not appear to apply to the DDIY market in which the consumers are individuals and not also potential traders or producers.

While some diversion from DDIY to manual filing may occur in response to a SSNIP, the Court finds that it would likely be limited and marginal. The functional experience of using a DDIY product is meaningfully different from the self-service task of filling out tax forms independently. Manual completion of a tax return requires different tools, effort, resources, and time investment by a consumer than use of either DDIY or assisted methods. The following discussion from *United States v. Visa U.S.A. Inc.* regarding why cash and checks should not be included in the credit card market is instructive here:

[A]lthough it is literally true that, in a general sense, cash and checks compete with general purpose cards as an option for payment by consumers and that growth in payments via cards takes share from cash and checks in some instances, cash and checks do not drive many of the means of competition in the general purpose card market. In this respect, [the expert's] analogy of the general purpose card market to that for airplane travel is illustrative. [The expert] argues that while it is true that at the margin there is some competition for customers among planes, trains, cars and buses, the reality is that airplane travel is a distinct product in which airlines are the principal drivers of competition. Any airline that had monopoly power over airline travel could raise prices or limit output without significant concern about competition from other forms of transportation. The same holds true for competition among general purpose credit and charge cards.

Visa U.S.A. Inc., 163 F. Supp. 2d at 338. Here, the same analogy to airplane travel holds true for competition among DDIY providers, who provide a distinct product for completion of tax returns. Indeed, the pen-and-paper method, in which the consumer essentially relies on his or her own labor to prepare a tax return, is perhaps most analogous to walking as opposed to purchasing a ride on any means of transportation. In sum, filling out a tax return manually is not reasonably interchangeable with DDIY products that effectively fill out the tax return with data input provided by the consumer.

Inclusion of all possible methods of tax preparation, including pen-and-paper, in the relevant product market also violates the principle that the relevant product market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test. *See* Merger Guidelines § 4.1.1 (“When the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.”); *see also* Warren-Boulton, TT, 9/8/11 p.m., at 35-36. Indeed, the defendants’ inclusion of pen-and-paper in the relevant market ignores at least one obvious, smaller market possibility that they might have proposed – the combined market of all DDIY and assisted tax preparation products. It is hardly plausible that a monopolist of this market – to which the only alternative would be pen-and-paper – could not impose a SSNIP.

The defendants' proposed relevant market of all methods of tax return preparation is so broadly defined that, as the plaintiff's expert testified, there are no conceivable alternatives besides going to jail, fleeing to Canada, or not earning any taxable income. Warren-Boulton, TT, 9/8/11 p.m., at 35-36. As the plaintiff's expert put it, "if you're talking about the market for all tax preparation, you're talking about a market where, in economist terms, demand is completely [in]elastic. There are no alternatives." *Id.* at 35. In such circumstances, the usual tools of antitrust analysis – such as the hypothetical monopolist test – cease being useful because it is self-evident that a monopolist of all forms of tax preparation, including self-preparation, could impose a small, but significant price increase. Indeed, a monopolist in that situation could essentially name any price since taxpayers would have no alternative but to pay it. As the plaintiff's expert testified, defining a market that broadly

negates the entire purpose of defining a relevant market in an antitrust case. You want to define a relevant market in an antitrust case so then [you can calculate] shares and the change in shares makes sense. I don't want to go to infinity . . . I want to define a relevant market under . . . the smallest market principle, which is I want to define the relevant market so that if a hypothetical monopolist . . . did manage to control all of those products, they would impose a significant price increase, large enough to be of concern but not so large as to make the whole exercise pointless.

Id. at 35-36. The Court agrees with this assessment and finds the defendants' proposed relevant market to be overbroad.

3. The Economic Expert Testimony Tends To Confirm That DDIY Is The Relevant Product Market.

Both the plaintiff and the defendants presented testimony from expert economists to support their view of the relevant product market.¹⁴ In addition to their testimony at the hearing,

¹⁴ The plaintiff presented expert testimony on market definition from Frederick R. Warren-Boulton, an economist at MiCRA, an economics consulting and research firm. GX 121 (Warren-Boulton Rep.) at 1. Dr. Warren-Boulton holds a B.A. from Yale University, a Ph.D. in economics from Princeton University, and formerly served as the chief economist for the Antitrust Division of the U.S. Department of Justice. *Id.* Dr. Warren-Boulton has previously served as an expert witness in other antitrust cases, including cases challenging the possible

these expert witnesses also provided a detailed expert report and an affidavit summarizing their analysis and conclusions.

The Court finds that the analysis performed by the plaintiff's expert tends to confirm that DDIY is a relevant product market, although the available data in this case limited the predictive power of the plaintiff's expert's economic models. The Court also finds that it cannot draw any conclusions from defendants' expert's analysis because of severe shortcomings in the underlying consumer survey data upon which the defendants' expert relied.

a. Plaintiff's Expert - Dr. Warren-Boulton

The plaintiff's expert, Dr. Warren-Boulton, found the relevant product market to be DDIY. He determined that a hypothetical monopolist of DDIY products could profitably impose a SSNIP for at least one DDIY product, and that consumer substitution to assisted methods or pen-and-paper would be insufficient to defeat the SSNIP. GX 121 (Warren-Boulton Rep.) at 12.

Dr. Warren-Boulton began his analysis by postulating that DDIY was the relevant product market and then he used two principal analytical tests to confirm the validity of that assumption. He began by testing DDIY as a relevant market for a few reasons. First, he concluded that the parties' DDIY products are substantially similar in terms of functionality. GX 121 (Warren-Boulton Rep.) at 12-18. Second, he concluded from his review of the defendants' business documents that they viewed DDIY as a discrete product market when competing in the

anticompetitive effects of a merger or acquisition. *Id.* (noting involvement in *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997)).

The defendants presented expert testimony from Christine Siegwarth Meyer, an economist at National Economic Research Associates, Inc., an economics consulting and research firm. DX 17 (Meyer Rep.) at 1. Dr. Meyer holds a B.A. from the United States Military Academy at West Point, a Ph.D. in economics from the Massachusetts Institute of Technology, and has taught economics at the university level. *Id.* Dr. Meyer has not previously provided expert testimony regarding the possible anticompetitive effects of a merger or acquisition. Meyer, TT, 9/13/11 a.m., at 39.

ordinary course of business. *Id.* Third, he ruled out including pen-and-paper and assisted products in the relevant product market based on a consideration of various data. *Id.* at 24-32.

Dr. Warren-Boulton's decision to begin the relevant market analysis with DDIY was appropriate. *See Areeda & Hovenkamp* ¶ 536, at 287 (“[T]wo products are provisionally part of the same market [for hypothetical monopolist analysis] when they employ similar technologies and similar costs and customers use them interchangeably. . . In cases of doubt, [products] should generally be excluded from the provisional market, for incorrect exclusions will ultimately be brought into the market via the price increase methodology.”). The parties' DDIY products all provide a fundamentally similar service and a similar user experience for the consumer when compared with other methods of tax preparation. The DDIY consumer sits down at a computer and interacts with the DDIY software, which prompts the consumer for information and ultimately completes the consumer's tax return. This experience is qualitatively different than that of hiring a tax professional or figuring out how to complete one's own tax return manually. Various other evidence in the record also supports the fundamental functional similarity of the technology underlying the parties' DDIY products – perhaps most notably the testimony that post-merger, HRB plans to migrate {redacted} onto TaxACT's software “engine” {redacted}. *See Dunn, TT, 9/8/11 p.m. (sealed), at 16-17.*

As discussed in detail above, various documentary evidence suggests that the parties treat DDIY as a distinct product market in the ordinary course of business.

Dr. Warren-Boulton also considered whether the pen-and-paper and assisted methods should be included in the provisional relevant market, as the defendants contend, and concluded that they should not be.

Dr. Warren-Boulton ruled out including pen-and-paper in the relevant product market, concluding instead that historical tax return data reflects “a gradual migration of customers to [DDIY] from more traditional methods like pen-and paper.” GX 121 (Warren-Boulton Rep.) at 24. The percentage of returns prepared by pen-and-paper has fallen considerably over the last decade, while the percentage of DDIY has grown. *Id.* Changes in the yearly percentage shares of taxpayers using pen-and-paper do not appear correlated to changes in the yearly average price of DDIY. *Id.* at 27. Finally, based on IRS data, Dr. Warren-Boulton observed that taxpayers who switched from DDIY to pen-and-paper for tax seasons 2008 and 2009 on average experienced a decrease in tax return complexity, suggesting that much switching from DDIY products to pen-and-paper is driven by such complexity decreases.¹⁵

Dr. Warren-Boulton also ruled out including the assisted tax preparation methods in the relevant market based on consideration of several factors. He reviewed HRB documents that conclude that growth in DDIY has not come at the expense of HRB’s assisted business. *Id.* at 28. Testimony from HRB employees, including the former CEO, also reinforced the same conclusion. *Id.* at 28-29. He also cited HRB internal studies, which concluded that consumers who have switched from DDIY to assisted are likely to have experienced a change in tax complexity. He found that HRB’s internal conclusion was consistent with IRS switching data, which also indicated a correlation between switching from DDIY to assisted and an increase in tax complexity. *Id.* at 29-30. Finally, Dr. Warren-Boulton noted that, based on data from tax years 2004-2009, increases in the relative price of assisted products were not associated with decreases in the relative market share of assisted products and increases in the relative market

¹⁵ Switching, as discussed further below, refers to the switching of consumers between different products for any reason. The IRS categorizes tax returns into one of three complexity categories: Simple, Intermediate, and Complex. Accordingly, the IRS data only reflects complexity changes that are sufficient to result in assignment to a different one of the three categories.

share of DDIY, as might be expected if DDIY and assisted prices moved in a single, price-responsive market. *Id.* at 32.

Therefore, having determined that the best provisional relevant market is DDIY and not all methods of tax preparation, Dr. Warren-Boulton then performed two economic tests to confirm that a hypothetical monopolist of all DDIY products could profitably impose a SSNIP. If these economic tests indicated that a hypothetical monopolist could not profitably impose a SSNIP, then the tests would call for the relevant market to be expanded. The tests, however, validated the relevant market as DDIY, as detailed below.

The economic tests Dr. Warren-Boulton applied relied heavily upon switching data from the IRS. Switching refers to the number of consumers who switch between different products for any reason. In any given year, many taxpayers switch from the tax preparation method they used in the prior year to a new method. Since the IRS processes all U.S. tax returns each year and tracks data about the methods of tax preparation that taxpayers used, there is ample, reliable data that market analysts can use to see how many taxpayers switched between methods each year. The IRS data, however, provides little direct insight about *why* any given taxpayer switched methods of preparation. The switch could have been for reasons of price, convenience, changes in the consumer's personal situation, an increase or decrease in tax complexity, a loss of confidence in the prior method of preparation, or any other reason.

As opposed to switching, diversion refers to a consumer's response to a measured increase in the price of a product. In other words, diversion measures to what extent consumers of a given product will switch (or be "diverted") to other products in response to a price increase in the given product. The IRS switching data does not directly measure diversion because switching can occur for any number of reasons, many of which may not involve price.

Unfortunately, no direct, reliable data on diversion exists in this case. The plaintiff's expert argues, however, that the IRS switching data can provide at least some estimate of diversion. While this approach is not without its limitations, as discussed further below, the Court finds that the switching data is at least somewhat indicative of likely diversion ratios. Moreover, the IRS data is highly reliable because (1) the sample size is enormous, since it encompasses over 100 million taxpayers, and (2) the data reflects actual historical tax return filing patterns as opposed to predicted behavior.¹⁶

The defendant's expert, who criticizes reliance on this switching data, suggests instead that a better analysis can be based upon simulated diversion data derived from consumer surveys commissioned by the defendants. As described more fully below, however, the shortcomings of these survey-derived diversion data are so substantial that the Court cannot rely on them.

i. Critical Loss Analysis

The first economic test Dr. Warren-Boulton performed is known as a "critical loss" analysis. This test attempts to calculate "the largest amount of sales that a monopolist can lose before a price increase becomes unprofitable." *Swedish Match*, 131 F. Supp. 2d at 160. Dr. Warren-Boulton calculated that for a 10 percent price increase in DDIY, the price increase would

¹⁶ One limitation in the IRS data set is that if a taxpayer uses a DDIY product to prepare the return, but then prints and mails the return instead of e-filing it, the IRS does not attribute the filing to the DDIY provider and instead lists it in a generic "v-coded" pool of returns. At the hearing, the defendants' criticized the IRS switching data set as problematic on these grounds, suggesting that up to 30 million returns may be "v-coded." See Warren-Boulton, TT 9/20/11 a.m., at 21-22. As Dr. Warren-Boulton fully addressed in his expert report, however, a "conservative method for dealing with this issue is to drop all v-coded returns from the analysis," which would still leave well over 100 million returns in the IRS data set. *Id.*; GX 121 (Warren-Boulton Rep.) at 47. The defendants did not identify any reason the v-coded data would be likely to skew the data set. Thus, even if the v-coded data is disregarded, the IRS data set remains extensive and reliable. It is also worth noting that the IRS data does not distinguish between the DDIY providers' various products, so only firm-level switching rates are available. GX 121 (Warren-Boulton Rep.) at 47

be profitable if the resulting lost sales did not surpass 16.7 percent.¹⁷ GX 121 (Warren-Boulton Rep.) at 34.

Dr. Warren-Boulton then sought to compare this critical loss threshold with “aggregate diversion ratios.” The aggregate diversion ratio for any given product represents the proportion of lost sales that are recaptured by all other firms in the proposed market as the result of a price increase. Since these lost sales are recaptured within the proposed market, they are not lost to the hypothetical monopolist. According to Dr. Warren-Boulton, economists have shown that if the aggregate diversion ratio to products inside the proposed relevant market exceeds the critical loss threshold, then the critical loss analysis indicates that a SSNIP at that level would be profitable for a hypothetical monopolist. *Id.* at 34 (citing Michael Katz and Carl Shapiro, *Critical Loss: Let’s Tell the Whole Story*, ANTITRUST (Spring 2003) at 49 -56); *see also* Warren-Boulton, TT, 9/9/11 p.m., at 33-34.

Because no diversion data is available, Dr. Warren-Boulton relied instead on IRS switching data to estimate aggregate diversion ratios. *Id.* These data show that of the taxpayers who left HRB’s DDIY products between tax year 2007 and 2008,¹⁸ 57 percent went to other DDIY providers. Of those who left TaxACT, 53 percent stayed in DDIY, and for TurboTax, 39 percent stayed in DDIY. *Id.* at 34-35. Since these numbers are all well above the 16.7 percent critical loss threshold, Dr. Warren-Boulton concluded a 10 percent SSNIP in the DDIY market would be profitable for a hypothetical monopolist.

In cross-examining Dr. Warren-Boulton, the defendants suggested that the critical loss test is meaningless because it would seem to validate numerous different candidate markets

¹⁷ The formula for critical loss is $L = X/(X + M)$, where L is the critical loss, X is the percentage price increase, and M is the hypothetical monopolist’s gross margin. Assuming a 50 percent margin, which Dr. Warren-Boulton claims is a conservative estimate for firms in the DDIY market, then the critical loss for a 10 percent SSNIP is 16.7 percent. 16.7 percent is the result of applying 10 percent and 50 percent in the formula $X/(X+M)$: $.167 = .1/(.1+.5)$.

¹⁸ These are the last two years for which this data was available.

consisting of various assortments of tax preparation businesses. Warren-Boulton, TT, 9/9/11 p.m., at 20-42. For example, the defendants demonstrated that the test could also validate a market consisting of just HRB and Intuit or a market consisting of just TaxACT and Intuit. *See* DX 9802. Dr. Warren-Boulton noted in his testimony, however, that such markets are “smaller, irrelevant” markets for evaluating the proposed transaction between HRB and TaxACT. Warren-Boulton, TT, 9/9/11 p.m., at 41; *see also* Areeda & Hovenkamp ¶ 533c, at 254 (“[C]ourts correctly search for a ‘relevant market’ – that is a market relevant to the particular legal issue being litigated.”). The fact that critical loss analysis would validate other groupings of businesses does not undermine Dr. Warren-Boulton’s reliance on it to validate DDIY as the relevant market in this case.¹⁹ Indeed, rather than urging a smaller relevant market definition, the defendants urged the Court to define the market much more broadly. Nonetheless, the Court appreciates the defendants’ point that the critical loss test alone cannot answer the relevant market inquiry. While some inappropriate proposed relevant markets would be ruled out by the critical loss test, the fact that the test could still confirm multiple relevant markets means that the Court must rely on additional evidence in reaching the single, appropriate market definition.

ii. Merger Simulation

In addition to the critical loss analysis, Dr. Warren-Boulton also performed an economic simulation of a merger among the HRB, TaxACT, and Intuit. GX 121 (Warren-Boulton Rep.) at

¹⁹ The defendants also referred obliquely in cross examination to an academic debate surrounding the proper way to perform critical loss analysis. Warren-Boulton, TT, 9/9/11 p.m., at 23. Dr. Warren-Boulton acknowledged his awareness of the existence of this debate and the defendants’ counsel did not pursue the topic further. *Id.* The Court has no basis for disputing Dr. Warren-Boulton’s application of critical loss analysis based merely on the existence of unspecified academic critiques. The Court notes that the critical loss analysis is specifically endorsed by the Merger Guidelines as a method for implementing the SSNIP test, *see* Merger Guidelines § 4.1.3, and has been accepted by courts as a standard methodology. *See FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 40 n.16 (D.D.C. 2009) (“Critical loss analysis is a standard tool used by economists to study potentially relevant markets.”). The court in *CCC Holdings* ultimately did not rely on the expert’s application of critical loss analysis due to what the court deemed a “gap” or oversight in the expert’s reasoning, but the court nonetheless adopted the same relevant product market that the critical loss analysis had validated. *See id.* at 40-41.

35. This simulation, known as a Bertrand model, predicted that a monopolist of the DDIY products of these three companies would find it profit-maximizing to raise TaxACT's price by 83 percent, HRB's price by 37 percent and TurboTax's price by 11 percent absent efficiencies. *Id.* Dr. Warren Boulton concluded that this simulation also confirms that DDIY is the relevant product market.²⁰

iii. Critiques of Dr. Warren-Boulton's Analysis

The defendants' expert, Dr. Meyer, critiques Dr. Warren-Boulton's analysis in numerous ways. Her most fundamental critique is that his reliance on switching data as a proxy for diversion is flawed because switching can occur for any number of reasons and, therefore, it is not necessarily indicative of what products consumers would switch to in response to a price increase. DX 17 (Meyer Rep.) at 59-60. Dr. Meyer is certainly correct in this critique. Dr. Warren-Boulton, however, testified forthrightly about the limitations involved in relying on switching data as a proxy for diversion:

Using migration [i.e., switching] doesn't really answer, or it doesn't answer the precise question of [the] merger guidelines, which of course is, where would you go if there was a small but significant price increase? It basically asks the question, where did you go? And you could go for a lot of reasons. You could go because the price has changed, you could go because the quality changes, you could go because you changed. Complexity changes. And there's a lot of evidence in the record that people switch because of changes in their own complexity. But using migration percentages, or using those gives you, I think, a reasonable second estimate of diversion ratios, because it's really asking the question, you know, if you went to some -- if for some reason you decided to go from HRB to TaxACT, for all those reasons, is that roughly about the same percentages if you went due to a price increase?

Warren-Boulton, TT, 9/9/11 a.m., at 13-14. Thus, switching data does not necessarily indicate diversion for the reasons both experts have identified. In light of all the evidence in the record and the general similarity of DDIY products, the Court credits Dr. Warren-Boulton's conclusion

²⁰ Dr. Warren-Boulton's merger simulation is addressed further below in the Court's discussion of unilateral effects in Section III.B.2.c.

that it was reasonable to use switching data as a proxy for diversion, especially since no more refined historical data apparently exists. Bearing in mind the shortcomings of the switching data, the Court will not treat Dr. Warren-Boulton's hypothetical monopolist analysis as conclusive. The Court will treat it as another data point suggesting that DDIY is the correct relevant market, however.

Another major critique of Dr. Warren-Boulton's hypothetical monopolist analysis – and one that the defendants repeatedly emphasized at the hearing – is that Dr. Warren-Boulton decided “arbitrarily to *exclude* some alternatives that are closer substitutes than the products that he *included*.” DX 17 (Meyer Rep.) at 70; *see* Meyer, TT, 9/12/11 p.m., at 20-22. As Dr. Meyer put it at the hearing, “Dr. Warren-Boulton's relevant market is a miscellaneous set of unconnected links, because it doesn't include . . . the closest substitute to H&R Block [At Home], which is assisted tax preparation. It doesn't include pen and paper, which is the closest substitute to TaxACT.” Meyer, TT, 9/12/11 p.m., at 24-25. Dr. Meyer identified the “closest substitutes” to the merging parties' products using simulated diversion data. As discussed below, the Court finds this data unreliable and declines to rely upon it. Dr. Meyer opines, however, that Dr. Warren-Boulton failed to include the closest substitutes for the defendants' products in his market, even if switching data is treated as a proxy for diversion, as Dr. Warren-Boulton suggests. For example, Dr. Meyer states that “11.2% of TaxACT's customers in TY2007 switched to assisted preparation in TY2008, while only 2.7% switched to H&R Block At Home and 9.1% switched to TurboTax.” DX 17 (Meyer Rep.) at 72. Thus, the defendants contend Dr. Warren-Boulton violated the following principle from the Merger Guidelines: “When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally

also include a third product if that third product is a closer substitute for the first product than is the second product.” *Id.* at 72 (quoting Merger Guidelines § 4.1.1).

The government persuasively illustrated the key flaw in this critique during the cross-examination of the defendants’ expert. *See* Meyer, TT, 9/13/11 a.m., at 90-96. Simply put, when determining the “closest substitutes” for products within the DDIY category, Dr. Meyer looked at diversion to individual DDIY brands, such as TurboTax and H&R Block At Home, but when assessing substitutes outside the DDIY category, Dr. Meyer lumped all products and methods together into large, aggregated market categories, such as “assisted” or “pen-and-paper.” *See id.* If, instead, DDIY products are grouped together as an aggregated category, similar to the treatment of assisted and pen-and-paper in Dr. Meyer’s analysis, then the IRS switching data would indicate that other DDIY products are the closest substitutes for both the DDIY products of HRB and TaxACT. *See* GTX 15, 16 (illustrating this analysis). For HRB, the numbers show 56.8 percent switching to other DDIY, 36.9 percent to assisted, and 6.3 percent to pen-and-paper. GTX 15. For TaxACT, the numbers show 52.7 percent switching to other DDIY, 40.1 percent to assisted, and 7.3 percent to pen-and-paper. GTX 16.

Some of Dr. Meyer’s additional critiques have more merit. For example, one datum Dr. Warren-Boulton relied on in his analysis was the outcome of an advertising study showing that HRB’s sales {were affected} in cities where TaxACT pursued an advertising campaign. *See* GX 121 (Warren-Boulton Rep.) at 43. The Court accepts Dr. Meyer’s critique that few conclusions can be drawn from this observation because the observed correlation could have been due to other variables – for example, the advertising of a third competitor like TurboTax. *See* DX 17 (Meyer Rep.) at 69. Similarly, Dr. Warren-Boulton’s observations that changes in relative

market share of DDIY, assisted, and pen-and-paper do not appear correlated to changes in relative price could also have been affected by confounding variables. *Id.* at 67.

b. Defendants' Expert - Dr. Meyer

Dr. Meyer found the relevant product market to be all methods of tax preparation, including DDIY, assisted, and pen-and-paper. Her conclusion rested on various factors, including an analysis of documents and testimony. *See, e.g., id.* at 15. This Court, however, has already discussed its own analysis of the relevant documents and testimony above. Therefore, the Court will focus now on Dr. Meyer's analysis of pricing data and, in particular, her use of and reliance on data derived from customer surveys commissioned by the defendants.

Dr. Meyer found that assisted preparation competes with DDIY in part because the assisted method is the most popular method of tax preparation across all complexity levels. *See id.* at 12-13. Dr. Meyer concedes, however, that "taxpayers with the most complex tax returns are the most likely to use [assisted preparation]." *Id.* Indeed, her data show that this effect is pronounced, with approximately 70 percent of filers of complex returns using assisted and approximately 44 percent of filers of simple returns using assisted. *Id.* DDIY, by contrast, accounts for approximately 37 percent of simple returns and 23 percent of complex returns. *Id.* If anything, these data indicate that assisted products are linked to the needs of consumers with complex returns, suggesting a partially different consumer profile from DDIY products.

Dr. Meyer also noted that the pricing of DDIY and assisted products overlaps, but her analysis of this overlap rests primarily on comparing high-end DDIY products, such as HRB's Best of Both product,²¹ with low-end assisted products, such as Jackson Hewitt's offering of

²¹ The Best of Both product, as the name implies, actually combines aspects of DDIY and assisted. It enables a return completed on HRB's DDIY product to be reviewed by a tax professional. *See* DX 17 (Meyer Rep.) at 13 n.44. Thus, it is hardly surprising that this "hybrid" product, which features such exhaustive service, is priced more expensively than a typical DDIY product.

limited, simple return preparation at Wal-Mart. *See id.* at 13-14. Dr. Meyer concedes that the median price of assisted is higher than the median DDIY price, *see id.* at 13, and that is the more useful point of comparison.

Apart from these comparisons and her conclusions about how industry participants view the market based on her review of documents and testimony in the record, Dr. Meyer's definition of the relevant market rests primarily on her analysis of simulated diversion data obtained from a "pricing simulator" created for HRB in 2009 and an email survey conducted by TaxACT in 2011. *See id.* at 17-20. These two sources for her conclusions are discussed seriatim below.

i. Pricing Simulator

Dr. Meyer asserts in her report that the pricing simulator "created for HRB in 2009, provides the only direct test of the likely diversion from HRB's [DDIY] products in reaction to a change in price." *Id.* at 17. The simulator itself is a pricing model that runs as a dynamic Excel spreadsheet. *See Meyer, TT, 9/13/11 a.m., at 42.* Dr. Meyer's report in several instances relies upon an internal HRB Powerpoint presentation that reflects the simulator's data output under several different scenarios. *See, e.g., DX 17 (Meyer Rep.) at 37 n.155 (citing the Powerpoint).* As Dr. Meyer describes, the "simulator was prepared using a discrete choice survey of 6,119 respondents." *Id.* at 17. She explains that "[t]he respondents were shown five pricing scenarios, and the options included online DIY options, software DIY options, assisted tax preparation options, and other DIY options (including pen-and-paper and friends/family)." *Id.* Dr. Meyer further states that the "pricing of the various options changed across scenarios" and a "conjoint analysis was conducted to analyze the effect of a change in the price of each product on its own sales and the sales of the other tax preparation options." *Id.*

Based on the pricing simulator's results, Dr. Meyer calculated diversion ratios for DDIY products. Dr. Meyer found that "the largest diversion from HRB's [DDIY products], in the event of a price increase, is to CPAs and accountants." *Id.* at 18. She found the "second largest diversion from HRB's [DDIY products]" was to pen-and-paper. *Id.* at 19-20. In addition, "the fourth largest diversion is to HRB retail stores." *Id.* at 18. Accordingly, Dr. Meyer concluded that assisted preparation and pen-and-paper were the closest substitutes to HRB's DDIY products and should be included in the relevant market.

There is a critical flaw in the design of the pricing simulator, however, that renders conclusions based on its output unreliable. Despite Dr. Meyer's assertion that the "pricing of the various options changed across [the] scenarios" presented to the survey respondents, not all of the options in the survey underlying the simulator actually had prices associated with them. *See* Meyer, TT, 9/13/11 a.m., at 27-28. Several "non-priced choice options" were available to the survey respondents and these non-priced options included, importantly, "CPA or Accountant," "H&R Block Retail Office," and "Paper & Pencil." DX 9231 (May 2009 Pricing Simulator Powerpoint) at 4. Thus, while the pricing of the various options changed *for some products* across the different scenarios presented in the survey, no prices at all were associated with these critical "non-priced choice options."

The fact that the pricing simulator survey failed to assign any prices to these particular products is, of course, especially significant given Dr. Meyer's findings that the highest diversion from HRB DDIY was to CPAs and then to pen-and-paper. DX 17 (Meyer Rep.) at 18. Indeed, the conclusion that the largest diversion from HRB's DDIY products would be to CPAs is puzzling on its face. This outcome is counterintuitive because CPAs in general tend to be the most expensive form of tax preparation assistance, while DDIY tends to be the least expensive.

See GTX 14. The Court finds that these surprising results are most likely due to the fact that the survey did not, in fact, assign any price at all to the CPA option. Due to this flaw in the survey's design, respondents may well have selected the CPA option and the other non-priced options without even attempting to consider price as a factor in their decision. Accordingly, the Court finds that it simply cannot rely on the diversion ratios predicted by the simulator.

Additional problems with the pricing simulator also render its output unreliable. As Dr. Warren-Boulton noted in his rebuttal of Dr. Meyer's report, the compilation of pricing simulator data which Dr. Meyer relied upon to calculate her diversion ratios contains results that appear to violate what is "[p]erhaps the most fundamental principle in economics." See GX 665 (Warren-Boulton Reply Rep.) at 9-10. Increasing the price of one HRB DDIY product in the simulation, TaxCut Online Basic, appears to increase the quantity of the product sold, holding other variables constant. *Id.* This anomaly violates the fundamental economic principle that "demand curves almost always slope downward," which holds that, all other things being equal, consumers buy less of a product when the price goes up. See *id.* In another anomalous result, Dr. Warren-Boulton found that, based on the simulator data, cutting the price of TaxCut Online Basic from \$29.95 to \$14.95 approximately doubles its predicted market share, but cutting the price only to \$19.95 greatly reduces its market share.²² *Id.* Dr. Warren-Boulton also found that analysis of different print outs of simulator data in the HRB Powerpoint may yield inexplicably different results. For example, relying on the data on one page of the simulator Powerpoint, Dr. Meyer determined that the "the diversion rate from HRB to TaxACT is only 1.6 percent." DX 17 (Meyer Rep.) at 37. Yet, Dr. Warren-Boulton applied the same methodology for calculating

²² Dr. Meyer testified at the hearing that these anomalies are not reflected in the underlying simulator Excel data, but rather appear only in the printouts of simulator data contained in the internal HRB Powerpoint. In addition, Dr. Meyer explained that she redid her calculations excluding the anomalous data and came up with the same conclusions. See Meyer, TT, 9/12/11 p.m., at 45-47. Dr. Meyer never identified the source or cause of the anomalies, however. *Id.* at 49.

the diversion rate to the simulator data reflected on another slide of the same Powerpoint purporting to show the same simulator data as applied to a different scenario. This calculation yielded the “wildly different estimate” of a 32.4 percent diversion rate from HRB to TaxACT. See GX 665 (Warren-Boulton Reply Rep.) at 10. These inconsistent and anomalous results provide additional reasons to discredit the diversion ratios Dr. Meyer predicted from the simulator data.

ii. 2011 Email Survey

Dr. Meyer’s analysis also relied on a 2011 email survey of TaxACT customers commissioned by the defendants.²³ See DX 17 (Meyer Rep.) at 20, 38. In April 2011, TaxACT and HRB jointly commissioned this survey “to determine to which products TaxACT’s customers would switch if those customers were displeased with TaxACT because of price, quality, or functionality.” *Id.* at 20. The survey asked one primary question: “If you had become dissatisfied with TaxACT’s price, functionality, or quality, which of these products or services would you have considered using to prepare your federal taxes?” GX 604 (Survey Summary) at 1. The survey then offered the respondents a list of other products or services from which to choose and instructed them to select all applicable options. *Id.* The list of options that respondents were given varied somewhat depending on the respondents’ filing status and the payments they had made for their 2011 tax returns.²⁴ *Id.* A follow-up question asked the respondents to narrow their selections to a single choice. *Id.*

²³ Prior to the hearing in this case, the government filed a motion in limine to exclude this survey from evidence and to limit Dr. Meyer’s opinion to the extent it relied on the survey. See ECF No. 60. The government argued that the survey’s wording and methodology made it inherently unreliable and therefore inadmissible. While the Court noted that the government had identified a number of defects in the methodology and wording of the survey, the Court concluded that these defects did not undermine the survey and the expert’s reliance on it so overwhelmingly as to render the survey inadmissible, especially in a bench trial. See Memorandum Opinion and Order on Motion in Limine, September 6, 2011, ECF No. 84.

²⁴ The response options varied among four different categories of filers, which are discussed further below. For example, the list of options presented to filers who completed a free federal tax return and no state return were: “I

The research firm conducting the survey initially sent out 46,899 email requests to TaxACT customers inviting them to participate in the survey and then subsequently targeted 24,898 customers who had purchased a federal tax return product but not a state product. *Id.* Survey respondents were also asked screening questions to determine their membership in one of four categories of customers: (1) those who paid to complete both a federal and state tax return; (2) those who completed a free federal return and paid to complete a state return; (3) those who completed a paid federal return but did not complete a state return; and (4) those who completed a free federal return and did not complete a state return. *Id.*

A total of 1,089 customers responded to the survey. *Id.* at 1-3. The response rates for the four categories of customers were: (1) 2.45 percent for paid federal / paid state filing (422); (2) 2.08 percent for free federal / paid state filing (245); (3) 0.6 percent for paid federal / no state filing (182); and (4) 1.7 percent for free federal / no state filing (240). *Id.*

Dr. Meyer opined that “this survey is closer to the concept of a diversion ratio than are data on overall switching between products.” DX 17 (Meyer Rep.) at 20 n.85. Based on the survey’s results, she concluded that the survey “provides direct evidence that digital DIY products compete with pen-and-paper” because the percentage of TaxACT customers who reported that, if they were dissatisfied with TaxACT, they would switch to pen-and-paper in each group ranged from 27 to 34 percent. DX 17 (Meyer Rep.) at 20. Dr. Meyer also noted that the survey showed that few TaxACT customers would switch to H&R Block At Home, since only 4 to 10 percent of respondents selected that option. *Id.* at 38. Accordingly, Dr. Meyer found this outcome indicative that “HRB is not a particularly close competitor to TaxACT.” *Id.*

would prepare myself without help,” “TurboTax Free Edition,” “H&R Block at Home Free Edition,” “Free TaxUSA Free Edition,” “Complete Tax Free Basic,” “An Accountant,” “I would use a product on FFA [i.e., Free File Alliance],” “TaxSlayer Free Edition,” “Jackson Hewitt Free Basic,” “Tax\$imple Free Basic,” and “Other.” GX604 at 2.

In response to Dr. Meyer's reliance upon this survey, the government submitted a rebuttal expert report from Dr. Ravi Dhar, a professor of management at Yale University, which credibly critiques the survey on several levels.²⁵ GX 623 (Dhar Rep.). Most fundamentally, the government points out that the phrasing of the survey question – which asks about dissatisfaction with “TaxACT’s price, functionality, or quality” – appears to ask a hypothetical question about *switching*, not diversion based solely on a price change. Since the phrasing of the survey question conflates customer concerns about price, functionality, or quality, the government argues that the survey cannot shed any light on customer reactions to price changes alone. *See id.* at 5. Further, to the extent that the wording of the question addresses price, it does not ask about a change in price, but rather suggests a change in the customer’s satisfaction with TaxACT’s existing price. *See id.*

At the hearing, Dr. Meyer explained that she viewed the email survey data as “closer to diversion than is pure switching data” because switching could occur for any reason at all, while the survey only asked about potential switching due to dissatisfaction with “price, functionality, or quality.” Meyer, TT, 9/13/11 a.m., at 87. Yet the Court finds that almost any reason for switching from a product could be characterized as dissatisfaction with the “functionality” or “quality” offered by the product in some respect. Therefore, the survey question does not come much closer to identifying diversion ratios than pure switching data does. Moreover, since there is extensive IRS data reflecting actual switching behavior in the marketplace – as opposed to the hypothetical switching behavior asked about in the email survey – the Court will not rely on the “diversion ratios” suggested by the 2011 email survey.

Furthermore, additional defects in the 2011 email survey’s methodology also render the reliability of its findings questionable. First, the high level of non-response to the defendants’

²⁵ Dr. Dhar did not testify in person at the hearing, but provided an expert report and affidavit.

email invitations to participate in the survey could have biased the results. Dr. Dhar explained that the “level of nonresponse . . . is extremely high (more than 98%)” and that the “extremely low response rates makes it difficult to determine whether the results were impacted by a certain segment who were systematically more likely to respond to the survey (e.g., those who were price sensitive or time insensitive) in relation to those who did not respond.” GX 623 (Dhar Rep.) at 10. The Court agrees that non-response bias is a potential pitfall of the survey. *See University of Kansas v. Sinks*, No. 06-2341, 2008 WL 755065, at *4 (D. Kan. Mar. 19, 2008) (noting, in trademark case, that a consumer survey response rate of “2.16% appears, by any standard, to be quite low.”). Second, by providing survey respondents with a pre-selected list of alternative options, rather than letting respondents respond organically, the survey leads respondents to think about the market for tax preparation services in the same terms that the defendants do, which may have led respondents to select options they otherwise would not have selected. Since the survey’s question essentially asks about hypothetical switching, and since the actual IRS switching data in this case reflect a much larger sample size without the methodological deficiencies of the 2011 survey, the Court declines to rely on the purported diversion ratios calculated from the email survey.

On the whole, the Court views Dr. Warren-Boulton’s expert analysis as more persuasive than Dr. Meyer’s.²⁶ First, Dr. Warren-Boulton’s testimony was generally more credible than Dr. Meyer’s.²⁷ Second, the diversion ratios that Dr. Meyer calculated from the pricing simulator and the 2011 email survey are unreliable, as discussed above. Without these simulated diversion

²⁶ Of course, the Court remains cognizant that the plaintiff bears the burden of proof in demonstrating the relevant market.

²⁷ For example, Dr. Meyer’s description of the pricing simulator survey as one in which the “pricing of the various options changed across scenarios” was inaccurate insofar as several of the most significant products for the purposes of Dr. Meyer’s analysis did not have any prices associated with them at all. *See discussion supra*.

ratios, little remains of Dr. Meyer's expert conclusions apart from her analysis of documents in the record.

Dr. Warren-Boulton's analysis is not without its limitations. The main shortcoming for his approach is that he relied on switching data as a proxy for diversion. Since there is evidence in the record that switching among different products in the broader tax preparation industry occurs for reasons other than price competition, switching cannot serve as a complete proxy for diversion. Even so, the Court credits Dr. Warren-Boulton's conclusion that switching data can provide a "reasonable second estimate" of diversion ratios here. Therefore, the Court finds that Dr. Warren-Boulton's analysis tends to confirm that the relevant market is DDIY, although the Court would not rely on his analysis exclusively. As explained above, however, the full body of evidence in this case makes clear that DDIY is the correct relevant market for evaluating this merger.

B. Likely Effect on Competition

1. The Plaintiff's Prima Facie Case

Having defined the relevant market as DDIY tax preparation products, "the Court must next consider the likely effects of the proposed acquisition on competition within that market." *Swedish Match*, 131 F. Supp. 2d at 166. The government must now make out its prima facie case by showing "that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[] in a significant increase in the concentration of firms in that market.'" *Heinz*, 246 F.3d at 715 (quoting *Philadelphia Nat'l Bank*, 374 U.S. at 363). "Such a showing establishes a 'presumption' that the merger will substantially lessen competition." *Id.*

“Market concentration, or the lack thereof, is often measured by the Herfindahl-Hirschmann Index (‘HHI’).” *Id.* at 716. “The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. For example, a market with ten firms having market shares of 20%, 17%, 13%, 12%, 10%, 10%, 8%, 5%, 3% and 2% has an HHI of 1304 ($20^2 + 17^2 + 13^2 + 12^2 + 10^2 + 10^2 + 8^2 + 5^2 + 3^2 + 2^2$).” *Id.* at 715 n.9. Sufficiently large HHI figures establish the government’s prima facie case that a merger is anticompetitive. *Id.* Under the Horizontal Merger Guidelines, markets with an HHI above 2500 are considered “highly concentrated” and mergers “resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.” Merger Guidelines § 5.3.

In this case, market concentration as measured by HHI is currently 4,291, indicating a highly concentrated market under the Merger Guidelines. GX 121 (Warren-Boulton Rep.) at 38. The most recent measures of market share show Intuit with 62.2 percent of the market, HRB with 15.6 percent, and TaxACT with 12.8 percent. GX 27. These market share calculations are based on data provided by the IRS for federal tax filings for 2010, the most recent data available.

The defendants argue that market share calculations based exclusively on federal filing data are insufficient to meet the plaintiff’s burden in establishing its alleged relevant product market, which includes both federal and state filings. Defs.’ Post-Trial Mem. at 12-13. The Court rejects this argument. State tax return products are typically sold as add-ons to or in combination with federal return products and the Court finds that there is little reason to conclude that the market share proportions within the state DDIY segment would be significantly different from federal DDIY. *See* GX 600 at 8 (HRB market research study stating that “[t]he desire to file State and Federal taxes together, and, inherently, for ease/convenience overruled all

other rationales for the method chosen for State taxes.”). While, as defendants point out, many customers of federal tax return DDIY products do not also purchase state returns, that may be because they live in states without income tax or because their state returns are simple enough to prepare very easily without assistance. See Dunn, TT, 9/8/11 a.m., at 48-49. A reliable, reasonable, close approximation of relevant market share data is sufficient, however. *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986). Further, the defendants’ own ordinary course of business documents analyze the market based on IRS federal e-file data, without reference to state filings, even though the defendants’ clearly sell state tax return products. See, e.g., GX 27.

The proposed acquisition in this case would give the combined firm a 28.4 percent market share and will increase the HHI by approximately 400, resulting in a post-acquisition HHI of 4,691. *Id.* These HHI levels are high enough to create a presumption of anticompetitive effects. See, e.g., *Heinz*, 246 F.3d at 716 (three-firm to two-firm merger that would have increased HHI by 510 points from 4,775 created presumption of anticompetitive effects by a “wide margin”); *Swedish Match*, 131 F. Supp. 2d at 166-67 (60 percent market share and 4,733 HHI established presumption). Accordingly, the government has established a *prima facie* case of anticompetitive effects.

“Upon the showing of a *prima facie* case, the burden shifts to defendants to show that traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger’s probable effect on competition in these markets or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects.” *CCC Holdings*, 605 F. Supp. 2d at 46. “The courts have not established a clear standard that the merging parties must meet in order to rebut a *prima facie* case, other than to

advise that “[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully.” *Id.* at 46-47 (quoting *Baker Hughes*, 908 F.2d at 991). Even in cases where the government has made a strong prima facie showing:

[i]mposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories.

Baker Hughes, 908 F.2d at 992. Thus, ultimately, “[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the [Clayton Act], weighing a variety of factors to determine the effects of particular transactions on competition.” *Id.* at 984. With these observations in mind, the Court will evaluate the parties’ evidence and arguments about the likely effect of the transaction on competition in the DDIY market.

2. Defendants’ Rebuttal Arguments

a. Barriers to Entry

Defendants argue that the likelihood of expansion by existing DDIY companies besides Intuit, HRB, and TaxACT will offset any potential anticompetitive effects from the merger. Courts have held that likely entry or expansion by other competitors can counteract anticompetitive effects that would otherwise be expected. *See Heinz*, 246 F.3d at 717 n.13 (“Barriers to entry are important in evaluating whether market concentration statistics accurately reflect the pre- and likely post-merger competitive picture.”); *Baker Hughes*, 908 F.2d at 987 (“In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time.”). According to the Merger Guidelines, entry or expansion must be “timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.” Merger Guidelines § 9; *see also CCC Holdings*, 605 F. Supp.

2d at 47; *United States v. Visa USA, Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001) (entry must be “timely, likely, and [of a] sufficient scale to deter or counteract any anticompetitive restraints”). “Determining whether there is ease of entry hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market.” *CCC Holdings*, 605 F. Supp. 2d at 47 (quoting *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 55 (D.D.C. 1998)). In this case, the parties essentially agree that the proper focus of this inquiry is on the likelihood of expansion by existing competitors rather than new entry into the market.²⁸ See Defs.’ Post-Trial Mem. at 21-22. Since the government has established its prima facie case, the defendants carry the burden to show that ease of expansion is sufficient “to fill the competitive void that will result if [defendants are] permitted to purchase” their acquisition target. *Swedish Match*, 131 F. Supp. 2d at 169.

In describing the competitive landscape, the defendants note there are eighteen companies offering various DDIY products through the FFA. Defs.’ Post-Trial Mem. at 22. Most of these companies are very small-time operators, however. The defendants acknowledge this fact, but nevertheless contend that the companies “TaxSlayer and TaxHawk are the two largest and most poised to replicate the scale and strength of TaxACT.” *Id.* at 23. Witnesses from TaxSlayer and TaxHawk were the only witnesses from other DDIY companies to testify at the hearing. As such, the Court’s ease of expansion analysis will focus on whether these two competitors are poised to expand in a way that is “timely, likely, and sufficient in its magnitude,

²⁸ New entrants to the market would not only face all of the barriers to expansion already faced by the existing small firms offering DDIY products, they would also have to develop their own products, including a software platform and a sufficient level of tax expertise. For entry to be considered timely, it typically must occur within approximately two years post-merger. See Commentary on the Horizontal Merger Guidelines (2006) at 45-46 (discussing prior Merger Guidelines § 3.2, which specified that timely entry should occur within two years). It is unlikely that an entirely new entrant to the market could compete meaningfully with the established DDIY firms within that time frame.

character, and scope to deter or counteract” any potential anticompetitive effects resulting from the merger.

TaxHawk runs five different websites, including FreeTaxUSA.com, that all market the same underlying DDIY product. Kimber, TT, 9/12/11 a.m., at 12, 40. TaxHawk was founded in 2001, three years after TaxACT, although it has a significantly smaller market share of 3.2 percent. *Id.* at 11; GX 27. TaxHawk’s vice-president and co-founder, Mr. Dane Kimber, testified that the company has the technical infrastructure to grow by five to seven times the number of customers in any given year. Kimber, TT, 9/12/11 a.m., at 21. TaxHawk’s marketing strategy relies substantially on search engine advertising and search term optimization, including by using the FreeTaxUSA.com domain name, which contains the keywords “free” and “tax.” *See id.* at 19-27. Despite having been in business for a decade, its products are functionally more limited than those of Intuit, HRB, and TaxACT in various ways. *See* PFF ¶ 185. Although TaxHawk services the forms that cover most taxpayers, its program does not service all federal forms, it excludes two states’ forms in their entirety, and it does not service city income tax forms for major cities that have income taxes – notably, New York City. Kimber, TT, 9/12/11 a.m., at 44. In fact, Mr. Kimber testified that the company would likely need another decade before its DDIY products could fully support all the tax forms. *Id.* at 45. The reason is that TaxHawk is what Mr. Kimber “like[s] to call . . . a ‘lifestyle’ company. We like the lifestyle we have as owners. We want our employees to have a life, if you will. I do feel we have the expertise to [expand functionality] more rapidly, but we choose not to.” *Id.* Mr. Kimber also testified that TaxHawk had suddenly experienced an unprecedented growth rate of over 60 percent since April 2011, *id.* at 20-21, but that the company had not done any analysis to attempt to explain this unanticipated (and presumably welcome) growth. *Id.* at 39.

TaxHawk's relaxed attitude toward its business stands in stark contrast to the entrepreneurial verve that was apparent throughout the testimony of Mr. Dunn and that has been rewarded by the impressive growth of TaxACT over the years. In short, TaxHawk is a very different company from TaxACT. TaxHawk is a small company that has developed a string of search-engine-optimized DDIY websites, which deliver a sufficient income stream to sustain its owners' comfortable lifestyle, without requiring maximal effort on their part. While TaxHawk's decision to prioritize a relaxed lifestyle over robust competition and innovation is certainly a valid one, expansion from TaxHawk that would allow it to compete "on the same playing field" as the merged company appears unlikely. *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 430 (5th Cir. 2008).

After TaxHawk, TaxSlayer is the next largest DDIY competitor, with a 2.7 percent market share. GX 27. TaxSlayer.com launched in 2003, although the same company started selling a software product to tax professionals several years earlier. Rhodes, TT, 9/12/11 a.m., at 71. TaxSlayer is part of the same corporate family as Rhodes Murphy, a tax firm that provides assisted tax preparation through sixteen retail offices in the Augusta, Georgia area. *Id.* The company is a family business and James Brian Rhodes, the product manager of TaxSlayer and the son of the company's founder, testified at the hearing. *Id.* at 70,73. Mr. Rhodes testified that, in the event of an increase in TaxACT's prices or a decrease in its quality, he "believe[s] that [TaxSlayer is] poised and ready to take those customers who would want to go elsewhere for lower prices." *Id.* at 81. TaxSlayer's marketing strategy relies heavily on sponsorship of sporting events, including the Gator Bowl and NASCAR. *Id.* at 75. TaxSlayer typically invests {a significant amount of its budget in marketing}. Rhodes, TT, 9/12/11 a.m. (sealed), at 86, 92. For example, TaxSlayer plans to spend \${redacted} on marketing in 2012 based on 2011

revenues of \${redacted}. *Id.* at 84, 87. Despite this {high} level of marketing spending, TaxSlayer's DDIY market share has not changed substantially since 2006, despite steady growth in TaxSlayer's revenue and number of units sold. *See id.* at 94-96; GX 21-7 (IRS e-file share data chart showing 2.5 percent share for TaxSlayer in 2006 and 2.7 percent in 2010). Rather, TaxSlayer's growth in unit sales and revenue has come from maintaining the same slice of an expanding pie – the growing DDIY market. *See* GX 21-7.

TaxSlayer's stable market share despite its {significant} marketing expenditure as a proportion of revenue points to what the government considers the key barrier to entry in this market – the importance of reputation and brand in driving consumer behavior in purchasing DDIY products. Simply put, tax returns are highly personal documents that carry significant financial and legal consequences for consumers. Consumers, therefore, must trust and have confidence in their tax service provider. As one of TaxACT's bankers put it a confidential memorandum, “[t]ax filers must have confidence that sensitive data is being handled with care and that returns are processed in a secure, error-free and timely manner.” GX 125 at 12.

Building a reputation that a significant number of consumers will trust requires time and money. As HRB's former CEO noted, it takes millions of dollars and lots of time to develop a brand. Bennett, TT, 9/6/11 p.m., at 30. TaxACT's offering memoranda also point to the difficulty in building a brand in the industry as a barrier to competition. *See* GX 28-24 at 2SS-CORPe-2419 (2009 memorandum stating “With over 11 years of building reliable, robust software solutions, 2SS has created a valuable brand within the online tax preparation market which Management believes would take years of competitive investment to replicate.”). In the DDIY industry, the Big Three incumbent players spend millions on marketing and advertising each year to build and maintain their brands, dwarfing the combined spending of the smaller

companies. For example, in tax year 2009, Intuit, HRB, and TaxACT collectively spent approximately {over \$100 million} on marketing and advertising. GX 29 (Intuit Decl.) ¶ 38; GX 61-22 at 3; GX 138 at 37. By contrast, {TaxSlayer and TaxHawk spent a significantly smaller amount}.²⁹ Rhodes, TT, 9/12/11 a.m. (sealed), at 95; GX 25 (TaxHawk Decl.) ¶ 14.

Even TaxACT's successful business strategy has been premised on the notion that it cannot outspend Intuit and HRB on marketing. Dunn, TT, 9/7/11 p.m., at 71-72. The massive marketing expenditures of the two major DDIY firms create high per customer acquisition costs and limit the easy marketing channels that are open to smaller competitors. *See, e.g., id.* at 88-89 (noting that "Web advertising is the most competitive. . . I think [TaxACT is] going to get shut out on Yahoo [the popular web portal]. I think Intuit is going to buy it lock, stock and barrel," and explaining that this outcome would hurt TaxACT's business if it doesn't find effective alternative advertising venues). Rather than attempting to outspend HRB and Intuit, TaxACT's growth strategy has largely depended on providing "great customer service, a great product, and a great customer experience" and then relying on word-of-mouth referrals to spread the awareness of the brand. *Id.* at 71-72. This process is inherently time-consuming and difficult to replicate.

In support of their argument that TaxSlayer and TaxHawk are poised to expand in response to a price increase, the defendants emphasize that these companies "are at about the same position in terms of customer base as TaxACT was in 2002, which was the year before it did the Free For All [offer on] the FFA." Meyer, TT, 9/12/11 p.m., at 130. The government points out, however, that there are two flaws in this comparison, even assuming that TaxSlayer

²⁹ The defendants attempt to reframe this disparity by noting that their calculation of TaxSlayer's projected tax season 2015 marketing budget would slightly surpass the amount of TaxACT's actual 2011 marketing budget. Defs.' Post-Trial Mem. at 23. Setting aside the validity of the defendants' aggressive projections of TaxSlayer's 2015 budget, a proper comparison would have to be founded upon a comparable projection of TaxACT's 2015 budget—not TaxACT's actual 2011 numbers, for which the relevant comparison is TaxSlayer's 2011 numbers.

and TaxHawk were TaxACT's competitive equals. First, while these companies may have a similar number of customers to TaxACT in 2002 in absolute terms, TaxACT's market share at 8 percent was already significantly larger than the market shares of these firms today, despite the fact that TaxACT had been in the market for fewer years. *See* GTX 17.

Second, the DDIY market has matured considerably since 2002, in parallel with the general ripening of various online industries during the past decade. Notably, the pool of pen-and-paper customers has dwindled as DDIY preparation has grown. Thus, the "low hanging fruit" of DDIY customer acquisition may have been plucked. *See* GX 296 (Houseworth Dep.) at 66-68 (noting that "there's probably only two or three years of continued mid teens category growth for online" because of the shrinking pool of new potential customers that can be converted from the pen-and-paper method). This trend suggests existing market shares may become further entrenched and that growing market share may be even harder, especially because there are barriers to switching from one DDIY product to another. For example, the hearing evidence showed that it is difficult to import prior-year tax return data across DDIY brands. If a taxpayer uses, say, TurboTax or TaxACT in one year, then when the taxpayer returns the next year, the program can automatically import the prior year's data, which is not only convenient but can also help the taxpayer identify useful tax information, such as carry forwards and available deductions. Dunn, TT, 9/8/11 a.m., at 111-14. Currently, it is not possible to import much of this data if the taxpayer switches to a competitor's product. *Id.* Thus, this feature lends a "stickiness" to each particular DDIY product once a customer has used it.

Upon consideration of all of the evidence relating to barriers to entry or expansion, the Court cannot find that expansion is likely to avert anticompetitive effects from the transaction.

The Court will next consider whether the evidence supports a likelihood of coordinated or unilateral anticompetitive effects from the merger.

b. Coordinated Effects

Merger law “rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels.” *CCC Holdings*, 605 F. Supp. 2d at 60 (quoting *Heinz*, 246 F.3d at 715). The government argues that the “elimination of TaxACT, one of the ‘Big 3’ Digital DIY firms” will facilitate tacit coordination between Intuit and HRB. Pl.’s Post-Trial Mem. at 15. “Whether a merger will make coordinated interaction more likely depends on whether market conditions, on the whole, are conducive to reaching terms of coordination and detecting and punishing deviations from those terms.” *CCC Holdings*, 605 F. Supp. 2d at 60 (internal quotation omitted). Since the government has established its prima facie case, the burden is on the defendants to produce evidence of “structural market barriers to collusion” specific to this industry that would defeat the “ordinary presumption of collusion” that attaches to a merger in a highly concentrated market. *See Heinz*, 246 F.3d at 725.

The defendants argue the primary reason that coordinated effects will be unlikely is that Intuit will have no incentive to compete any less vigorously post-merger. The defendants assert that the competition between Intuit and HRB’s retail stores would be “fundamentally nullified if Intuit decided to reduce the competitiveness of TurboTax.” Defs.’ Post-Trial Mem. at 17. Further, defendants contend that Intuit has no incentive to reduce the competitiveness of its free product because it views its free product as a critical driver of new customers. *Id.* at 17-18. Therefore, the defendants conclude that if HRB does not compete as aggressively as possible with its post-merger products, it will lose customers to Intuit. *Id.* at 18.

The most compelling evidence the defendants marshal in support of these arguments consists of documents and testimony indicating that Intuit engaged in a series of “war games” designed to anticipate and defuse new competitive threats that might emerge from HRB post-merger. *See* GX 293 (Intuit Dep.) at 98-101; DX 84. The documents and testimony do indicate that Intuit and HRB will continue to compete for taxpayers’ patronage after the merger—indeed, in the DDIY market, they would be the only major competitors. This conclusion, however, is not necessarily inconsistent with some coordination. As the Merger Guidelines explain, coordinated interaction involves a range of conduct, including unspoken understandings about *how* firms will compete or refrain from competing. *See* Merger Guidelines § 7.

In this case, the government contends that coordination would likely take the form of mutual recognition that neither firm has an interest in an overall “race to free” in which high-quality tax preparation software is provided for free or very low prices. Indeed, the government points to an outline created as part of the Intuit “war games” regarding post-merger competition with HRB that also indicates an Intuit employee’s perception that part of HRB’s post-merger strategy would be to “not escalate free war: Make free the starting point not the end point for customers.” GX 293-13 at INT-DOJ0015942.³⁰ Since, as defendants point out, DDIY companies have found “free” offers to be a useful marketing tool, it is unlikely that free offers would be eliminated. Rather, the government argues, it is more likely that HRB and Intuit may

³⁰ The government also cites an informal analysis written by Adam Newkirk, an analyst for HRB’s DDIY business. Mr. Newkirk’s analysis hypothesized that one possible reason for HRB to acquire TaxACT was that HRB and Intuit would jointly control a large DDIY market share post-merger and would “both obviously have great incentive to keep this channel profitable,” while other potential purchasers of TaxACT “could decide to cut prices even further . . .” *See* Newkirk, TT, 9/7/11 a.m., at 100; GX 18. The Court finds that the government overemphasized the importance and relevance of Mr. Newkirk’s analysis. The hearing testimony showed that Mr. Newkirk is a data analyst who had no decision-making role or authority in relation to the merger and that his discussion about the rationales for the merger was informal speculation. *See* Newkirk, TT, 9/7/11 p.m., at 42-44. Even so, this reasoning – independently reached by Intuit – is essentially a précis of the government’s coordinated effects concern.

find it “in their mutual interest to reduce the quality of their free offerings . . . offer a lower quality free product and maintain higher prices for paid products” PFF ¶ 141.

The government points to a highly persuasive historical act of cooperation between HRB and Intuit that supports this theory. *Cf.* Merger Guidelines § 7.2 (“[M]arket conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion.”). After TaxACT launched its free-for-all offer in the FFA, Intuit proposed that the firms in the market limit their free FFA offers, a move which TaxACT opposed and which Mr. Dunn believed was an illegal restraint on trade. Dunn, TT, 9/7/11 p.m., at 79. HRB, Intuit, and others then joined together and successfully lobbied the IRS for limitations on the scope of the free offers through the FFA – limitations that remain in place today. Ernst, TT, 9/7/11 a.m., at 26-27; Warren-Boulton, TT, 9/9/11 p.m., at 78. This action illustrates how the pricing incentives of HRB and Intuit differ from those of TaxACT and it also shows that HRB and Intuit, although otherwise competitors, are capable of acting in concert to protect their common interests.

The defendants also argue that coordinated effects are unlikely because the DDIY market consists of differentiated products and has low price transparency. *See CCC Holdings*, 605 F. Supp. 2d at 62 (recognizing the importance of price transparency to the likelihood of coordinated effects). To the contrary, the record clearly demonstrates that the players in the DDIY industry are well aware of the prices and features offered by competitors. Since DDIY products are marketed to a large swath of the American population and available via the Internet, DDIY firms can easily monitor their competitors’ offerings and pricing. The fact that competitors may offer various discounts and coupons to some customers via email hardly renders industry pricing “not transparent,” as defendants submit. *See* Defs.’ Post-Trial Mem. at 21. Moreover, while

collusion may, in some instances, be more likely in markets for homogenous products than differentiated products, product differentiation in this market would not necessarily make collusion more difficult. *See Heinz*, 246 F.3d at 716-17, 724-25 (finding likelihood of coordinated effects in product market differentiated by brand); *see also CCC Holdings*, 605 F. Supp. 2d at 65 n.42 (“[T]acit collusion may be easier when products are differentiated.”) (quoting Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook*, § 11.2e1, at 635 (2d ed. 2006)).

Other indicia of likely coordination are also present in the DDIY market. Transactions in the market are small, numerous, and spread among a mass of individual consumers, each of whom has low bargaining power; prices can be changed easily; and there are barriers to switching due to the “stickiness” of the DDIY products. *See CCC Holdings*, 605 F. Supp. 2d at 65-66 (discussing these factors as characteristic of markets conducive to coordination); *see also supra* Section III.B.2.a (discussing the difficulty of importing data as a barrier to switching from one DDIY product to another).

Finally, the Court notes that the “merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market, a factor which is certainly an important consideration when analyzing possible anti-competitive effects.” *Staples*, 970 F. Supp. at 1083; *see also FTC v. Libbey*, 211 F. Supp. 2d 34, 47 (D.D.C. 2002). The evidence presented at the hearing from all parties demonstrated TaxACT’s impressive history of innovation and competition in the DDIY market. Mr. Dunn’s trial testimony revealed him to be a dedicated and talented entrepreneur and businessman, with deep knowledge and passion for providing high-quality, low-cost tax solutions. TaxACT’s history of expanding the scope of its high-quality, free product offerings has pushed the industry toward lower pricing, even when the two major

players were not yet ready to follow – most notably in TaxACT’s introduction of free-for-all into the market.

The government presses the argument that TaxACT’s role as an aggressive competitor is particularly important by urging this Court to find that TaxACT is a “maverick.” *See* Pl.’s Post-Trial Mem. at 18-19. In the context of antitrust law, a maverick has been defined as a particularly aggressive competitor that “plays a disruptive role in the market to the benefit of customers.” Merger Guidelines § 2.1.5. The most recent revision of the Merger Guidelines endorses this concept and gives a few examples of firms that may be industry mavericks, such as where “one of the merging firms may have the incentive to take the lead in price cutting or . . . a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.” *Id.*

The parties have spilled substantial ink debating TaxACT’s maverick status. The arguments over whether TaxACT is or is not a “maverick” – or whether perhaps it once was a maverick but has not been a maverick recently – have not been particularly helpful to the Court’s analysis. The government even put forward as supposed evidence a TaxACT promotional press release in which the company described itself as a “maverick.” *See* GX 28-6. This type of evidence amounts to little more than a game of semantic gotcha. Here, the record is clear that while TaxACT has been an aggressive and innovative competitor in the market, as defendants admit, TaxACT is not unique in this role. Other competitors, including HRB and Intuit, have also been aggressive and innovative in forcing companies in the DDIY market to respond to new product offerings to the benefit of consumers. *See* Defs.’ Post-Trial Mem. at 20.

The government has not set out a clear standard, based on functional or economic considerations, to distinguish a maverick from any other aggressive competitor. At times, the

government has emphasized TaxACT's low pricing as evidence of its maverick status, while, at other times, the government seems to suggest that almost any competitive activity on TaxACT's part is a "disruptive" indicator of a maverick. For example, the government claims that "[m]ost recently, TaxACT continued to disrupt the Digital DIY market by entering the boxed retail software segment of the market, which had belonged solely to HRB and [Intuit]." Pl.'s Post-Trial Mem. at 19. Credible evidence at the hearing, however, showed {otherwise}. See Dunn, TT, 9/8/11 p.m. (sealed), at 4. Moreover, the Court credits Mr. Dunn's explanation that TaxACT has little interest in selling boxed retail software because he believes this market segment is {redacted} not particularly significant. See Dunn, TT, 9/7/11 p.m. (sealed), at 123 ({redacted}).

What the Court finds particularly germane for the "maverick" or "particularly aggressive competitor" analysis in this case is this question: Does TaxACT consistently play a role within the competitive structure of this market that constrains prices? See *Staples*, 970 F. Supp. 1083 (finding "merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market" where the merger would remove competition between "the two lowest cost and lowest priced firms" in the market); Merger Guidelines § 2.1.5 (noting maverick concerns may arise where "one of the merging firms may have the incentive to take the lead in price cutting or [with] . . . a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.")). The Court finds that TaxACT's competition does play a special role in this market that constrains prices. Not only did TaxACT buck prevailing pricing norms by introducing the free-for-all offer, which others later matched, it has remained the only competitor with significant market share to embrace a business strategy that relies primarily on offering high-quality, full-featured products for free with associated products at low prices.

Moreover, as the plaintiff's expert, Dr. Warren-Boulton, explained, the pricing incentives of the merged firm will differ from those of TaxACT pre-merger because the merged firm's opportunity cost for offering free or very low-priced products will increase as compared to TaxACT now. *See* Warren-Boulton, 9/9/11 p.m., at 14-16. In other words, the merged firm will have a greater incentive to migrate customers into its higher-priced offerings – for example, by limiting the breadth of features available in the free or low-priced offerings or only offering innovative new features in the higher-priced products. *See* Commentary on the Horizontal Merger Guidelines (2006) at 24 (noting the importance of asking “whether the acquired firm has behaved as a maverick and whether the incentives that are expected to guide the merged firm's behavior likely would be different.”).

While the defendants oppose the government's maverick theory, they do not deny that TaxACT has been an aggressive competitor. Indeed, they submit that “that's why H&R Block wants to buy them.” Defs.' Closing Argument, TT, 10/3/11 a.m., at 132. HRB contends that the acquisition of TaxACT will result in efficiencies and management improvements that “will lead to better, more effective, and/or cheaper H&R Block digital products post-merger” that are better able to compete with Intuit. Defs.' Post-Trial Mem. at 17. This argument is quite similar to the argument of the defendants in *Heinz*, which some commentators have described as arguing that the merger would create a maverick. *Heinz*, 246 F.3d at 720-22; *see* Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. Rev. 135, 184 (2002). While the district court in *Heinz* accepted this argument that the merger would enhance rather than stifle competition, the D.C. Circuit reversed, finding that the “district court's analysis [fell] short of the findings necessary for a successful efficiencies defense” in that case. *Heinz*, 246 F.3d at 721. As explained more fully in

Section III.B.2.d below, the defendants' efficiency arguments fail here for some of the same reasons the D.C. Circuit identified in *Heinz*.

Finally, the defendants suggest that coordinated effects are unlikely because of the ease of expansion for other competitors in the market. As detailed above in the Court's discussion of barriers to entry and expansion, the Court does not find that ease of expansion would counteract likely anticompetitive effects.

Accordingly, the defendants have not rebutted the presumption that anticompetitive coordinated effects would result from the merger. To the contrary, the preponderance of the evidence suggests the acquisition is reasonably likely to cause such effects. *See id.* at 711-12 (finding, in market characterized by high barriers to entry and high HHI figures, that "no court has ever approved a merger to duopoly under similar circumstances.").

c. Unilateral Effects

A merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms. *See Swedish Match*, 131 F. Supp. 2d at 169; Merger Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."). "The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects." Merger Guidelines § 6.1. As Judge Collyer in *CCC Holdings* explained:

Unilateral effects in a differentiated product market are likely to be profitable under the following conditions: (1) the products must be differentiated; (2) the products controlled by the *merging* firms must be close substitutes, *i.e.*, "a substantial number of the customers of one firm would turn to the other in response to a price increase"; (3) other products must be sufficiently different from the products offered by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging firm; and (4) repositioning must be unlikely.

605 F. Supp. 2d at 68 (citing *Oracle*, 331 F. Supp. 2d at 1117-18).³¹ Since the Court has already found that the preponderance of the evidence shows a reasonable likelihood of coordinated effects, the Court need not reach the issue of unilateral effects. *See id.* at 67. The Court will discuss it, however, since there has been substantial argument on this topic and the Court's findings regarding unilateral effects bolster the conclusion that this proposed merger would violate Section 7 of the Clayton Act. As with coordinated effects, since the government has established its prima facie case, the burden is on the defendants to produce evidence showing that the presumption of anticompetitive effects that attaches to a merger in a highly concentrated market is unfounded, but the ultimate burden of proof remains with the government.

i. Elimination of Direct Competition Between the Merging Parties

The government argues that unilateral effects are likely because the merger will eliminate head-to-head competition between HRB and TaxACT that has benefited taxpaying American consumers. Much of the evidence indicating direct competition between HRB and TaxACT is discussed above in relation to the market definition. *See supra* Section III.A. The government emphasizes that HRB has lowered its DDIY prices to better compete with free online products, the category pioneered by TaxACT, and has directly considered TaxACT's prices in setting its own prices. *See* GX 53 at 2, 8; GX 188; GX 199 at 5-9. HRB has also determined the nature of its free offerings in response to competitive activity from TaxACT. *See, e.g.*, GX 304 at 5 (HRB changed timing of FFA offering in response to TaxACT's offer); GX 44 (recognizing need to compete with TaxACT offerings); GX 79 (comparing contemplated free product description on HRB's website with TaxACT's website); GX 51 at 4 (noting launch of free online products intended "[t]o match competitor offerings and stem online share loss to Intuit and TaxACT"). The government also points to HRB documents that appear to acknowledge that TaxACT has put

³¹ The first criterion in this analysis is satisfied because it is undisputed that DDIY products are differentiated.

downward pressure on HRB's pricing ability. *See* GX 296-16 at 20-21 (noting TaxACT's association with the "commoditization of online space" and downward price pressure from commoditization); GX 20 at 11 ({redacted}). From all of this evidence, and the additional evidence discussed in this opinion, it is clear that HRB and TaxACT are head-to-head competitors.

ii. Pledge to Maintain TaxACT's Current Prices

Defendants press a few different arguments against a finding of likely unilateral anticompetitive effects. First, the defendants have pledged to maintain TaxACT's current prices for three years.³² While the Court has no reason to doubt that defendants would honor their promise, this type of guarantee cannot rebut a likelihood of anticompetitive effects in this case. *See Cardinal Health*, 12 F. Supp. 2d at 64 (finding that "even with such guarantees [to maintain prices], the mergers would likely result in anti-competitive prices."). Even if TaxACT's list price remains the same, the merged firm could accomplish what amounts to a price increase through other means. For example, instead of raising TaxACT's prices, it could limit the functionality of TaxACT's products, reserving special features or innovations for higher priced, HRB-branded products. The merged firm could also limit the availability of TaxACT to consumers by marketing it more selectively and less vigorously. Indeed, the defendants concede that one immediate effect of the merger will be the removal of TaxACT from the IRS-sponsored FFA website, a marketing channel whose importance the defendants themselves emphasize in their argument regarding barriers to expansion. *See* Dunn, TT, 9/7/11 p.m., at 76-77; Defs.' Post-Trial Mem. at 22.

³² Before the hearing, the plaintiff filed a motion in limine to exclude evidence relating to this guarantee. ECF No. 44. Following oral argument at the pre-hearing conference, the plaintiff withdrew this motion. *See* Minute Entry dated September 2, 2011.

iii. Value Versus Premium Market Segments

Second, defendants argue that HRB and TaxACT are not particularly close competitors. The defendants contend that HRB and TaxACT largely compete in distinct segments of the market – with HRB in the higher-priced, “premium” segment and TaxACT in the lower-priced, “value” segment.³³ The defendants also argue that there can be no unilateral effects because the evidence shows that both TaxACT and HRB are closer competitors to TurboTax than to each other. Defs.’ Post-Trial Mem. at 15.

As part of the argument that HRB and TaxACT focus on separate value and premium segments, the defendants argued that for several years in the mid-2000s, HRB was trapped in the “murky middle” between TaxACT’s value offerings and Intuit’s premium offerings. *See* DX 17 (Meyer Rep.) at 29; Meyer, TT, 9/13/2011 a.m., at 103-107. The defendants argue that, in recent years, HRB has positioned itself more clearly as a premium provider, as evidenced by the fact that the list price of its online federal plus state DDIY product has tracked Intuit’s price more closely since 2010. *See* DX 17 (Meyer Rep.) at 29. This comparison is misleading because it focuses solely on the comparison of the list prices for the companies’ highest-priced products. *See id.* at 29 n.116. During the past few years, while HRB has increased the list price of its top-priced DDIY offering, it has also more heavily marketed free products. *See* GX 51 at 4; *see also* Meyer, TT, 9/13/2011 a.m., at 105-106. Accordingly, since 2008, HRB’s average DDIY sales price has declined, while the average revenue per paid customer has remained roughly the same.

³³ In the defendants’ submissions to the Antitrust Division of the DOJ prior to this litigation, the defendants appeared to emphasize this “value” and “premium” distinction as the basis for their definition of the relevant market. *See* GX 135 at 14-15; GX 629 at 18-30. As a result, the government accuses the defendants of having “tacked back and forth” regarding their proposed relevant market definition. Pl.’s Post-Trial Mem. at 1-2. While the Court agrees that the import of the hearing testimony about value and premium products was not always clear, the defendants’ counsel clarified during closing arguments that the “only real relevance” of the premium versus value distinction was to show that HRB and TaxACT are not closest the competitors for the purposes of unilateral effects analysis. Defs.’ Closing Argument, TT, 10/3/2011 a.m., at 93-94.

See GX 296-7 (“Digital Tax Solutions FY11 Actual Deep Dive”) at 1; Meyer, TT, 9/13/11 a.m., at 107-108.

Further, the evidence discussed above indicating direct price and feature competition between HRB and TaxACT negates the conclusion that they operate in separate value and premium segments of the market. There are certainly occasional references to different pricing levels in the defendants’ documents. See GX 20 at 11 (HRB document noting {redacted}) (emphasis added). This hardly means that the companies are not in close competition, however. Rather, as Mr. Dunn’s testimony reflects, TaxACT competes with capital-rich HRB and Intuit by offering high-quality products at substantially lower prices. See Dunn, TT, 9/7/11 p.m., at 71-72 (noting that rather than attempting to outspend its richer competitors on marketing, TaxACT’s growth strategy has depended on providing “great customer service, a great product, and a great customer experience” for a much lower price, including free). *Id.* This type of healthy competition benefits taxpaying consumers.

The fact that Intuit may be the closest competitor for both HRB and TaxACT also does not necessarily prevent a finding of unilateral effects for this merger. See Areeda & Hovenkamp, ¶ 914, 77-80 (explaining that the merging parties need not be the closest rivals for there to be unilateral anticompetitive effects); see also Commentary on the Horizontal Merger Guidelines (2006) at 28 (“A merger may produce significant unilateral effects even though a non-merging product is the ‘closest’ substitute for every merging product . . .”). Using a simple estimate of diversion based on market share would indeed suggest that HRB and TaxACT are each other’s second closest rivals after Intuit.³⁴ See GX 121 (Warren-Boulton Rep.) at 44 (explaining that

³⁴ The relevance of the diversion estimates provided by the expert economists to the unilateral effects analysis is discussed more fully below.

using market share to estimate diversion is a “benchmark” assumption in standard empirical models of consumer demand).

iv. Merged Company’s Combined Market Share

Another argument that the defendants present against a likelihood of unilateral effects is that, in their view, unilateral effects cannot be demonstrated where the combined firm’s market share does not surpass a certain threshold. The defendants point out that in *Oracle*, the court stated that “[a] presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted. Indeed, the opposite is likely true.” 331 F. Supp. 2d at 1123. The *Oracle* court stated that “[t]o prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position.” *Id.* Some commentators have criticized this standard, however, because “impermissible price increases . . . can be achieved on far lower market shares” than *Oracle*’s standard evidently requires. Areeda & Hovenkamp ¶ 914, at 84. Indeed, Judge Brown’s subsequent opinion from this Circuit in *Whole Foods* implied that a market definition itself may not even be required for proving a Section 7 violation based on unilateral effects. *See Whole Foods*, 548 F.3d at 1036. In a footnote, Judge Brown explained that “a merger between two close competitors can sometimes raise antitrust concerns due to unilateral effects in highly differentiated markets. In such a situation, it might not be necessary to understand the market definition to conclude a preliminary injunction should issue.”³⁵ *Id.* at

³⁵ “As a matter of applied economics, evaluation of unilateral effects does not require a market definition in the traditional sense at all.” Areeda & Hovenkamp ¶ 913a, at 66. This is so because unilateral effects analysis focuses on measuring a firm’s market power directly by “estimating the change in residual demand facing the post-merger firm. ‘Residual demand’ refers to the demand for a firm’s goods after the output of all other competing firms has been taken into account.” *Id.* at 63. If market power itself can be directly measured or estimated reliably, then in theory market definition is superfluous, at least as a matter of economics, because “[i]dentifying a market and computing market shares provide an indirect means for measuring market power.” *Id.* ¶ 532a at 242-43; *see also id.* ¶ 521c. The 2010 revisions to the Merger Guidelines also appear to reflect this understanding. *See* Merger Guidelines § 4 (“The Agencies’ analysis need not start with market definition. Some of the analytical tools used by

n.1 (citation omitted). The Court therefore declines the defendants' invitation, in reliance on *Oracle*, to impose a market share threshold for proving a unilateral effects claim.³⁶

v. Post-Merger Dual Brand Strategy

HRB's plans for the post-merger company raise anticompetitive questions. Post-merger, HRB's stated plan is to maintain both the HRB and TaxACT brands –with the HRB-brand focusing on higher priced-products and the TaxACT brand focusing on the lower-priced products. See Bennett, TT, 9/6/11 a.m., 101-102; DX 1005 at 1. HRB's general pre-merger pricing strategy has been to price its products a bit below Intuit's products. Bennett, TT, 9/6/11 a.m., at 99. Part of HRB's post-merger strategy, however, appears to involve raising prices on HRB-branded products. Under this two-brand strategy, HRB would price its "premium" HRB-branded products equal to or above Intuit's prices. See Bennett, TT, 9/6/11 a.m., 101-102; DX 1005 at 1. At the same time, the company would "offer TaxACT as its free and value brand." DX 17 (Meyer Rep.) at 78. Yet, the defendants have never convincingly explained how this two-brand strategy would work in practice because defendants have repeatedly emphasized how

the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis."'). As a legal matter, however, a market definition may be required by Section 7 of the Clayton Act. See *Brown Shoe*, 370 U.S. at 324 ("[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected. The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').") (internal citation omitted); see also *Heinz*, 246 F.3d at 719 n.17 ("Courts interpret 'line of commerce' [in the language of the Clayton Act] as synonymous with the relevant product market."). The Court is not aware of any modern Section 7 case in which the court dispensed with the requirement to define a relevant product market, although Judge Brown's opinion in *Whole Foods* may be read to endorse this possibility in accordance with the evolving understandings in economics. See *Whole Foods*, 548 F.3d at 1036 (Brown, J.) (stating that the *Baker Hughes* analytical framework, which "rests on defining a market and showing undue concentration in that market," "does not exhaust the possible ways to prove a § 7 violation on the merits").

³⁶ The Commentary on the Merger Guidelines, for its part, explains that while "[a]s an empirical matter, the unilateral effects challenges made by the Agencies nearly always have involved combined shares greater than 35%," "the Agencies may challenge mergers when the combined share falls below 35% if the analysis of the mergers' particular unilateral competitive effects indicates that they would be likely substantially to lessen competition." Commentary on the Horizontal Merger Guidelines (2006) at 26. "Combined shares less than 35% may be sufficiently high to produce a substantial unilateral anticompetitive effect if the products are differentiated and the merging products are especially close substitutes" *Id.*

important “free” product offerings are for all DDIY brands. *See* DFF ¶ 185 (“Free is a highly profitable method of acquiring customers for H&R Block.”); DX 600 at 10 (HRB Board of Directors presentation for merger approval stating that after the merger TaxACT would be the “low cost value provider focused on free” but that the company would “[c]ontinue to offer a free product in the HRB brand to drive client acquisition”).

Part of the government’s concern with HRB’s two-brand strategy is that the incentives for the combined firm in marketing and developing the TaxACT product would be quite different from the incentives that exist in the current market. HRB may feel comfortable raising its “premium” prices because it knows that consumers looking for lower-cost DDIY options would be most likely to migrate to TaxACT, the established “value leader” in the market. Since HRB will also control TaxACT post-merger, however, HRB can still ensure that TaxACT’s value proposition does not get “too good” and undermine the paid HRB products with the highest profit margins. For example, HRB might restrict the features of TaxACT’s free and low-cost products to ensure they do not cannibalize sales of HRB’s higher priced offerings. Indeed, assuming that there are high barriers to entry and expansion, this strategy would appear logical because it would maximize HRB’s profit per customer. Post-merger, TaxACT will not have the same incentives it has today to develop robust free and low-cost offerings that can compete with the functionality offered by HRB and Intuit. *See* Warren-Boulton, TT, 9/8/11 p.m., at 32-33. Thus, this merger could potentially have the effect of stifling price and feature competition compared with maintaining TaxACT as an independent firm.

vi. Merger Simulation Shows Likely Unilateral Price Increase

The government’s expert economist, Dr. Warren-Boulton, did a merger simulation analysis that suggests a unilateral price increase is likely. Warren-Boulton, TT, 9/9/11 a.m., at 5-

11; GX 121 (Warren-Boulton Rep.) at 52. The key factors in this simulation are HRB and TaxACT's price-cost margins and the diversion ratios between their products. *Cf. Swedish Match*, 131 F. Supp. 2d at 169 ("High margins and high diversion ratios support large price increases, a tenet endorsed by most economists.").

(a). Diversion Ratios Between the Merging Parties' DDIY Products

As explained above, the diversion rate from TaxACT to HRB measures the proportion of customers that would leave TaxACT in response to a price increase and switch to HRB. Dr. Warren-Boulton's report explains that higher diversion rates between merging parties "allow the firms to recapture more lost sales following a price increase, and therefore lead to greater upward pricing pressure and post-merger unilateral price increases." GX 121 (Warren-Boulton Rep.) at 44. Dr. Warren-Boulton estimated diversion ratios from two sources: the parties' DDIY market share data and the IRS switching data.³⁷ *Id.* at 44-48.

By assuming diversion rates in accordance with market share, Dr. Warren-Boulton estimated the diversion rate from TaxACT to HRB to be 12 percent and from HRB to TaxACT to be 14 percent. *Id.* at 44-45. Dr. Warren-Boulton notes that these diversion estimates likely underestimate what the actual post-merger diversion rates will be since the merged company will likely implement marketing strategies to keep customers within the umbrella of the combined company. *Id.* at 45.

Dr. Warren-Boulton estimated diversion ratios using IRS switching data as well. As discussed above in Section III.A.3.a, he also used this switching data to test the relevant market definition. As previously noted in that prior discussion, switching data is not equivalent to diversion, since diversion measures switching in response to a price increase as opposed to all

³⁷ Dr. Warren-Boulton declined to rely on the defendants' proposed diversion data, derived from their consumer surveys, for the reasons already discussed *supra* in Section III.A.3.

switching generally. In particular, Dr. Warren-Boulton found that switching data is especially likely to overstate diversion from DDIY products to assisted preparation. *Id.* at 46-47.

Therefore, Dr. Warren-Boulton discounted the switching rates from DDIY to assisted by half to correct for this effect.³⁸ *Id.* After this correction, Dr. Warren-Boulton calculated estimated diversion rates from TaxACT to HRB and from HRB to TaxACT of 12 percent. *Id.* at 47-48.

(b). Price-Cost Margins

The next step in his analysis was to estimate the firms' price-cost margins. "All else equal, higher margins lead to greater unilateral price increases because the value of recaptured sales is higher." *Id.* at 48. Using a procedure described in his report, Dr. Warren-Boulton estimated {that the merging parties have high margins}. *Id.* at 49. The merger simulation also required quantities of units sold and average revenue per unit. Dr. Warren-Boulton obtained this data from the companies' submissions. *Id.* at 50.

(c). Simulation Results

Using all of these data, Dr. Warren-Boulton performed a linear demand Bertrand model simulation. *Id.* at 51. Unless there are significant efficiencies from the merger that are passed on to consumers, this simulation predicts a unilateral price increase.³⁹ *Id.* at 52. Assuming diversion ratios according to market share, the model predicts TaxACT's price will increase by 12.2 percent and HRB's price by 2.5 percent. *Id.* Assuming diversion ratios based on the IRS switching data as discussed above, the model predicts TaxACT's price will increase by 10.5 percent and HRB's price by 2.2 percent. *Id.*

³⁸ As a basis for this conclusion that switching data overstates diversion and for his choice to discount the DDIY-to-assisted switching rate by half, Dr. Warren-Boulton relies upon HRB documents that suggest that more than half of switching from DDIY to assisted occurs for reasons unrelated to price, such as a change in tax complexity. GX 121 (Warren-Boulton Rep.) at 46 n.128 (citing GX 635, GX 126). He also relies on IRS data showing that customers switching from DDIY to assisted were twice as likely to have a complexity increase as taxpayers who stayed within DDIY. *Id.* at 47.

³⁹ As discussed in Section III.B.2.d below, the Court finds most of defendants' claimed efficiencies are not merger-specific or unverifiable.

(d). Critique of the Simulation's Unilateral Effects Results

The defendants attack Dr. Warren-Boulton's simulation on several grounds. The defendants reiterate their critique that switching data is an inappropriate proxy for diversion data. Further, defendants criticize the way in which Dr. Warren-Boulton discounted the switching rates from DDIY products to assisted preparation. *See* Warren-Boulton, TT, 9/9/9 p.m., at 60-65. In addition, the defendants contend that Dr. Warren-Boulton's simulator model is flawed because it will always predict a price increase with any positive diversion and because the model is "static," does not take various factors into account, such as the parties' different products, innovation, and marketing, and would never predict that a firm would offer free products, even though free products are a staple of the industry. DX 17 (Meyer Rep.) at 74-75.

The Court agrees that Dr. Warren-Boulton's discounting by half of the switching data from DDIY to assisted appears imprecise. Dr. Warren-Boulton clarified in his report, however, that "the model still predicts significant unilateral harm when non-discounted switching rates are used to approximate diversion rates." GX 121 (Warren-Boulton Rep.) at 47. Further, and more importantly, Dr. Warren-Boulton also estimated diversion ratios based on market share and the Court has concluded above that DDIY is the appropriate relevant product market.⁴⁰

As for the defendants' critiques about Dr. Warren-Boulton's economic model itself, Dr. Warren-Boulton addressed these directly. First, insofar as the model will predict at least some price increase absent efficiencies with any positive diversion ratios, Dr. Warren-Boulton explained that outcome is fully consistent with correct economic theory. GX 665 (Warren-

⁴⁰ The defendants suggest that Dr. Warren-Boulton's reliance on market share as an estimate of diversion ratios is somewhat circular in that his market shares derive from his market definition, which, in turn, relied on his use of switching data as a proxy for diversion ratios. DX 17 (Meyer Rep.) at 76. As discussed above, however, the Court's finding that DDIY is the correct relevant product market is not dependent on Dr. Warren-Boulton's analysis.

Boulton Reply Rep.) at 14 (“Economic theory concludes that absent merger specific efficiencies, a merger between competing firms will cause the merging firms to increase their prices by at least some amount. Thus, it is not a deficiency, but a strength, of merger simulation models that they reflect this aspect of economic reality.”). In response to the critique that his “static” model would never predict that companies would offer free products, Dr. Warren-Boulton contends that because free DDIY products are often packaged with other paid products, these “free” products actually provide the companies with a positive average revenue per free unit, which his model does take into account. *See id.* at 14-15. As for the remaining critiques that the model does not factor in marketing or innovation, Dr. Warren-Boulton replies that any model is inherently a simplification of the real world, but there is no reason to assume these factors negate the price effect findings of the model. *Id.*

The Court finds that the merger simulation model used by the government’s expert is an imprecise tool, but nonetheless has some probative value in predicting the likelihood of a potential price increase after the merger. The results of the merger simulation tend to confirm the Court’s conclusions based upon the documents, testimony, and other evidence in this case that HRB and TaxACT are head-to-head competitors, that TaxACT’s competition has constrained HRB’s pricing, and that, post-merger, overall prices in the DDIY products of the merged firms are likely to increase to the detriment of the American taxpayer.

vii. Repositioning Unlikely to Defeat Unilateral Price Increase

Repositioning by smaller competitors in response to a unilateral price increase is unlikely for the same reasons discussed above regarding barriers to entry and expansion. *See Merger Guidelines* § 6.1 (“Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency.”).

Repositioning by Intuit is also unlikely due to the coordinated effects incentives discussed above. The Merger Guidelines make clear that a unilateral price increase may be defeated where “non-merging firms [are] able to reposition their products to offer close substitutes for the products offered by the merging firms.” Merger Guidelines § 6.1. Since the Court has already found that HRB and Intuit would have coordinated pricing incentives post-merger, that finding implies that repositioning by Intuit would not prevent HRB from raising prices. By relying on its finding of coordinated effects to predict the likelihood of repositioning by Intuit, the Court acknowledges that its unilateral effects finding is not strictly “unilateral” in the sense that it does take coordination into account. The case law and the Merger Guidelines, however, require that “repositioning” be considered in assessing unilateral effects, and the repositioning inquiry necessarily entails a consideration of the likely actions of other competitors in response to a price increase. *See CCC Holdings, Inc.*, 605 F. Supp. 2d at 67 (noting that the distinction between coordinated and unilateral effects “has more significance in law than it does in economics” and citing expert testimony describing the distinction as “artificial”).

viii. Finding Unilateral Anticompetitive Effects Likely

On balance, and considering the evidence as a whole, the Court finds that, absent efficiencies, the plaintiff has demonstrated a reasonable likelihood of unilateral effects by a preponderance of the evidence. *See Swedish Match*, 131 F. Supp. 2d at 169 (finding likelihood of unilateral price increase where merger would eliminate one of the larger merging firm’s “primary direct competitors,” “the third largest selling” brand “that has consistently played a role in constraining the price” of the larger firm’s products); *see also Staples* 970 F. Supp. at 1083 (finding anticompetitive effects where the “merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the . . . market.”).

The Court will now turn to the defendants' final rebuttal argument – the existence of significant, merger-specific efficiencies.

d. Post-Merger Efficiencies

One of the key benefits of a merger to the economy is its potential to generate efficiencies. *See Heinz*, 246 F.3d at 720. As the Merger Guidelines recognize, merger-generated efficiencies can “enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.” Merger Guidelines § 10. Courts have recognized that a showing of sufficient efficiencies may rebut the government’s showing of likely anticompetitive effects. *Heinz*, 246 F.3d at 720. High market concentration levels require “proof of extraordinary efficiencies,” however, and courts “generally have found inadequate proof of efficiencies to sustain a rebuttal of the government’s case.” *Id.* (citation omitted).

“[T]he court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior.” *Id.* at 721. As the Merger Guidelines explain, “[c]ognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.” Merger Guidelines § 10. Efficiencies are inherently “difficult to verify and quantify” and “it is incumbent upon the merging firms to substantiate efficiency claims” so that it is possible to “verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific.” *Id.* In other words, a “cognizable” efficiency claim must represent a type of cost saving that could not be achieved

without the merger and the estimate of the predicted saving must be reasonably verifiable by an independent party.

The defendants claim that “H&R Block’s primary motivation for the TaxACT acquisition is to achieve significant synergies that will enable H&R Block to provide better products at a lower price and to compete more effectively.”⁴¹ Defs.’ Post-Trial Mem. at 24. The defendants predict that they will achieve over \${redacted} million in annual efficiencies in ten different areas.⁴² *Id.* at 24-25.

The chart below summarizes the defendants’ claimed efficiencies and predicted annual cost savings:

⁴¹ “Cognizable efficiencies” are a subset of “synergies.” “Synergies” refer more generally to any business performance benefits that result from the merger of two companies. *See* Zmijewski, TT, 9/19/11 a.m., at 99.

⁴² Originally, the defendants claimed 11 efficiencies, including an efficiency related to {redacted}. This task is “really not an efficiency” but “an additional cost,” Dunn, TT, 9/8/11 p.m. (sealed) at 7, and defendants do not reference it in their proposed findings of fact. DFF ¶ 291.

Efficiency	Description	Estimated Annual Cost Saving
1. Online IT	{redacted}	\${redacted} million
2. Emerald Card	Allowing TaxACT's prepaid debit card offerings to be fulfilled through HRB's bank	\${redacted} million
3. H&R Block Bank Refund Anticipation Checks	Funding TaxACT's refund anticipation checks through HRB's bank	\${redacted} million
4. {redacted}	{redacted}	\${redacted}million
5. {redacted}	{redacted}	\${redacted} million
6. {redacted}	{redacted}	\${redacted} million
7. Corporate Website	{redacted}	\${redacted} million
8. Software IT	{redacted}	\${redacted} million
9. Download Fulfillment	{redacted}	\${redacted} million
10. {redacted}	{redacted}	\${redacted}million

DFF ¶ 292; *see also* DX236-007.

Dr. Mark E. Zmijewski, an expert witness for the government, analyzed the defendants' alleged efficiencies and concluded that – with the exception of {one efficiency related to eliminating third-party contracts} – the proposed efficiencies identified by the defendants are either not merger-specific or not verifiable.⁴³ *See generally* GX 664 (Zmijewski Rep.).

The Court agrees with Dr. Zmijewski that the defendants have not demonstrated that their claimed efficiencies are merger-specific. If a company could achieve certain cost savings

⁴³ Dr. Zmijewski is a professor of accounting and deputy dean at The University of Chicago Booth School of Business and a founder and principal of Navigant Economics, a consulting firm. GX 664 (Zmijewski Rep.) at 5. He holds a Ph.D. in accounting. *Id.*

without any merger at all, then those stand-alone cost savings cannot be credited as merger-specific efficiencies. The defendants must show that their “efficiencies . . . cannot be achieved by either company alone because, if they can, the merger’s asserted benefits can be achieved without the concomitant loss of a competitor.” *Heinz*, 246 F.3d at 722. For example, if HRB’s {redacted} are not running in the most efficient, cost-effective manner, it is hard to see why a merger with TaxACT is necessary to improve their cost structure. The reasons HRB claims it has higher {redacted} costs than TaxACT include (1) that TaxACT has lower labor costs in Cedar Rapids than HRB has in Kansas City and (2) that TaxACT is simply more cost conscious. Bowen, TT, 9/15/11 p.m., (sealed), at 104-105. Plainly, then, HRB could therefore achieve at least some of the {redacted} cost savings on its own – by relocating {redacted} and taking a more cost conscious attitude toward them. Likewise, the efficiencies related to bringing HRB’s outsourced {redacted} functions in-house are unlikely to be wholly merger-specific.

Similarly, the defendants’ IT-related efficiencies, which account for the largest efficiency claims, are not entirely merger-specific either. Both TaxACT and HRB witnesses testified that {redacted} – suggesting that the platform consolidation would result in at least some merger-specific efficiencies. *See* Dunn, TT, 9/8/11 p.m. (sealed), at 16-17; Bowen, TT, 9/15/11 p.m. (sealed), at 67-68. One way in which {redacted}. Dunn, TT, 9/8/11 p.m. (sealed), at 16-17; Bowen, TT, 9/15/11 p.m. (sealed), at 67-68; Bowen, TT, 9/19/11 a.m., at 12. Thus, the IT consolidation efficiency actually can be thought of as entailing two distinct consolidations: (1) {redacted} and (2) HRB’s platform will be merged with TaxACT’s platform. Bowen, TT, 9/19/11 a.m., at 12. Yet the claimed IT efficiency is not discounted for whatever savings HRB could obtain by {performing the first consolidation} on its own – an option the company considered in the past but did not adopt – and the defendants did not present evidence explaining

why, as a technical matter, {performing the first consolidation} would not be feasible or, in fact, would not be more feasible than {the double consolidation}. Bowen, TT, 9/19/11 a.m., at 12; 9/15/11 p.m. (sealed) at 75. The IT efficiencies also apparently account for cost reductions associated with TaxACT's more cost-conscious culture and practices. See Dunn, TT, 9/8/11 a.m. (sealed), at 5 ("for Block to achieve these [efficiencies] would require them to come up with an entirely different corporate culture {redacted}.").

Even if the efficiencies were entirely merger-specific, many of them are also not independently verifiable. As Dr. Zmijewski explained, for the various efficiencies that involve the activities now performed by HRB or its vendors that are proposed to be transferred to TaxACT, TaxACT's predicted cost figures for taking over these activities were not based on an analysis of facts that could be verified by a third party. Instead, TaxACT based its cost estimates on management judgments. GX 664 (Zmijewski Rep.) at 22-25. By comparison, HRB's estimated costs for the relevant activities were rooted in accounting and planning documents prepared in the ordinary course of business.

The testimony at the hearing confirmed that TaxACT's recurring cost estimates were largely premised on its managers experiential judgment about likely costs, rather than a detailed analysis of historical accounting data. See, e.g., Dunn, TT, 9/8/11 p.m. (sealed), at 28-31. While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court. If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise. The difficulty in substantiating efficiency claims in a verifiable

way is one reason why courts “generally have found inadequate proof of efficiencies to sustain a rebuttal of the government’s case.” *Heinz*, 246 F.3d at 720 (citation omitted); *see also Staples*, 970 F. Supp. at 1089 (finding “defendants failed to produce the necessary documentation for verification” of efficiencies).

Particular scrutiny of HRB’s efficiencies claims is also warranted in light of HRB’s historical acquisitions. In 2006, HRB acquired a software company called TaxWorks, which was renamed “RedGear.” Bowen, TT, 9/15/11 p.m. (sealed), at 84. For the RedGear acquisition, which was much smaller in scale than the proposed TaxACT deal, HRB projected a total of \${redacted} million in efficiencies over three years. GX 1459 (February 2009 “Taxworks Financial Analysis”) at 5. HRB failed to achieve these {efficiencies} {redacted}. *Id.* In this case, the efficiency estimates are much more aggressive, in that defendants are claiming approximately \${redacted} million in efficiencies for 2013 and \${redacted} million in annual savings going forward thereafter, as opposed to \${redacted} million over three years. *See* Bowen, TT, 9/15/11 p.m. (sealed), at 77-78. While HRB has attempted to learn from the mistakes of the RedGear acquisition, *id.* at 85-87, the Court finds that this history only underscores the need for any claimed efficiencies to be independently verifiable in order to constitute evidence that can rebut the government’s presumption of anticompetitive effects.

Considering all of the evidence regarding efficiencies, the Court finds that most of the defendants’ claimed efficiencies are not cognizable because the defendants have not demonstrated that they are merger-specific and verifiable.⁴⁴

⁴⁴ In addition, the defendants have not addressed how much of the claimed efficiencies would be passed through to consumers. *See Staples*, 970 F. Supp. at 1090 (analyzing projected pass-through rate for claimed efficiencies).

IV. CONCLUSION

The Court concludes that the proposed merger between HRB and TaxACT violates Section 7 of the Clayton Act because it is reasonably likely to cause anticompetitive effects. The law of this Circuit supports this conclusion. In *Heinz*, the Court of Appeals reversed a district court's denial of a preliminary injunction against a merger involving the second- and third-largest jarred baby food companies. 246 F.3d at 711-12. After noting the high barriers to entry and high HHI figures that characterized the market, the D.C. Circuit observed that "[a]s far as we can determine, no court has ever approved a merger to duopoly under similar circumstances." *Id.* at 717. The situation in this case is similar. The government established a prima facie case indicating that anticompetitive effects are likely to result from the merger. The defendants have not made a showing of evidence that rebuts the presumption of anticompetitive effects by demonstrating that the government's market share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market. To the contrary, the totality of the evidence confirms that anticompetitive effects are a likely result of the merger, which would give H&R Block and Intuit control over 90 percent of the market for digital do-it-yourself tax preparation products.

Accordingly, the Court will enjoin H&R Block's proposed acquisition of TaxACT. An appropriate Order will accompany this Memorandum Opinion.

DATED: November 10, 2011

/s/ *Beryl A. Howell*

BERYL A. HOWELL
United States District Judge

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D. C. 20549**

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (date of earliest event reported): November 14, 2011

H&R BLOCK, INC.

(Exact name of registrant as specified in charter)

Missouri
(State of Incorporation)

1-6089
(Commission File Number)

44-0607856
(I.R.S. Employer
Identification Number)

One H&R Block Way, Kansas City, MO 64105
(Address of Principal Executive Offices) (Zip Code)

(816) 854-3000
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
-

Item 1.02. Termination of a Material Definitive Agreement.

H&R Block, Inc. (the “Company”), 2SS Holdings, Inc. (“2SS”), TA Associates Management, L.P., and Lance Dunn have mutually agreed effective November 14, 2011 to terminate the Agreement and Plan of Merger dated October 13, 2010, as amended (the “Merger Agreement”), among the Company and HRB Island Acquisition, Inc. (“Sub”), an indirect wholly owned subsidiary of the Company, 2SS, TA Associates Management, L.P. in its capacity as a stockholder representative, and Lance Dunn in his capacity as a stockholder representative, pursuant to which Sub would have merged with and into 2SS (the “Merger”), with 2SS continuing as the surviving corporation and an indirect subsidiary of the Company after the Merger.

A description of the terms of the Merger Agreement was included in Item 1.01 of the Current Reports on Form 8-K filed by the Company with the Securities and Exchange Commission on October 14, 2010 and March 9, 2011 and in Item 9B of the Annual Report on Form 10-K filed by the Company with the Securities and Exchange Commission on June 23, 2011 and, to the extent required by Item 1.02 of Form 8-K, such descriptions are incorporated by reference in this Item 1.02 pursuant to General Instruction B.3 of Form 8-K.

As previously disclosed, the United States Department of Justice (the “DOJ”) filed a civil antitrust lawsuit in the United States District Court in Washington, D.C. to block the Merger. On October 31, 2011, the United States District Court granted the DOJ’s motion for a permanent injunction. On November 14, 2011, the Company, 2SS, TA Associates Management, L.P. in its capacity as a stockholder representative, and Lance Dunn in his capacity as a stockholder representative, mutually agreed to a termination of the Merger Agreement.

The Company is not expected to incur any early termination penalties as a result of the termination of the Merger Agreement.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

H&R BLOCK, INC.

Date: November 14, 2011
Jeffrey T. Brown
Senior Vice President and Chief Financial Officer

By: /s/ Jeffrey T. Brown

EX-99.1 3 d278620dex991.htm PRESS RELEASE ISSUED JANUARY 9, 2010

Exhibit 99.1

INFOSPACE TO ACQUIRE TAXACT*Transaction Provides InfoSpace Strong Presence and Growth Opportunities in Online Consumer Tax Preparation*

BELLEVUE, Wash. – January 9, 2012 – InfoSpace, Inc. (NASDAQ: INSP), a leader in online search, today announced that it has signed a definitive agreement to acquire TaxACT, a leading provider of online tax solutions, for \$287.5 million in cash. The acquisition is subject to satisfaction of customary closing conditions and is expected to close in the first quarter of 2012.

“The acquisition of TaxACT is significant for our Company, and consistent with our capital deployment objectives,” said William J. Ruckelshaus, President and Chief Executive Officer of InfoSpace. “As a leading brand with a loyal, growing customer base and a sustained track record, TaxACT is well positioned to grow in the large and enduring tax preparation category. As the market continues its shift toward online ‘do-it-yourself’ tax preparation, we are confident that we can leverage our online expertise, TaxACT’s industry leading solutions, and the fantastic TaxACT management team to drive future growth. The financial benefits of this transaction are compelling and provide us ongoing flexibility to invest in our businesses to further enhance shareholder value.”

The transaction is expected to be immediately accretive to InfoSpace earnings per share, and year one return on shareholder capital is expected to exceed 16%. For the twelve months ending September 30, 2011, TaxACT had revenues of \$78.1 million and adjusted EBITDA of \$37.8 million. For the twelve months ending September 30, 2011, InfoSpace and TaxACT together generated pro forma revenue of \$290.0 million, pro forma adjusted EBITDA of \$72.5 million, and pro forma non-GAAP net income of \$45.6 million or \$1.21 per diluted share.

Based in Cedar Rapids, Iowa, TaxACT is the second largest provider of online individual income tax solutions. With approximately 70 full-time employees, TaxACT participates in the large and growing \$20 billion tax preparation market. The Company had more than five million tax filers last season, with the vast majority of those customers filing online.

TaxACT offers the only complete free federal tax solution for “*everyone*.” Its offerings include the free edition, deluxe edition, and state edition for individual tax filers, and TaxACT professional for businesses. TaxACT’s offerings are available through a secure online delivery system, complemented by available desktop downloads and extensive tax and IRS expertise.

“On behalf of the entire TaxACT team, I want to express my excitement as we partner with InfoSpace,” said JoAnn Kintzel, president of TaxACT. “We are committed to

providing a superior customer experience and working hard to ensure that everyone is comfortable using the TaxACT products to complete their federal tax returns for free. We have the right tools, tremendous in-house expertise, and an established consumer following. With the support of InfoSpace, we are confident that we can further strengthen our position and capitalize on the substantial opportunities in the market for online tax preparation.”

InfoSpace will fund the acquisition through a combination of cash on hand and debt, having secured a commitment for approximately \$95 million of financing in connection with this transaction. The combined company is expected to have a solid balance sheet with an estimated cash and short term investments in excess of \$90 million.

Upon completion of the acquisition, 2nd Story Software, the operating company for the TaxACT business, will become a wholly-owned subsidiary of InfoSpace, and will continue operations in Cedar Rapids, Iowa as a standalone business unit led by the TaxACT management team. TA Associates, the majority shareholder of the TaxACT business, will sell its full holdings as part of this transaction.

Conference Call and Webcast

InfoSpace will host a conference today at 5:30 a.m. Pacific time / 8:30 a.m. Eastern time to discuss the acquisition of TaxACT. The live webcast and a set of slides with additional information can be accessed in the Investor Relations section of the Company’s website, at <http://www.infospaceinc.com>.

About InfoSpace, Inc.

InfoSpace, Inc., a leading developer of metasearch products, is focused on bringing the best of the Web to Internet users. InfoSpace’s proprietary metasearch technology combines the top results from several of the largest online search engines, providing fast and comprehensive search results. InfoSpace sites include Dogpile(R) (www.dogpile.com), InfoSpace.com (R) (www.infospace.com), MetaCrawler(R) (www.metacrawler.com), WebCrawler(R) (www.webcrawler.com), and WebFetch(R) (www.webfetch.com). InfoSpace’s metasearch technology is also available on nearly 100 partner sites, including content, community, and connectivity sites. In addition, the Company operates an innovative online search engine optimization tool, WebPosition(R) (www.webposition.com). Additional information may be found at www.infospaceinc.com.

About TaxACT

TaxACT, is a privately held company founded in 1998 and critically acclaimed as a leader in developing affordable tax preparation software and Web-based services directly for consumers. TaxACT was the first to offer free Federal tax software and free e-file to all American taxpayers in the 2005 tax season. TaxACT is the 2nd most visited online destination for tax preparation services. Since 2000, TaxACT Online has assisted with more than 20 million e-filed federal returns. TaxACT is also the only Web-based tax

planning and preparation product to offer a year-round tax preparation solution, with Preview Versions released in October and Final Versions released in January. Learn more about TaxACT individual, business and professional products at www.taxact.com and in the Press Center at www.taxact.com/press.

InfoSpace.com, InfoSpace, Dogpile, MetaCrawler, WebCrawler, WebFetch, and other marks are trademarks of InfoSpace, Inc. TaxACT and 2nd Story Software are trademarks of 2nd Story Software, Inc.

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Investor Contact:
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stacy.ybarra@infospace.com

This announcement contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Readers are cautioned not to place undue reliance on these forward-looking statements, which speak only as of the date of this release, and which may differ significantly from actual results due to various risks and uncertainties including, but not limited to: general economic, industry, and market sector conditions; the timing and extent of market acceptance of developed products and services and related costs; the successful execution of the Company's strategic initiatives, business integration plans, operating plans, and marketing strategies. A more detailed description of these and certain other factors that could affect actual results is included in InfoSpace, Inc.'s most recent Annual Report on Form 10-K and subsequent reports filed with or furnished to the Securities and Exchange Commission. InfoSpace, Inc. undertakes no obligation to update any forward-looking statements to reflect new information, events, or circumstances after the date of this release or to reflect the occurrence of unanticipated events.

A NOTE ON EXPERT EVIDENCE

As a general rule, a witness may not testify at trial to a matter on which the witness lacks personal knowledge. Rule 602 of the Federal Rules of Evidence provides:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.¹

Rule 702 governs the admissibility of opinion testimony by a qualified expert.² Rule 702 embodies separate requirements on qualifications, relevance, and reliability:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.³

Subject to Rule 702 and the other rules of evidence, Rule 704(a) permits experts to offer opinion testimony about an ultimate issue of fact in the case.⁴ But neither Rule 702 nor Rule 704(a) allows an expert to offer legal conclusions.⁵

1. FED. R. EVID. 602.

2. *Id.* 702.

3. *Id.* 702 (as amended in 2023). In limited circumstances, lay persons may give opinion testimony under Rule 701: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701.

4. *Id.* 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."). Rule 704 abolished the old common law prohibition against any witness, including an expert, from offering an opinion on the "ultimate issue" in the case. *See* FED. E. EVID. Advisory committee's note to Rule 704.

5. *See, e.g.,* *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1059-60 (9th Cir. 2008); *C.P. Interests, Inc. v. Cal. Pools, Inc.*, 238 F.3d 690, 697 (5th Cir. 2001); *Berry v. City of*

Rule 702 was amended in 2000 to incorporate the principles established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶ and *Kumho Tire Co. v. Carmichael*.⁷ *Daubert*, which involved scientific expert testimony, assigned the trial court the “gatekeeper” role “of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”⁸ *Kumho* clarified that *Daubert*’s gatekeeping obligation applies as well to all types of expert testimony.⁹ The 2000 amendment reaffirmed the trial court’s role as a gatekeeper and imposed requirements of relevance, qualification, and reliability on expert testimony.¹⁰

Rule 702 was again amended, effective December 1, 2023, to make two significant changes that strengthen judicial gatekeeping over expert testimony. First, the amendment clarifies that courts must apply the preponderance of evidence standard (“more likely than not”) to determine whether expert testimony meets all admissibility requirements before allowing it to reach the jury.¹¹ This change addresses a widespread problem where courts incorrectly treated reliability questions as matters of “weight” for the jury rather than “admissibility” for the judge. The amendment emphasizes that judges must rigorously evaluate the three reliability requirements added in 2000 and that expert testimony need only “help” the trier of fact rather than meet the higher “appreciably help” standard some courts had imposed.¹² Once the admissibility requirements are satisfied, further challenges focus on the weight of the evidence rather than admissibility.¹³

Second, the amendment strengthened Rule 702(d) to emphasize that expert opinions must stay within the bounds of what their basis and methodology can

Detroit, 25 F.3d 1342, 1353 (6th Cir. 1994) (“Although an expert’s opinion may embrace an ultimate issue to be decided by the trier of fact, the issue embraced must be a factual one.”) (citation, brackets, and quotation marks omitted).

6. 509 U.S. 579 (1993).

7. 526 U.S. 137 (1999).

8. *Daubert*, 509 U. at 597; *accord Kumho*, 526 U.S. at 141.

9. *Kumho*, 526 U.S. at 147.

10. Rule 702 was amended in 2011 as part of the restyling of the Federal Rules of Evidence. The purpose was to make the Rules more easily understood and to ensure stylistic and terminological consistency across the Rules. The Advisory Committee emphasized that these changes were stylistic only and were not intended to change the substantive standards governing the admissibility of expert testimony. *See* FED. R. EVID. 702 advisory committee’s note to the 2011 amendment.

11. FED. R. EVID. 702 (as amended effective Dec. 1, 2023) (prefatory clause). However, proponents “do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable.” Fed. R. Evid. 702, advisory committee note 1 to 2023 amendment (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994)); *accord In re NFL “Sunday Ticket” Antitrust Litig.*, No. 15-ml-02668, 2024 WL 3628118, at *2 (C.D. Cal. Aug. 1, 2024).

12. *See* FED. R. EVID. 702 advisory committee’s note to 2023 amendment; FED. R. EVID. 104(a); *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *Huddleston v. United States*, 485 U.S. 681, 687 n.5 (1988).

13. *See* FED. R. EVID. 702 advisory committee’s note to 2023 amendment.

reliably support.¹⁴ While the amendment includes specific guidance for traditional forensic evidence—such as fingerprint analysis, handwriting comparison, and other pattern-matching disciplines—where experts should avoid claims of absolute or 100% certainty when using subjective methodologies, the broader principle applies to all expert testimony. For economic experts in antitrust merger cases, this means acknowledging the limitations, assumptions, and potential sources of error in their economic models, econometric analyses, and market simulations rather than overstating the precision or certainty of their conclusions. Judges should seek error rate estimates when available for any methodology, and all expert testimony must be limited to reasonable inferences from reliable methods. The amendment does not impose new procedures or require courts to nitpick expert opinions to perfection, but it does prevent experts from making unsupported claims that exceed what their methodology can reliably establish. When experts disagree on contested facts, both sides' experts may still be admissible, allowing the jury to decide credibility.¹⁵

Significantly for merger antitrust injunctive relief proceedings, these clarifications do not require a pretrial *Daubert* ruling in a bench trial. When the court is both gatekeeper and factfinder, it may hear the expert evidence and resolve Rule 702 issues during trial, admitting subject to later exclusion or disregard, so long as it ultimately finds under Rule 104(a) that Rule 702's requirements are met by a preponderance of the evidence.¹⁶ Nor does the 2023 amendment impose any new procedures or require a sua sponte reliability finding in the absence of an objection.¹⁷ However, if a *Daubert* motion to exclude is made and denied before trial, the opposing party may re-raise the issue in a post-trial motion for judgment as a matter of law based on the expert's actual testimony during trial.¹⁸

Relevance. Rule 702 requires that the “expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”¹⁹ The Advisory Committee observed that the helpfulness inquiry is “whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved

14. FED. R. EVID. 702(d) (requiring “the expert’s opinion reflect[] a reliable application of the principles and methods to the facts of the case”) (as amended effective Dec. 1, 2023).

15. See FED. R. EVID. 702 advisory committee’s note to 2023 amendment.

16. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-0489 (PLF), 2016 WL 2962186, at 1 (D.D.C. May 20, 2016).

17. FED. R. EVID. 702 advisory committee’s note to 2023 amendment (“Nor does the amendment require that the court make a finding of reliability in the absence of objection.”; “Nothing in the amendment imposes any new, specific procedures.”).

18. See *In re NFL “Sunday Ticket” Antitrust Litig.*, No. 15-ml-02668, 2024 WL 3628118, at *4 (C.D. Cal. Aug. 1, 2024) (granting JMOL after concluding that the plaintiffs’ expert testimony at trial about the “but-for” world in a damages analysis was “not the product of sound economic methodology”).

19. FED. R. EVID. 702.

in the dispute.”²⁰ Expert testimony that is not helpful to the trier of fact is inadmissible.²¹

One aspect of the relevancy requirement is that the expert’s analysis is probative of a question of fact in the case under the proper legal standard. At trial, the expert must testify in a manner that does not contradict established legal rules or risk confusing the jury regarding the proper legal test. So, for example, courts have excluded expert testimony where the expert’s theory of market definition contradicted the applicable legal standards.²²

Qualifications. Rule 702 requires that an expert witness be qualified by scientific, technical, or other specialized knowledge. Without this specialized knowledge, the expert’s testimony would not be helpful to the jury: the trier of fact can simply perform the analysis on their own. Courts have construed this requirement liberally.²³ In assessing an expert’s qualifications, the court should consider a proposed expert’s full range of practical experience as well as academic or technical training.²⁴ When the expert is otherwise qualified, courts should not exclude the expert’s testimony merely because the expert did not have the degree or training that the court believes would be most appropriate.²⁵ But the expert’s qualifications must be relevant to the opinion the expert is offering. A person, although qualified as an expert in one area of expertise, may be precluded from offering opinions beyond that area of expertise.²⁶ Moreover, while an expert may be “qualified” sufficient to

20. Fed. R. Evid. 702 advisory committee’s note to the original proposed rule; *see* *Superior Prod. P’ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 323 (6th Cir. 2015) (affirming exclusion of expert testimony that the defendant’s pricing strategy reflected an intent to force the plaintiff out of the market where no expert testimony on intent was needed); *In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2010 WL 8228830, at *3 (E.D. Tenn. Dec. 8, 2010) (granting motion to exclude expert testimony that did no more than collate the plaintiffs’ evidence and summarize it in nontechnical form, without the application of any expertise).

21. *See* *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) (“When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert’s judgment for the jury’s. When this occurs, the expert acts outside his limited role of providing the groundwork in the form of an opinion to enable the jury to make its own informed determination. In evaluating the admissibility of expert testimony, this Court requires the exclusion of testimony which states a legal conclusion.”) (emphasis in original).

22. *See, e.g., Superior Prod. P’ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 325 (6th Cir. 2015) (affirming exclusion of expert testimony that defendant’s prices were below cost where expert used an incorrect test for below-cost pricing under Sixth Circuit precedent); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995); *Bailey v. Allgas, Inc.*, 148 F.Supp.2d 1222, 1242-45 (N.D. Ala. 2000), *aff’d*, 284 F.3d 1237, 1247-49 (11th Cir. 2002).

23. *See, e.g., In re Paoli R.R. Yard PCB Litig. (Paoli II)*, 35 F.3d 717, 741 (3d Cir. 1994).

24. *See In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 163 (S.D. Ind. 2009).

25. *See, e.g., Paoli II*, 35 F.3d at 741.

26. *See Weisgram v. Marley Co.*, 169 F.3d 514, 518 (8th Cir. 1999) (holding that a city fire captain, although qualified as an expert on fire investigation, and therefore qualified to testify as to his opinion that a fire started in the entryway and radiated to a sofa, was not qualified to testify as to his unsubstantiated theories of a malfunction that might have caused the fire).

satisfy the standards of Rule 702, the nature of the qualifications may affect the weight to be given to the testimony.²⁷

Facts and data. By its terms, Rule 702(b) requires that expert opinion testimony be based on “sufficient data or facts.”²⁸ An expert may obtain her data or facts from one of three sources:²⁹

1. The expert may have first-hand personal knowledge of them, such as when the expert is a treating physician who directly observed the patient.
2. The expert may be provided data and facts at trial, such as when the expert attended the testimony of fact witnesses in which the data and facts were disclosed, or when counsel during the expert’s examination (especially cross-examination) presented the expert with data or facts in a hypothetical situation on which the expert was asked to opine.
3. More commonly, especially in antitrust cases involving economic experts, the expert obtains her data or facts from third-party sources and therefore does not have “personal knowledge” of them within the meaning of Rule 602.

Rule 703 governs the facts or data on which an expert may base an opinion:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.³⁰

The first sentence of Rule 703 addresses the expert’s first-hand knowledge, as well as the data or facts provided at trial. The rest of the rule handles data and facts from third-party sources. Note that the expert may rely on data and facts that are not admitted, or even are inadmissible, if experts in the field reasonably rely on them.³¹

Under Rule 703, experts are entitled to use assistance in formulating expert opinion, and their assistants need not themselves testify to make the expert’s opinion

27. See, e.g., *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2015 WL 5767415, at *3-*5 (E.D. Pa. July 29, 2015) (finding Einer Elhauge, a professor at Harvard who teaches and has published in antitrust law, “qualified” within the meaning of Rule 702 to offer economic opinions based on the use of regression analysis, although he has no formal training in economics, econometrics or statistics, but noting that his lack of formal training typical of testifying economic experts would factor in the weight given to his testimony).

28. FED. R. EVID. 702(b).

29. FED. R. EVID. 703 advisory committee’s note to the original proposed rule.

30. FED. R. EVID. 703.

31. This is an exception to Rule 104(b), which provides: “When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.” *Id.* 104(b).

testimony admissible.³² The opposing party, however, may examine the expert to determine whether there was adequate supervision and whether relying on such assistance was standard practice in the field.³³ Where the expert relied on an assistant's work, the opposing party may also depose the assistant to determine how the task was performed and whether it was performed competently. Where the data or facts on which the expert relied cannot be shown to be reliable, either by the expert herself or other testimony, the opinions that depend on those data or facts will be excluded.³⁴

As a general rule, an expert does not have to disclose in the expert's direct testimony the data and facts on which an opinion is based, but the relevant data and facts may be the subject of cross-examination. Rule 705 provides:

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.³⁵

Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure and Rule 16 of the Federal Rules of Criminal Procedure, however, require disclosure in advance of trial of the basis and reasons for an expert's opinions.³⁶

Reliable principles. Rule 702 requires that the expert testimony “is the product of reliable principles and methods.”³⁷ The *Daubert* Court identified several factors that the court may consider when making this determination, including: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence, and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.³⁸ These factors are not exhaustive, and the trial court has “broad latitude when it decides *how* to determine reliability.”³⁹

Reliable application. Rule 702 requires that “the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.”⁴⁰ In other words, “the expert's testimony must be relevant for the purposes of the case and must

32. See *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 646, 658 (N.D. Ill. 2006).

33. *Id.*

34. See, e.g., *Orthofix Inc. v. Lemanski*, No. 13-11421, 2015 WL 12990115, at *1 (E.D. Mich. Sept. 29, 2015).

35. FED. R. EVID. 705. Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure and Rule 16 of the Federal Rules of Criminal Procedure, however, require disclosure in advance of trial of the basis and reasons for an expert's opinions. See FED. R. CIV. P. 26(a)(2)(B), 26(e)(1); FED. R. CRIM. P. 16.

36. See FED. R. CIV. P. 26(a)(2)(B), 26(e)(1); FED. R. CRIM. P. 16.

37. FED. R. EVID. 702.

38. See, e.g., *In re Paoli R.R. Yard PCB Litig. (Paoli II)*, 35 F.3d 717, 742 n.8 (3d Cir. 1994).

39. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999) (emphasis in original).

40. FED. R. EVID. 702.

assist the trier of fact.”⁴¹ This requirement is commonly known as “fit.”⁴² The *Daubert* Court observed that “[f]it” is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.”⁴³

As a general matter, flaws in a proffered expert’s analysis typically go to the weight, rather than the admissibility, of the expert’s testimony.⁴⁴ The evidentiary requirement of reliability is lower than the merits standard of correctness.⁴⁵ As the Third Circuit explained:

A judge frequently should find an expert’s methodology helpful even when the judge thinks that the expert’s technique has flaws sufficient to render the conclusions inaccurate. He or she will often still believe that hearing the expert’s testimony and assessing its flaws was an important part of assessing what conclusion was correct and may certainly still believe that a jury attempting to reach an accurate result should consider the evidence.⁴⁶

Two areas of particular interest in antitrust cases are regression analysis and surveys.

Regression analysis is a well-accepted economic tool that courts have accepted when reliably applied.⁴⁷ The Supreme Court addressed the application reliability of opinions based on regression analysis in *Bazemore v. Friday*, an employment discrimination case:

While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors “must be considered unacceptable as evidence of discrimination.” Normally, failure to include variables will affect the analysis’ probativeness, not its admissibility.⁴⁸

41. *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003); *accord In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2015 WL 5767415, at *2 (E.D. Pa. July 29, 2015).

42. *See, e.g., Paoli II*, 35 F.3d at 743; *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 52 (1st Cir. 2016); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2000).

43. *Daubert*, 509 U. at 591.

44. *See, e.g., In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 973 (C.D. Cal. 2012).

45. *Paoli II*, 35 F.3d at 744; *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2015 WL 5767415, at *6 (E.D. Pa. July 29, 2015).

46. *Id.* at 744-45.

47. *See, e.g., In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486 (W.D. Pa. 1999) (collecting cases).

48. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). For applications in antitrust cases, see, for example, *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2015 WL 5767415, at *11 (E.D. Pa. July 29, 2015) (Daubert decision denying motion to exclude *Einer Elhauge*); *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666, 678 (E.D. Pa. 2007) (“[I]t is only the rare case where the regressions are so incomplete as to be irrelevant and the expert’s decisions regarding control variables are the basis to exclude the analysis.”) (internal citations omitted).

Generally, courts recognize that the economic tools used in antitrust cases require the exercise of professional judgment, often resulting in disagreements between opposing experts, and that these disagreements typically should be resolved by the trier of fact in the adversarial process, rather than by the court in a *Daubert* proceeding.⁴⁹ However, there are limits to this deference. In some cases, the analysis may be so incomplete as to the “major factors” as to be inadmissible as irrelevant.⁵⁰ Courts have yet to establish a bright-line test for determining when a regression analysis is “so incomplete” as to be irrelevant, but instead have more generally held that the burden is on the opposing party to show that the regression omitted material variables or was otherwise misspecified in a way that, if the regression analysis had been properly performed, would have changed the outcome of the analysis.⁵¹ Merely identifying variables that the opposing party believes should have been included in the analysis, without showing how the inclusion of these variables would affect the result, is not enough.⁵² Recent decisions applying the 2023 Rule 702 amendments have reinforced that economic modeling in antitrust cases—including “but for” analyses commonly used to establish damages—must be grounded in sufficient factual support and reliable methodology, rather than mere assumptions about how market participants would behave.⁵³

To assess application reliability of opinions based on surveys, courts have examined a variety of factors, including whether (1) the “universe” of the survey was defined correctly, (2) a representative sample of that universe was selected, (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner, (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted, (5) the data gathered was accurately reported, (6) the data was analyzed in accordance with accepted statistical principles and (7) the objectivity of the entire process was ensured.⁵⁴ Still, these are only factors for the court to consider. Unless

49. See *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2015 WL 5767415, at *6 (E.D. Pa. July 29, 2015); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-1175, 2014 WL 7882100, at *8 (E.D.N.Y. Oct. 15, 2014).

50. See *Live Concert*, 863 F. Supp. at 973 (quoting *Bazemore*, 478 U.S. at 400 n.10); *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir.1998) (finding expert damages reports were “worthless” because they controlled for only a single factor).

51. See, e.g., *Resco Prod., Inc. v. Bosai Minerals Grp.*, No. CIV.A. 06-235, 2015 WL 5521768, at *5 (W.D. Pa. Sept. 18, 2015); *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2015 WL 5767415, at *11 (E.D. Pa. July 29, 2015) (rejecting *Daubert* challenge on omitted variables for failure to show that the omitted variables mattered).

52. See, e.g., *Resco*, 2015 WL 5521768, at *5; *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666, 678 (E.D. Pa. 2007); *In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348, 1365 (N.D. Ga. 2000).

53. See *In re NFL “Sunday Ticket” Antitrust Litig.*, No. 15-ml-02668, 2024 WL 3628118, at *2-*8 (C.D. Cal. Aug. 1, 2024) (excluding expert testimony that relied on unsupported assumptions about market behavior in hypothetical scenarios).

54. See, e.g., *Estes Park Taffy Co., LLC v. Original Taffy Shop, Inc.*, No. 15-CV-01697-CBS, 2017 WL 2472149, at *3 (D. Colo. June 8, 2017); *LG Electronics U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 940, 952 (N.D. Ill. 2009).

the court determines that the survey is fundamentally unreliable, the expert testimony should be admitted and then tested through cross-examination at trial.⁵⁵

Prejudice. Even if admissible under Rule 702, expert testimony is still subject to exclusion under Rule 403, which permits the court to exclude otherwise admissible evidence “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁵⁶ Courts are likely to use this rule if there is substantially more reliable and accurate evidence to answer the question in issue.

Daubert motions. The admissibility of expert testimony is a question for the court. Rule 104(a) requires that “[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”⁵⁷ *Daubert* held that when a party proffers expert testimony, the trial court, pursuant to Rule 104(a), must “determine at the outset” whether the testimony is admissible.⁵⁸ The court’s inquiry must focus on qualifications, relevance, and reliability of the expert and her testimony, not on the conclusions the expert reaches nor the expert’s credibility.⁵⁹

Although Rule 103(a) generally provides that parties must make a timely objection to the admission of evidence to impose an obligation on the court to determine admissibility (and to preserve a claim of error as to the determination), *Daubert* imposes an independent requirement that trial courts conduct a preliminary assessment of the admissibility of expert testimony, even in the absence of an objection.⁶⁰ There is no requirement, however, that the district court conduct sua sponte an in-depth *Daubert* analysis and make explicit findings on the record as to the elements of Rule 702. Instead, it is enough that the district court is alert to the requirements on the admissibility of expert testimony and assures itself that these requirements are facially satisfied by the proffered expert testimony.

Finally, *Daubert* imposed the gatekeeper role on the courts to ensure that the trier of fact will not be exposed to unreliable or irrelevant testimony about scientific, technical or other specialized matters. However, the need for a gatekeeper in advance is significantly diminished when the trier of fact is the judge, rather than a jury.

That is not to say that the scientific reliability requirement is lessened in such situations; the point is only that the court can hear the evidence and make its reliability determination during, rather than in advance of, trial. Thus, where the factfinder and the gatekeeper are the same, the court does not err in admitting

55. See, e.g., *Estes Park Taffy*, 2017 WL 2472149, at *4 (denying motion to exclude).

56. FED. R. EVID. 403.

57. *Id.* 104(a).

58. *Daubert*, 509 U.S. at 592.

59. See, e.g., *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008); *In re Paoli R.R. Yard PCB Litig. (Paoli II)*, 35 F.3d 717, 743 (3d Cir. 1994)

60. See *Hoult v. Hoult*, 57 F.3d 1, 4-5 (1st Cir. 1995).

the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.⁶¹

While courts certainly can make Rule 702 determinations as the evidence is presented, not making an earlier determination can create significant inefficiency for both the court and the parties. In the absence of an earlier *Daubert* decision, the parties must prepare and present their evidence and arguments for both contingencies: that the expert evidence will be accepted and that it will be excluded. Especially when multiple experts are testifying and all are being challenged, the burden can be substantial.

Burden of proof and standard of review. The burden of laying the proper foundation for the admission of expert testimony is on the party offering the testimony, and a preponderance of the evidence must show admissibility.⁶² As with other evidentiary rulings, the decision to admit or exclude expert testimony is within the discretion of the court.⁶³ Appellate courts review the district court's decision for abuse of discretion.⁶⁴

61. *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006) (internal citation omitted); *accord In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-0489 (PLF), 2016 WL 2962186, at *1 (D.D.C. May 20, 2016) (denying motion to exclude).

62. *See, e.g., Daubert*, 509 U.S. at 593 n.10 (1993); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 n.9 (2d Cir. 2004); *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1261 (11th Cir. 2004); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001); *Meister v. Medical Engineering Corp.*, 267 F.3d 1123, 1128 n.9 (D.C. Cir. 2001); *Cooper v. Smith and Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001); *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 144 (3d Cir. 2000); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999); *United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997); FED. R. EVID. 702 advisory committee's note to 2000 amendments (observing that "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.").

63. *See, e.g., Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1079 (10th Cir. 2006); *United States v. Gabaldon*, 389 F.3d 1090, 1098 (10th Cir. 2004); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 264-65 (2d Cir. 2002).

64. *See, e.g., Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 322 (6th Cir. 2015); *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 52 (1st Cir. 2016).

This opinion was unsealed by order of Judge Howell on 12/8/11.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 06 2011

Clerk, U.S. District and
Bankruptcy Courts

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. 11-00948 (BAH)

H&R BLOCK, INC., *et al.*,

Defendants.

UNSEALED

MEMORANDUM OPINION AND ORDER

The United States, through the Antitrust Division of the Department of Justice (the “DOJ” or the “plaintiff”), brought this civil case to enjoin the proposed acquisition of a digital do-it-yourself tax preparation company known as TaxACT by H&R Block, another company that sells digital do-it-yourself tax preparation products as well as provides other tax preparation services.¹ A preliminary injunction hearing in this case is scheduled for September 6, 2011, and the plaintiff has filed a motion in limine to exclude evidence of an email survey commissioned by the defendants and the portions of a defendants’ expert opinion that relies upon the survey. For the reasons that follow, the Court denies the motion in limine.²

I. BACKGROUND

The DOJ filed this action on May 23, 2011, seeking to enjoin Defendant H&R Block, Inc. from acquiring Defendant 2SS Holdings, Inc. (“TaxACT”), which sells digital do-it-yourself

¹ The Court has subject matter jurisdiction to hear this suit under 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337 and 1345.

² The plaintiff initially filed an additional motion in limine to exclude evidence of defendants’ guarantee to maintain TaxACT’s current prices for three years following the acquisition. See ECF No. 44. The plaintiff withdrew that motion at oral argument on September 2, 2011.

tax preparation products marketed under the brand name TaxACT. Compl. ¶ 10. Defendant TA IX, L.P. (“TA”), owns a two-thirds interest in TaxACT.³ *Id.* ¶ 11.

According to the Complaint, last year an estimated 35 to 40 million taxpayers filed their taxes using digital do-it-yourself tax preparation products (“Digital DIY Tax Preparation Products”). *Id.* ¶ 1. In the U.S. Digital DIY Tax Preparation Product market, the three largest firms collectively have about 90% of the market share. *Id.* The leading company in the market is Intuit, Inc., the maker of “TurboTax.” *Id.* ¶ 3. H&R Block’s proposed acquisition of TaxACT, if allowed to proceed, would combine the second- and third-largest providers in the market – i.e., H&R Block and TaxACT, respectively. *Id.*

The Complaint alleges that TaxACT is a “maverick” competitor that has a history of “disrupting” the Digital DIY Tax Preparation market and has forced its competitors, including H&R Block and Intuit, “to offer free products and increase the quality of their products for American taxpayers.” *Id.* ¶ 28. The Complaint alleges that TaxACT has aggressively competed with H&R Block and Intuit by providing high-quality products and services at low cost. *See id.* ¶¶ 30-40. The DOJ alleges that the acquisition of TaxACT by H&R Block would reduce competition in the industry and make anticompetitive coordination between the two major remaining market participants – H&R Block and Intuit – substantially more likely. *Id.* ¶¶ 40-49. The DOJ alleges that therefore the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and accordingly it seeks an injunction blocking H&R Block from acquiring TaxACT. *Id.* ¶¶ 53-55.

³ 2nd Story Software, Inc. (“2SS”) is a wholly-owned subsidiary of 2SS Holdings, Inc., which is the entity being purchased by H&R Block. Declaration of Lance Dunn, dated May 27, 2011 (“Dunn Decl.”), ¶¶ 2, 4. Both 2SS and 2SS Holdings, Inc. share the same address in Cedar Rapids, Iowa.

The defendants dispute that the appropriate product market is Digital DIY Tax Preparation products, but argue that the relevant market instead consists of “all methods of tax preparation for the U.S. federal and state income taxes.” Report of Dr. Christine Siegwirth Meyer, DX0017-006, at 2. Furthermore, even assuming *arguendo* that the plaintiff’s alleged market definition were correct, the defendants deny that the transaction would result in anticompetitive effects because, *inter alia*, “H&R Block and TaxAct are not close substitutes and the merger is likely to lead to substantial, incremental, merger-specific efficiencies.” Joint Pre-Hearing Statement at 4.

A pre-hearing conference in this matter, including oral argument on the motion in limine, was held on September 2, 2011.

II. DISCUSSION

The plaintiff has moved, pursuant to Federal Rules of Evidence 702 and 703, to exclude evidence of an email survey of defendants’ customers and to limit defendants’ expert opinion to the extent that it relies on this survey (the “2011 email survey”). Pl.’s Mem. in Supp. of Pl.’s Mot. to Exclude the 2011 Litigation Survey and Limit Defs.’ Expert Report (“Pl.’s Mem.”) at 1-2. The plaintiff contends the survey’s “methodology falls far short of the requirements of Federal Rules of Evidence 703 and 702 because: (1) it fails to ask a question relevant to this proceeding; (2) it suffers from extraordinary non-response bias, with response rates far below what courts have found necessary to establish reliability; and (3) the response options provided are leading and fail to discourage guessing.” *Id.* at 2. For the reasons below, the Court declines to exclude the evidence or to limit the expert’s opinion.

A. Standard of Review

“Under Rule 702, a trial court may only admit expert testimony that is both relevant and reliable.” *Harris v. Koenig*, No. 02-618, 2011 WL 2531257, at *1 (D.D.C. June 27, 2011) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)). “Courts take a flexible approach to deciding Rule 702 motions and have ‘broad discretion in determining whether to admit or exclude expert testimony.’” *Id.* (quoting *U.S. ex rel. Miller v. Bill Harbert Int’l Constr., Inc.*, 608 F.3d 871, 895 (D.C. Cir. 2010) (internal citation omitted). “In considering Rule 702 motions, the court assumes only a ‘limited gate-keep[ing] role’ directed at excluding expert testimony that is based upon ‘subjective belief’ or ‘unsupported speculation.’” *Id.* (quoting *Ambrosini v. Labarraque*, 101 F.3d 129, 135-36 (D.C. Cir. 1996)). In addition, “the importance of the trial court’s gatekeeper role is significantly diminished in bench trials . . . because, there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence.” *Whitehouse Hotel Ltd. Partnership v. Comm’r of Internal Revenue*, 615 F.3d 321, 330 (5th Cir. 2010). “The party seeking to introduce expert testimony must demonstrate its admissibility by a preponderance of the evidence.” *Harris*, 2011 WL 2531257, at *1 (citing *Daubert*, 509 U.S. at 592 n.10).

Under Rule 703, the facts or data underlying an expert’s opinion “need not be admissible in evidence in order for the opinion or inference to be admitted” if the facts or data are “of a type reasonably relied upon by experts in the particular field.” Fed. R. Evid. 703. In addition, such “facts or data that are otherwise inadmissible” may be disclosed by the proponent of the opinion if their probative value substantially outweighs any prejudicial effect. *Id.*

B. Background Regarding the 2011 Email Survey

In late April 2011, following the 2011 tax season, the defendants commissioned Directions Research, a market research firm, to conduct an Internet-based survey of TaxACT's customers. GX 604. According to the defendants, during the investigation of the transaction, the DOJ did not accept the defendants' evidence of an "extremely low switching between the Defendants' products" as an appropriate proxy for diversion – i.e., the government contended that current switching rates are not necessarily predictive of how TaxACT customers would react to a price increase or functionality decrease. Defs.' Mem. in Opp'n to Pl.'s Mot. In Limine ("Defs.' Mem.") at 3. The survey was therefore initiated to respond to a question raised by the DOJ – namely, "how TaxAct consumers would react to a price increase, service decrease or functionality decrease in the TaxAct products." *Id.* The survey asked one primary question: "If you had become dissatisfied with TaxACT's price, functionality or quality, which of these products or services would you have considered using to prepare your federal taxes?" GX 604 (Results of the 2011 email survey); GX623 (App'x 2 to Report of Dr. Dhar). The survey then offered the respondents a list of eleven options, including other products or services, from which to choose and instructed them to select all applicable options. *Id.* The list of options that respondents were given varied somewhat depending on the respondents' filing status and the payments they had made for their 2011 tax returns.⁴ *Id.* A follow-up question asked the respondents to narrow their selections to a single choice. *Id.*

⁴ The response options varied among four different categories of filers, which are discussed further below. For example, the list of options presented to filers who completed a free federal tax return and no state return were: "I would prepare myself without help," "TurboTax Free Edition," "H&R Block at Home Free Edition," "Free TaxUSA Free Edition," "Complete Tax Free Basic," "An Accountant," "I would use a product on FFA [i.e., Free File Alliance]," "TaxSlayer Free Edition," "Jackson Hewitt Free Basic," "TaxSimple Free Basic," and "Other." GX604 at 2.

The research firm sent over 70,000 surveys via email to a statistically-random selection of TaxACT customers inviting them to participate in the survey. Declaration of Tina Ruddy, dated August 24, 2011 (“Ruddy Decl.”) ¶¶ 9, 10. Survey respondents were asked screening questions to determine their membership in one of four categories of customers: (1) those who paid to use TaxAct’s products for filing both federal and state tax returns (denominated in the survey report analysis by Directions Research as “Paid Fed/Paid State”); (2) those who paid to use TaxAct’s federal return product but not for filing the state return (“Paid Fed/No State”); (3) those who used TaxAct’s free product for filing a federal return and paid to use a TaxAct product to file a state return (“Free Fed/Paid State”); and (4) those who used TaxAct’s free product for filing a federal return but not for filing the state return (“Free Fed/No State”).⁵ GX604 (Results of the 2011 email survey).

A total of 1,089 customers responded to the survey. *Id.* at 2-3. The response rates for the four categories of customers were: (1) 2.45% for paid federal / paid state filing (422); (2) 0.6% for paid federal / no state filing (182); (245); (3) 2.08% for free federal / paid state filing; and (4) 1.7% for free federal / no state filing (240). *Id.*; *see also* Pl.’s Mem. at 3.

Defendants’ expert, Dr. Christine Siegwarth Meyer, summarized the results of the survey as follows:

[A] survey of TaxACT customers indicates that few would switch to H&R Block At Home in the event that they were satisfied with TaxACT. In each of the four groups, the comparable HRB product was neither the first nor second most likely alternative tax products for the respondents. The percentage of TaxACT customers that would switch to H&R Block At Home ranged from 4 to 10 percent, with a weighted average of only 6 percent. Instead, in each group, pen-and-paper and TurboTax were the two options with the

⁵ By contrast to federal tax returns, TaxAct does not provide free state return preparation software but does offer free electronic filing of state returns to those customers who purchase a TaxAct-branded desktop software product available at Staples retail stores. Report of Dr. Meyer ¶¶ 191-92. The Court understands the survey’s category for “No State” to cover those respondents who did not purchase TaxAct’s state return preparation software from Staples or any other source.

highest responses. In only one of the four groups was HRB the third response. Instead, Free TaxUSA (Tax Hawk) was a more prevalent choice than HRB for three of the four groups.

Report of Dr. Meyer, DX0017-042 (footnotes omitted). Based upon this analysis of the results,

Dr. Meyer opined that:

This further indicates that HRB is not a particularly close competitor to TaxACT. Following the merger, consumers who are dissatisfied with TaxACT will have numerous other choices to which they can and would turn, including TurboTax, pen-and-paper, other software products, and assisted tax preparation.

Id.

C. Analysis

In order to admit expert testimony under Rule 702, the Court must find that it is “relevant and reliable.” *Kumho Tire Co.*, 526 U.S. at 141; *Daubert*, 509 U.S. at 589. “In general, Rule 702 has been interpreted to favor admissibility.” *Khairkhwa v. Obama*, No. 08-1805, 2011 WL 2490960, at *7 (D.D.C. May 27, 2011) (citing *Daubert*, 509 U.S. at 587; Fed. R. Evid. 702 Advisory Committee’s Note (2000) (“A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.”)). “The adversarial system remains the ‘traditional and appropriate’ mechanism for exposing ‘shaky but admissible evidence.’” *Id.* (citing Fed. R. Evid. 702 Advisory Committee’s Note (2000) (quoting *Daubert*, 509 U.S. at 596)).

Facts or data underlying an expert’s opinion that are “of a type reasonably relied upon by experts in the particular field” need not be admissible in evidence in order for the opinion or inference to be admitted. Fed. R. Evid. 703. Regarding survey results in particular, technical and methodological deficiencies in a survey generally go to the weight of the evidence, not the admissibility, unless the deficiencies are so substantial as to render the survey unreliable. *See Univ. of Kan. v. Sinks*, No. 06-2341, 2008 WL 755065, at *3 (D. Kan. Mar. 19, 2008) (discussing customer confusion survey in trademark case).

As discussed in more detail below, having reviewed the report of defendants' expert, Dr. Christine Siegwarth Meyer, the Court finds that Dr. Meyer's anticipated testimony regarding the 2011 email survey meets the criteria for admissibility. Dr. Meyer is an accomplished economist with a Ph.D. in economics from the Massachusetts Institute of Technology. *See* DX0017, Ex. 1. Her conclusions regarding the level of competition between TaxACT and H&R Block, as expressed in her report, are not based solely upon the results of the survey to which the plaintiff objects. *See* DX0017-022-26, 28-42 (discussing various documents and data to support Dr. Meyer's conclusions regarding competition with manual filing and unilateral effects); Meyer Dep. 175:6-16 ("I think [the 2011 email survey] – it's an important data point. It's not the only data point to make any of the points that I use it to make.") (cited in Defs.' Mem. at 18 n.58).

As for the survey itself, the Court finds that Dr. Meyer's use of the survey as a datum in reaching her conclusions is not unreliable. While the plaintiff has identified cogent concerns about the wording and the methodology of the survey, the Court finds that these concerns go to the weight, not the admissibility, of the evidence, especially in this bench hearing where there is no concern about jury confusion or prejudice.⁶ *See Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1301-02 (Fed. Cir. 2002) (noting that "concerns [about jury confusion] are of lesser import in a bench trial," although "*Daubert* standards of relevance and reliability" still apply).

⁶ At oral argument and in its briefs, the plaintiff urged the Court to follow *United States v. Dentsply Int'l Inc.*, an antitrust case in which the district court excluded a survey. 277 F. Supp. 2d 387, 436 (D. Del. 2003), *rev'd on other grounds*, 399 F.3d 181 (3d Cir. 2005). The court excluded the survey in that case because it suffered from myriad flaws: "(1) the screening questionnaire failed to identify relevant respondents; (2) the questionnaire instructions were complex and confusing; (3) a pre-test was not conducted; (4) the response rate was low; (5) non-response bias was not addressed; (6) respondents were unwilling or unable to devote time to take the survey seriously; (7) the results could not be replicated; (8) a standard error measurement was not calculated; and (9) a key parameter estimate was arbitrarily changed." *Id.* at 453-54. As discussed herein, the Court finds that the deficiencies the plaintiff has identified regarding the 2011 email survey affect the weight the Court will accord the survey, but do not sufficiently undermine the methodology used to design, execute and analyze the survey's results to bar admissibility.

1. Relevance

The Court finds that the survey is relevant because it is probative of the degree to which TaxACT and H&R Block are competitors, whether the market is defined, as alleged by the plaintiff, to be Digital DIY tax preparation products or more broadly, as alleged by the defendants, to be all tax preparation products and services. The options provided to survey respondents encompassed both competing Digital DIY tax preparation products as well as alternative services.

The plaintiff argues that the survey is irrelevant because Dr. Meyer asserted in her report that “this survey is closer to the concept of a diversion ratio than are data on overall switching between products,” Pl.’s Mem. at 5 (citing Dr. Meyer’s Report at DX0017-024 n.85). According to the plaintiff, diversion refers to “a measured customer reaction to a measured increase in price.” *Id.* Since the phrasing of the survey question conflates customer concerns about price, functionality, and quality, and does not actually ask about a change in price, the plaintiff argues that the survey cannot shed any light on customer reactions to price changes. *Id.* Even accepting the plaintiff’s critique, however, would not obliterate the survey’s relevance entirely. Further, Dr. Meyer’s report, in the portion cited by the plaintiff, did not state that the survey provided direct evidence of diversion, but rather that “this survey is closer to the concept of a diversion ratio than are data on overall switching between products,” which the Court understands as expressing a different idea. While the wording of the survey question may limit its relevance on specific issues, because the survey provides at least some indication of the products and services that compete with TaxACT, the Court cannot say that it does not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence.” Fed. R. Evid. 401 (defining relevant evidence).

2. Reliability

Customer surveys generally are a type of evidence that may be reasonably relied upon by experts in defining markets in antitrust cases. *See* GX622 (Christine Meyer, “Designing and Using Surveys to Define Relevant Markets,” in *Economics of Antitrust: Complex Issues in a Dynamic Economy* 101, 108 (Lawrence Wu, ed. 2007)); GX624 (Shari Seidman Diamond, “Reference Guide on Survey Research,” in Federal Judicial Center, *Reference Manual on Scientific Evidence*, hereinafter “Diamond,” at 234-35).

In determining whether a particular survey may be admissible under Rule 703, courts examine the validity of the survey’s methods and ask “Was the poll or survey conducted in accordance with generally accepted survey principles, and were the results used in a statistically correct way?” Diamond at 233-34. The methodological validity of a survey is necessarily a question of degree. As discussed above, technical deficiencies that can be adequately explored on cross-examination generally go to the weight, rather than the admissibility, of the evidence, unless the methodological deficiencies are so sweeping or fundamental as to render the survey wholly unreliable and therefore inadmissible.

a. Response Rate

The plaintiff argues that the survey is not reliable because it suffers from an “extraordinary level of non-response bias” due to its low response rate. Pl.’s Mem. at 7. The plaintiff cites authority indicating that a response rate below 50% “should be regarded with significant caution as a basis for precise quantitative statements from which the sample was drawn.” Pl.’s Mem. at 7 (citing Diamond at 245). The plaintiff’s rebuttal expert, Dr. Ravi Dhar,

has concluded that the “level of nonresponse . . . is extremely high (more than 98%)” and that the “extremely low response rates makes it difficult to determine whether the results were impacted by a certain segment who were systematically more likely to respond to the survey (e.g., those who were price sensitive or time insensitive) in relation to those who did not respond.” GX 623 (Report of Dr. Dhar at 10).

The defendants respond by citing authority indicating that web-based surveys typically have significantly lower response rates than other types of surveys. Defs.’ Mem. at 7-8. They also point to jury trials in which courts have admitted surveys with response rates of 10% or lower. Defs.’ Mem. at 7-8 (citing *Sinks*, 2008 WL 755065, at *4; *Kinetic Concepts, Inc. v. Bluesky Med. Corp.*, No. SA-03-CA-0832, 2006 WL 6505346, at *6 (W.D. Tex. Aug. 11, 2006)).

The defendants further argue that the survey’s sample size and response rate comply with industry standards for market research. A declaration from the Vice President of the market research firm that performed the survey affirms that large national companies commonly use similar survey results “to make business and pricing decisions.” Ruddy Decl. ¶¶ 3-4. This declaration also states that “[t]he standard, industry-expected response rate for surveys of this kind is generally between 1% - 2%” and that, for web-based email surveys, “a response rate above 50% is so improbable as to be considered entirely unavailable.” Ruddy Decl. ¶¶ 13, 16.

While the Court agrees with the plaintiff that the survey’s response rate “appears, by any standard, to be quite low,” *Sinks*, 2008 WL 755065, at *4, this concern goes to the weight, not the admissibility, of the evidence because the survey is not so unreliable as to be deemed inadmissible. The Court finds that the survey’s sample size of over 1,000 TaxACT customers from the most recent tax season, the testimony of Dr. Meyer in relying on the survey, and the

testimony that the survey's sample size and response rate are in line with industry standards for similar surveys establish sufficient reliability to allow admission of the survey evidence. The Court is cognizant of the detailed critique of the survey's response rate presented by the plaintiff's expert, Dr. Dhar, and the Court is fully capable of taking this critique into account in determining how much weight to accord the survey's results in its analysis. *See Sinks*, 2008 WL 755065, at *4 (admitting survey despite low response rate); *Kinetic Concepts, Inc.*, 2006 WL 6505346, at *6 (same).

b. Closed-Ended Questions and Discouragement of Guessing

The plaintiff also contends that the survey is fatally flawed because it asks only "closed-ended, leading questions" and that it failed to discourage guessing by not including a "no opinion" or "I don't know" option.

The plaintiff contends that the survey's closed-ended response options are "severely flawed because they are not exhaustive and fail to take into account that some people may not switch [products] even though they are dissatisfied." Pl.'s Mem. at 9 (citing GX 623, Report of Dr. Dhar, ¶¶ 18-19). The plaintiff also argues that, by providing survey respondents with a list of options from which to choose, the survey "hardly mirrors competition in the marketplace where the Big Three competitors spend millions of dollars annually to get their message in front of potential customers. In contrast, the [survey] counterfactually de-emphasizes the significance of brand and the millions spent building and maintaining it." *Id.* at 10. In addition, the plaintiff contends that the survey questions are leading because the response options vary depending on the product the respondent stated he or she used during the prior tax year. *Id.*

The defendants respond that the questions in the survey were not inappropriately leading and that authority cited by the plaintiff's expert actually establishes that "closed-ended questions

are more suitable for assessing choices between well-identified options or obtaining ratings on a clear set of alternatives.” Defs.’ Mem. at 8-9 (citing *Diamond* at 253). The defendants also note that the questions were not wholly closed-ended in that “Other” was an option that respondents could select. *Id.* at 9.

By providing survey respondents with a pre-selected list of alternative options, rather than letting respondents respond organically, the survey does lead respondents to think about the market for tax preparation services in the same terms that the defendants do, which may have led respondents to select options they otherwise would not have selected. This effect is not so inherently suggestive as to render the survey’s results wholly unreliable and therefore inadmissible, however. The survey does not appear to lead respondents to select any particular answer; the response choices included the major market participants under both parties’ views of the market; and it also included an “Other” option. Moreover, the survey question cannot be considered to be as “leading” as the questions identified as problematic in the plaintiff’s cited authority.⁷ Accordingly, this critique goes to the weight of the evidence and not to admissibility.

The same is true of plaintiffs’ concerns about the survey’s failure to discourage guessing by not including an “I don’t know” option. The plaintiff argues that “[s]urveys should explicitly mention that it is completely appropriate for respondents to have no opinion [on] a given question” and that failure to include an “I don’t know” opinion skews the results by failing to

⁷ In *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 591 (3d Cir. 2002), cited by the plaintiff, the Court discussed a case in which the Third Circuit identified a highly suggestive survey question. In that case, the party offering the survey evidence sought to defend an advertisement claiming that its medicine, Maalox, was “the strongest.” The survey at issue asked respondents the following question: “In the commercial you just saw, they said Maalox tablets are the strongest. What does that mean to you?” The Third Circuit held that this question improperly led respondents to answer that “strongest” meant something other than its ordinary, obvious meaning. See *id.* at 593 (discussing *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125 (3d Cir. 1994)).

provide an adequate answer for respondents who have no opinion on the question. Pl.'s Mem. at 10-11. While this concern is valid and the absence of such an "I don't know" option does diminish the weight the Court should accord this survey, the failure to include this option is partially mitigated here by the inclusion of the "Other" option. The Court does not find that this defect so undermines the survey as to require it to be deemed inadmissible. *See Kinetic Concepts*, 2006 WL 6505346, at *6 (admitting survey that did not have an "I don't know" option and concluding that any objections went to the weight of the survey rather than to admissibility).

3. Consideration of All Critiques

In sum, the plaintiff has identified a number of aspects about the methodology and wording of the defendants' 2011 email survey that will impact the weight that the Court gives this survey in its analysis. These defects do not undermine the survey and the expert's reliance on it so overwhelmingly that they render the survey wholly irrelevant or unreliable—and therefore inadmissible. While the admissibility of this survey might be a closer question in the context of a jury trial, since this hearing is not before a jury, "the importance of the trial court's gatekeeper role is significantly diminished . . . because, there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence." *Whitehouse Hotel Ltd. Partnership*, 615 F.3d at 330; *accord United States v. Oracle Corporation*, 331 F. Supp. 2d 1098, 1158 (N.D. Cal. 2004) (court at injunction hearing considered government's expert witness testimony on product market definition despite "shortcomings" in cited statistics and "sketchy" statistical tabulations based in part on "tiny sample" of Oracle customer surveys). Accordingly, the Court will deny the motion in limine to exclude the survey and to preclude defendant's expert from expressing opinions based upon the survey.

III. CONCLUSION

For the reasons explained above, the plaintiff's motion in limine is DENIED. This Memorandum Opinion and Order shall be filed under seal. On or before September 12, 2011, the parties shall advise the Court regarding whether any portion of this Memorandum Opinion should be redacted before public filing because it contains confidential information. In addition, if the parties have not already filed versions of their legal memoranda that may be filed publicly, they shall do so by September 12, 2011.

DATED: September 6, 2011

/s/ Beryl A. Howell

BERYL A. HOWELL
United States District Judge

The Hypothetical Monopolist Test: Critical Loss

**FTC v. TRONOX LTD.,
332 F. Supp. 3d 187, 204-05 (D.D.C. 2018)
(excerpt on critical loss¹)**

TREVOR N. MCFADDEN, U.S.D.J.

[The FTC sought a preliminary injunction under FTC Act § 13(b) to enjoin the acquisition by Tronox Limited of the National Titanium Dioxide Company's titanium dioxide (TiO₂) business (known as "Cristal") for \$1.67 billion in cash and a 24% equity stake in the combined firm. TiO₂ is a pigment used to add whiteness, brightness, and opacity to products like paints, plastics, and paper. It is manufactured by subjecting raw titanium ores to either a chloride or a sulfate production process. A central issue in the case was the relevant product market definition. The FTC alleged that the relevant product market was TiO₂ produced by the chloride process, while the parties argued that the market must also include TiO₂ produced by the sulfate process. The court accepted the FTC's definition, relying in part on the testimony of Dr. Nicholas Hill, the FTC's economic expert, on his application of the critical loss test.]

...

Dr. Hill also conducted several iterations of the "hypothetical monopolist test" to prove that the relevant market consists of North American sales of chloride-process TiO₂. The test seeks to determine whether a hypothetical company that is the only seller of the relevant product to customers in the relevant geography could profitably impose a "small but significant and non-transitory increase in price" ("SSNIP"). See Merger Guidelines §§ 4.1.1; 4.2.2. If this hypothetical monopolist can profit from imposing a SSNIP without losing a critical mass of customers, then a relevant antitrust market has been defined. If, on the other hand, customers can defeat the price increase "by substitution away from the relevant product or by arbitrage," the market definition must be broadened. *Id.* See also *[FTC v.] Sysco [Corp.]*, 113 F. Supp. 3d [1] at 33-34 [(D.D.C. 2015)].

To run the test, Dr. Hill conducted a "critical loss analysis." He began by calculating the "critical loss," which is the percentage of "lost unit sales that would leave profits unchanged" if a hypothetical monopolist imposed a SSNIP. Merger Guidelines § 4.1.3. Dr. Hill determined that, with an SSNIP of 10%, a hypothetical monopolist could lose up to 15.4% of its sales and still break even. PX5000-051. The critical loss threshold is thus 15.4%.

Next, Dr. Hill estimated the "predicted loss" that would be observed in the event of a SSNIP of 10%. If the predicted loss is less than the critical loss, imposing a SSNIP would be profitable for the hypothetical monopolist, and the relevant antitrust market has been correctly defined. Dr. Hill used three methods to calculate the predicted loss:

¹ Record citations omitted.

the “price elasticity of demand” method, a “substitution components” method, and a “documentary evidence” method. Each showed that a hypothetical monopolist could profitably raise North American chloride TiO_2 prices by 10%.

Price elasticity of demand measures the responsiveness of a product’s sales to a 1% change in the product’s price. Demand for a product is “elastic” if a 1% price increase decreases demand by more than 1%. It is “inelastic” if a 1% price increase decreases demand by less than 1%. The more inelastic a product’s demand, the less likely it is that the product has adequate substitutes. Dr. Hill found that the price elasticity of North American chloride TiO_2 is -0.45% (*i.e.*, a 1% increase in price reduces sales by 0.45%). He multiplied this number and a 10% SSNIP to show that the predicted loss of sales, 4.5%, would be considerably lower than the critical loss of 15.4%. In other words, estimates of price elasticity show that a hypothetical monopolist could profitably increase North American chloride TiO_2 prices by 10%.

Dr. Hill’s “substitution components method” used the Defendants’ data to estimate the expected increase of TiO_2 imports in response to a 10% SSNIP. The TiO_2 that firms acquire from imports or from other producers repatriating their exports represents lost sales for a hypothetical monopolist. Dr. Hill found that a 10% SSNIP would lead to roughly 75,000 more metric tons of TiO_2 being imported or repatriated, and another 3% decrease in the monopolist’s sales of rutile TiO_2 . Together, this represents roughly 12.6% of total North American chloride TiO_2 sales. As a 12.6% loss is lower than the critical loss threshold of 15.4%, the substitution components method predicts that the hypothetical monopolist could profitably raise prices.

Finally, Dr. Hill used data from Tronox documents. At some future point, Tronox contends, “Chinese sulfate could take up to 15 percent of [all TiO_2] applications” in North America, thus “reducing the share of chloride titanium dioxide by at most five percent.” Dr. Hill assumed that such sulfate substitution would occur in response to a 10% SSNIP. He and calculated that the resulting loss of sales to the hypothetical monopolist would be about 8.7%, which again is lower than the critical loss threshold. Based on these calculations and his other analyses, Dr. Hill concluded that the relevant market for evaluating the merger’s potential anticompetitive effects consists of North American chloride TiO_2 sales.

**FTC v. WHOLE FOODS MKT., INC.,
502 F. Supp. 2d 1, 15-22 (D.D.C. 2007), *rev'd*, 548 F.3d 1028 (D.C. Cir. 2008)
(excerpt on critical loss¹)**

PAUL L. FRIEDMAN, District Judge

[On June 6, 2007, the FTC filed a Section 13(b) complaint for a preliminary injunction to enjoin the acquisition by Whole Foods Market, Inc. of Wild Oats Markets, Inc. for approximately \$700 million (including assumed debt). Both companies operated supermarkets specializing in natural and organic foods. Whole Foods operated approximately 194 stores, while Wild Oats operated approximately 110 stores at the time of the proposed merger. The central issue in the case was the definition of the relevant product market. The FTC alleged that the relevant product market was “premium natural and organic supermarkets” (PNOS), consisting only of Whole Foods, Wild Oats, and two other small chains. If accepted, the transaction would be a merger-to-monopoly with a small fringe. The defendants argued that the market must include all supermarkets, which would make the transaction competitively insignificant. After a hearing on the FTC’s motion for a preliminary injunction, the district court rejected the FTC’s market definition and dismissed the case. In accepting the defendants’ broader market definition, the court relied heavily on the testimony of Dr. David Scheffman, the defendants’ economic expert, and his critical loss analysis, which showed that customers would readily switch to conventional supermarkets if PNOS prices increased. On appeal, the decision in favor of the merging firms was reversed and remanded. Judge Friedman’s description of the critical loss test below, however, is accurate.]

...

V. RELEVANT PRODUCT MARKET

As noted above, and as was the case in *Staples*, “the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market.” *FTC v. Staples, Inc.*, 970 F. Supp. at 1073. The FTC believes the relevant product market is premium natural and organic supermarkets (“PNOS”), of which it alleges there are four in the entire country—Whole Foods (the largest), Wild Oats (the second largest), Earth Fare (with 13 stores in only four states), and New Seasons (with eight stores, all in Oregon). Defendants Whole Foods and Wild Oats believe that the relevant product market is one that includes all supermarkets. “[O]nly examination of the particular market—its structure, history, and probable future”—how it operates in the real world—can provide the appropriate setting for determining the relevant product (and geographic) market and for judging the probable anticompetitive effects of a merger or acquisition. *FTC v.*

¹ Record citations and footnotes omitted.

Arch Coal, Inc., 329 F. Supp. 2d [109,] at 116-17 [(D.D.C. 2004)]. Antitrust theory “cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future.” *Id.*

The Court looks first at the Horizontal Merger Guidelines and the testimony and reports of the economic experts and then examines what the evidence shows is really happening in the marketplace.

A. The Horizontal Merger Guidelines and the Economic Evidence

The Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission in 1992, and revised in 1997 (“Merger Guidelines”), articulate the analytical framework the Justice Department and the FTC apply in determining whether a merger is “likely substantially to lessen competition.” Merger Guidelines § 0.1. Under the Guidelines, as under the case law, the relevant product market is determined according to the “reasonable interchangeability of use” or cross-elasticity of demand between the product sold and “substitutes for it.” Merger Guidelines §§ 1.0, 1.11; *Brown Shoe Co. v. United States*, 370 U.S. at 325. The analytical framework set forth in the Merger Guidelines approaches the inquiry regarding the reasonable interchangeability of use or cross-elasticity of demand by asking whether a “hypothetical monopolist . . . would profitably impose at least a ‘small but significant and nontransitory [price] increase’ “ (“SSNIP”). Merger Guidelines § 1.11.9 Reasonable interchangeability of use in effect means “substitutability”—the practical ability of a consumer to switch from one product to another. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d at 218-19; *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d at 119-20; *FTC v. Swedish Match*, 131 F. Supp. 2d [151,] at 158 [(D.D.C. 2000)]. The forward-looking test of the Horizontal Merger Guidelines therefore asks where customers would turn if a hypothetical monopolist of the candidate product imposed a SSNIP. Merger Guidelines § 1.11.

As the FTC explained it, the issue is whether there is a group of customers for whom there are not sufficiently close substitutes that a price increase—a “small but significant nontransitory increase in price”—can be inflicted on them. If there are alternatives to which customers could readily take their business such that the price increases would not be profitable for the hypothetical monopolist, the proposed product market is too narrow and additional alternatives must be included in the relevant product market, even if customers did not view them as substitutes at the lower price.

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In order to determine which products should be included in the relevant product market, the Guidelines methodology begins with each of the products sold by the two firms in question and then performs the hypothetical monopolist test. If a hypothetical firm that was the sole seller of a given set of products would find it profitable to impose a small but significant non-transitory increase in the price of any of those products, then the given set of products satisfies the relevant product market test. If not, then the product which is the next best substitute (defined in the Guidelines as the product that gains the largest share of the revenue diverted by a price increase) is added. Merger Guidelines § 1.11. The test is then repeated. Products are added sequentially in this way until a sole seller would find it profitable to increase price by the amount deemed to be “small but significant.”

Because the FTC contends that the relevant market is “premium and natural organic supermarkets” (“PNOS”), Dr. Scheffman applied the hypothetical monopolist test by focusing on how consumers likely would behave if the price of grocery products in PNOS rose relative to the price of grocery products in other supermarkets. He stated that the economic implication of this framework is that product market definition must focus its attention on “consumers at the margin” rather than consumers who are “inframarginal.”

A marginal consumer is someone who would switch where he or she shops in response to a SSNIP—that is, if his supermarket of choice imposed a small but significant and nontransitory price increase. According to Dr. Scheffman, in the context of supermarkets—including premium natural and organic supermarkets—such marginal consumers can switch or divert their purchases in any of three ways. First, they can reduce the size of their shopping basket at one supermarket and substitute by buying the same or similar items at another retailer—if that other retailer offers similar products for sale. Second, from the set of supermarkets that the consumer currently frequents, the consumer can switch a particular shopping trip from one supermarket to another. Third, the consumer can change retailers by deciding to no longer frequent a particular supermarket that the consumer no longer believes offers good quality for value.

Dr. Scheffman concludes that firms compete to retain existing business and win new business by competing for marginal consumers. It is these consumers who are susceptible to being won or retained by offering better prices, improved service, higher quality or more diverse product offerings. Supermarket retailers make their pricing, quality and service decisions in ways designed to retain and attract marginal consumers. While businesses value “core” customers, they simply “cannot survive—let alone grow and remain profitable—solely by catering to this small segment of customers.” The appropriate focus for defining the relevant product (and geographic) market therefore is those marginal consumers. Dr. Scheffman concludes that the “marginal” consumer, not the so-called “core” or “committed” consumer, must be the focus of any antitrust analysis. He believes that this is consistent with the analytical framework set out in the Merger Guidelines. The Court agrees.

Dr. Scheffman used critical loss analysis to analyze the FTC’s proposed product market. As the FTC acknowledges, this is a widely accepted analytical tool in antitrust

cases both to analyze market definition and competitive effects. That is because critical loss is implicit in the hypothetical monopolist test. The latter tests whether a SSNIP would be profitable over a candidate product; critical loss analysis assesses how much substitution in response to a SSNIP could occur before a SSNIP becomes unprofitable. To put it another way, SSNIP tests at what price increase a consumer will switch where he or she shops; critical loss tests at what point a purveyor's price increases lead to a sufficient amount of lost sales (and lost customers) that the economic loss exceeds the gain from having raised prices (the "critical" loss).

Critical loss analysis stems from the recognition that for almost any product, a price increase results in some lost sales as consumers make do with less, switch to other suppliers, or substitute other products. There is a profit detriment to the price increase equal to the product of the per unit gross margin and the number of units lost. But there is also an economic gain from the increased gross margin earned from the higher price on each remaining unit sold. The "critical loss" is the amount of lost sales at which the economic detriment equals the economic gain. It is a "critical" loss because any greater loss will result in the economic detriment exceeding the economic gain, thereby rendering the price increase unprofitable.

The application of the critical loss technique to market definition is a three step process. The first step is to estimate the incremental margin (gross margin) and determine the volume the hypothetical monopolist (or merged entity) would have to lose to render the price increase unprofitable (i.e., the critical loss). The second step is to separately estimate what the actual loss in volume is likely to be as a result of the hypothesized price increase (i.e., the estimated "actual loss"). The last step is to compare the estimate of the actual loss with the critical loss. If the actual loss is greater than the critical loss, the product market definition must be expanded.

In calculating critical loss, Dr. Scheffman originally used a SSNIP of 5% across all products sold by "premium natural and organic supermarkets." This is the SSNIP used in most contexts under the Merger Guidelines and (according to Dr. Scheffman) traditionally used by the FTC in supermarket mergers. As the FTC has pointed out, however, a lower SSNIP is sometimes used. *See also* Merger Guidelines § 1.11. According to the FTC, Dr. Scheffman himself has acknowledged that a 1% SSNIP may be appropriate to analyze markets characterized by high volume sales but low profit margins.

Whole Foods has an average gross margin at the store level of approximately [Redacted] A 5% price increase implies a critical loss for Whole Foods of about [Redacted] in volume. Wild Oats stores typically have a gross margin at the store level of about [Redacted] or less. A 5% price increase implies a critical loss for Wild Oats of about [Redacted] in volume. In response to Dr. Murphy's report and the FTC's criticism of his use of a 5% SSNIP, Dr. Scheffman also did exactly the same analysis again but this time calculated critical loss for a 1% SSNIP. Critical loss for Whole Foods at that price increase would be a little over [Redacted] in volume—that is, if the hypothetical monopolist lost a little over [Redacted] of its sales, then a 1% SSNIP would not be profitable.

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Critical loss analysis next considers what the actual loss is likely to be if prices increase. Actual loss depends on how many marginal customers are likely to exist and how likely they are to shift purchases in response to a SSNIP. There is no evidence in the record from which to determine cross-elasticity of demand between premium natural and organic supermarkets and other supermarkets and grocery retailers. Nor is there statistical evidence of actual loss, as the SSNIP is hypothetical rather than actual. Therefore, Dr. Scheffman based his estimate of actual loss on weighing the evidence in the case, including the 47 market studies he reviewed.

Dr. Scheffman summarized (and then discussed in detail) what the market studies show: (1) grocery shopping is a relatively highly price sensitive category of retail; (2) Whole Foods and Wild Oats customers are shifting purchases between PNOS and other supermarkets, and can further shift purchases costlessly, i.e., without having to change their shopping patterns; (3) most Whole Foods and Wild Oats shoppers shop frequently at other supermarkets and grocery retailers; (4) other supermarkets compete vigorously for the patronage of customers who also shop at Whole Foods and Wild Oats; and (5) Whole Foods (and to a lesser degree Wild Oats) regularly and extensively price check other supermarkets and food retailers in order to gauge their pricing, their assortments, and other strategies that these competitors are using to attract Whole Foods shoppers and other customers into their stores.

Dr. Scheffman concluded that a substantial portion of Whole Foods and Wild Oats business is at the margin such that in the event of a PNOS price increase, the actual loss would substantially exceed the critical loss. “Where marginal customers comprise such a significant portion of the business, there is no doubt that the actual loss from a PNOS price increase would greatly exceed the [Redacted] critical loss.” Dr. Scheffman’s conclusion obtains regardless if the SSNIP is 5% or 1%.

Even accepting the possibility that certain products are sold only at Whole Foods or Wild Oats, or that certain consumers perceive that the quality they want is only available at those stores, Dr. Scheffman concluded that critical loss analysis shows that, particularly with a small SSNIP, a relatively small sales loss would make a price increase unprofitable. The record evidence, including market research studies and evidence of how both consumers and retailers are actually acting in the marketplace, suggests that because so many people are cross-shopping for natural and organic foods and are marginal rather than core customers, the actual loss from a SSNIP would exceed the critical loss. The Court agrees with Dr. Scheffman.

Dr. Scheffman’s critical loss analysis demonstrates that the relevant product market must be broader than the market proposed by the FTC: “If all PNOS raised prices, there would be a substantial loss in business,” and the loss necessarily would be to other supermarkets. “Based on this qualitative and quantitative evidence, I have concluded that the relevant product market must encompass at least all supermarkets.” Evidence of the significant amount of sales that are “at the margin” shows that it is not plausible that a 5% increase in prices attempted by the proposed merged entity would be profitable, since the actual loss in sales arising from such a price increase is likely to far exceed the critical loss. Actual loss would also defeat a 1% price increase.

Applying the product market definition framework of the case law and the Merger Guidelines, it follows that the relevant product market within which to evaluate the proposed transaction must be at least as broad as the retail sale of food and grocery items in supermarkets. As a result, the FTC's proposed relevant product market of PNOS fails.

...

NOTES

1. Whole Foods' economic expert was David T. Scheffman. Scheffman earned his Ph.D. in economics from MIT and has served as an expert witness and consultant in a number of antitrust matters across various industries, including retail, healthcare, and consumer products. He twice served as Director of the Bureau of Economics at the FTC (1985-1988 and 2001-2003), held the Justin Potter Professorship of American Competitive Enterprise at the Owen Graduate School of Management, Vanderbilt University, from 1989 to 1999, and continued as an Adjunct Professor of Business Strategy and Marketing at Owen through 2011. Outside of the FTC and academia, Scheffman has been affiliated with private economics consulting groups. He is currently a Managing Director at Berkeley Research Group and previously held senior positions at LECG and Cornerstone Research.

2. The FTC's economic expert was Kevin M. Murphy. Murphy earned his Ph.D. in economics from the University of Chicago in 1986, following his undergraduate studies at UCLA in 1981. He is the George J. Stigler Distinguished Service Professor of Economics at the University of Chicago Booth School of Business, where he has taught since the mid-1980s. Murphy has consulted and testified in antitrust matters, including mergers, labor economics, price theory, and industrial organization, with consulting roles at Charles River Associates and previously as Managing Director and Principal at Navigant Economics. He received the John Bates Clark Medal in 1997, awarded to the most outstanding American economist under the age of forty, and a MacArthur Fellowship in 2005. Murphy has published extensively in labor economics, industrial organization, public policy, and health economics.

3. This excerpt contains several redactions, reflecting the standard practice by which courts protect confidential business information while preserving the strong presumption of public access to judicial proceedings.¹² This interest reaches its peak for judicial opinions themselves. While Federal Rule of Civil Procedure 26(c)(1)(G) authorizes courts to issue protective orders during discovery to prevent disclosure of trade secrets or other confidential commercial information,¹³ a different and heightened standard applies when courts redact their own opinions. Unlike discovery

¹² See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-75 (1980) (plurality opinion); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978).

¹³ Fed. R. Civ. P. 26(c)(1)(G) (in pertinent part: "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.").

materials, which can be protected under Rule 26(c)’s “good cause” standard,¹⁴ redacting judicial opinions triggers heightened scrutiny grounded in the First Amendment and common law rights of public access.

As a result, when deciding whether to redact portions of judicial opinions, courts engage in a more demanding balancing test, weighing transparency against legitimate confidentiality concerns for competitively sensitive information such as trade secrets, specific pricing data, profit margins, diversion metrics, critical-loss inputs, customer lists, and proprietary methodologies whose disclosure could cause concrete competitive harm to parties and non-party data providers. Any redactions must be narrowly tailored, supported by specific, line-by-line justifications, and leave the court’s legal reasoning fully intelligible. Procedurally, judges often issue the opinion under seal first, give parties a brief window (commonly five to seven days) to propose pinpoint redactions, reject overbroad requests, and then release a public version using bracketed “[Redacted]” substitutions rather than sealing opinions wholesale. In merger cases like Whole Foods, this commonly includes redacting store-level margins, critical-loss analysis inputs, and strategic planning materials from both litigants and subpoenaed third parties.

4. Although Judge Friedman redacted the store-level gross margins and the actual loss percentages, we can use fictionalized estimates to illustrate the critical loss analysis Scheffman performed. Assume store-level incremental margins of about 35% for Whole Foods and 30% for Wild Oats. The standard percentage critical loss formula $\delta/(\delta + m)$ then yields the following percentage critical losses for SSNIPs of 5% and 1%:

Whole Foods	Wild Oats
$\%CL_{5\%} = \frac{5}{5 + 35} = 12.50\%$	$\%CL_{5\%} = \frac{5}{5 + 30} = 14.29\%$
$\%CL_{1\%} = \frac{1}{1 + 35} = 2.78\%$	$\%CL_{1\%} = \frac{1}{1 + 30} = 3.23\%$

Now suppose—consistent with the opinion’s description of substantial cross-shopping with regular supermarkets—that a uniform SSNIP (both PNOS chains’ prices rise by the same percentage) produces actual outside-market losses of roughly 19.3% (5%) and 5.9% (1%) for Whole Foods, and 22.7% (5%) and 6.6% (1%) for Wild Oats. In each case, the firm’s actual loss exceeds its own critical loss, so that each firm would earn lower profits at the SSNIP than it did before the SSNIP. Since the hypothetical monopolist aggregates those losses, a candidate market limited to PNOS fails the HMT.

Scheffman’s analysis is not the most common way critical loss is applied in a differentiated products setting. Still, it is a valid one: apply the same percentage SSNIP to each firm, compute each firm’s critical loss using its own margin, and compare to that firm’s actual loss. If the actual loss exceeds the critical loss for both firms, each

¹⁴ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

firm would make less profit post-SSNIP compared to its pre-SSNIP level, and the hypothetical monopolist—which aggregates the profits of the two firms—would fail the HMT. That is what Scheffman found in his analysis. Keep in mind that this is only a *sufficient* condition, but not a necessary one. If one firm made a profit and the other firm sustained a loss as a result of the SSNIP, you must determine the relative gains and losses to ascertain whether the hypothetical monopolist makes or loses total incremental profits.

5. On appeal, the D.C. Circuit reversed and remanded in a fractured decision where each panel member wrote separately. Judge Janice Rogers Brown wrote what is commonly considered the court’s main opinion, though neither colleague joined it. Judge David S. Tatel concurred only in the judgment, and then-Judge Brett Kavanaugh dissented.

Judge Brown criticized the district court for improperly rejecting the FTC’s evidence of a distinct premium natural and organic supermarkets (PNOS) market. She argued the lower court erred by focusing primarily on whether “marginal consumers” would switch to conventional supermarkets, while inadequately considering “core customers” who remained loyal to PNOS stores. Brown found the FTC had presented credible evidence that Whole Foods and Wild Oats could profitably raise prices against these core customers, supporting a narrower market definition and warranting preliminary relief.

Judge Tatel reached the same result but avoided endorsing the core customer theory. He concluded the district court made procedural errors by dismissing or overlooking evidence supporting the FTC’s PNOS market theory. Tatel emphasized that such contested factual issues should not be resolved at the preliminary injunction stage, noting the evidence was sufficient only to raise “serious, substantial questions” requiring full investigation rather than proving the FTC’s case definitively.

Judge Kavanaugh dissented, arguing the district court correctly rejected the narrow market definition. He contended that despite their product differentiation, Whole Foods and Wild Oats competed within the broader supermarket industry. Kavanaugh criticized the FTC’s emphasis on core customers and differentiation as misguided antitrust analysis, maintaining that grocery competition realistically occurred across all supermarket types and that evidence failed to show the merging parties constrained each other’s pricing more than conventional competitors.

6. Why all the confusion on market definition? The problem begins with the FTC’s product market as PNOS. PNOS stores, however, sell two economically distinct sets of goods: (a) premium and natural organic (PNO) products, for which substitution is probably relatively high between PNOS stores and low with conventional supermarkets, and (b) non-PNO products, for which substitution with conventional supermarkets is relatively high. Scheffman’s analysis applies a uniform percentage SSNIP to both sets inside PNOS stores. That move invites a significant diversion of non-PNO purchases in PNOS stores to conventional supermarkets, and, given thinner margins on many conventional items, probably yields incremental profit losses on foregone non-PNO sales that can swamp any incremental profit gains on the more

inelastic PNO items. Read this way, the exercise stacks the deck against a PNOS market by mixing two product types that face very different outside options.

A more coherent framing, consistent with *Brown Shoe*'s product characteristics and purchaser preference "practical indicia," would analyze PNO products as the focal line of commerce and hold non-PNO prices at premerger levels. Under this approach, inside PNOS substitution remains relevant for PNO goods, whereas diversion on non-PNO goods does not significantly impact the profitability calculus. Viewed this way, Judge Brown's emphasis on "core customers" and PNO-type items, and her criticism of the district court's focus on marginal switchers of conventional goods, becomes more understandable. The lesson for critical loss analysis is straightforward: when a candidate market bundles products with materially different substitution patterns, a uniform SSNIP across the bundle can give a misleading result. The test should either separate the product types or implement the profitability check with category-specific pricing that aligns with the proposed line of commerce.¹⁵

¹⁵ We will see this approach, apparently learned by the FTC in considering what happened in *Whole Foods*, in Unit 8 in the FTC's challenge to the second effort by Staples to acquire Office Depot. There, the FTC alleged a relevant product market of consumable office supplies but carved out ink and toner for computer printers precisely because the different competitive dynamics created distinct residual demand functions for ink and toner compared to other consumable office supplies.

September 21, 2025

The Hypothetical Monopolist Test: Aggregate Diversion Ratio Recapture Tests

FTC v. IQVIA HOLDINGS INC.,
710 F. Supp. 3d 329, 367-376 (S.D.N.Y. 2024)
(excerpt on the one-product SSNIP recapture test¹)

[EDGARDO] RAMOS, United States District Judge

[On July 18, 2023, the FTC filed a Section 13(b) complaint challenging the acquisition by IQVIA Holdings Inc. (IQVIA), the world’s largest health care data provider, of Propel Media, Inc. (PMI). The FTC alleged that the acquisition would substantially lessen competition by combining two of the top three providers of programmatic advertising for health care products, namely prescription drugs and other health care products, to doctors and other health care professionals (“HCP programmatic advertising”), resulting in increased prices, reduced choice, and diminished innovation. Programmatic advertising is the automated, data-driven purchase of digital ad space, using algorithms and real-time bidding to target audiences across multiple websites, social media, and apps. IQVIA’s Lasso Marketing and PMI’s DeepIntent are two of the top three providers of HCP programmatic advertising. The FTC argued that this form of advertising was not reasonably interchangeable with social media or endemic healthcare website advertising, which offered more limited reach, fixed inventory, and less flexibility. Defendants argued for a broader market including these other channels, claiming advertisers viewed them as viable substitutes. Applying the *Brown Shoe* factors and weighing both qualitative and quantitative evidence, the Court agreed with the FTC that HCP programmatic advertising is a distinct product market. This excerpt focuses on the court’s application of the hypothetical monopolist test.]

...

I. Relevant Product Market

...

a. Brown Shoe Factors

...

vi. The Court’s Conclusion [on the Brown Shoe factors]

For the reasons discussed above, the *Brown Shoe* indicia, on balance, support the FTC’s position that HCP programmatic advertising is a relevant product market for antitrust purposes. Most critical to this conclusion is the Court’s finding that social media and endemic websites—and Google—are not reasonably interchangeable alternatives for the programmatic offerings in the FTC’s candidate market. While the testimony on this subject was not uniform, the Court ultimately finds credible the testimony of several witnesses who explained that programmatic has distinct

¹ Most record citations omitted.

characteristics as compared to social and endemic and that industry participants recognize the differences.

Second, it is important to reiterate that market definition requires an attempt to identify the narrowest possible market. In evaluating reasonable interchangeability, “the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.” [*FTC v. Sysco [Corp.]*, 113 F. Supp. 3d [1,] at 26 [(D.D.C. 2015)] (quoting [*FTC v. Staples*, 970 F. Supp. [1066,] at 1075) [(D.D.C. 1997)]. And as courts have recognized, a “broad product market . . . may contain smaller markets . . . which themselves ‘constitute [relevant] product markets for antitrust purposes.’” [*FTC v. Peabody [Energy Corp.]*, 492 F. Supp. 3d [865,] at 885 [(E.D. Mo. 2020)] (alteration in original) (quoting *Brown Shoe [Co. v. United States]*, 370 U.S. [294,] at 325 [1962])). In other words, the existence of a larger market within which two products compete does not necessarily mean that they are reasonably interchangeable substitutes for one another. In this case, there is undeniably a broader market for digital healthcare advertising in which programmatic, social media, and endemic websites all participate. But “the viability of such additional markets does not render the one identified by the government unusable.” *United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1, 28 (D.D.C. 2022). Traditional methods of reaching HCPs such as email or print advertising might also conceivably be within some broader market, yet no one has suggested that those options should be included in the relevant market here.

For all these reasons, the *Brown Shoe* factors and the reasonable interchangeability analysis support the FTC’s definition of the relevant product market.

b. Hypothetical Monopolist Test

The Court turns next to the quantitative evidence supporting the FTC’s proposed market. In particular, the FTC argues that the hypothetical monopolist test (HMT) confirms its assertion that HCP programmatic advertising is a relevant market for antitrust purposes.

The HMT is “commonly used in antitrust actions to define the relevant market.” *Peabody*, 492 F. Supp. 3d at 886 (quoting *FTC v. Sanford Health*, 926 F.3d 959, 963 (8th Cir. 2019)). The 2010 Horizontal Merger Guidelines, used by the Department of Justice (DOJ) and the FTC to evaluate potential mergers, set out the methodology of the HMT.¹⁹ The Guidelines explain:

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-

¹⁹ The Merger Guidelines are not binding on this Court but have been described as “a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers.” *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *see also, e.g., [In re] AMR Corp.*, [No. 22-901,] 2023 WL 2563897, at *3 n.2 [(2d Cir. Mar. 20, 2023)]. The Court also notes that on December 18, 2023, after briefing and argument in this case had concluded, the DOJ and the FTC jointly issued the revised 2023 Merger Guidelines. Because the parties did not have the opportunity to address whether the final version of the new guidelines would have any material effect on the analysis here, the Court considers only the 2010 Merger Guidelines.

merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (“hypothetical monopolist”) likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market, including at least one product sold by one of the merging firms.

Merger Guidelines § 4.1.1; *see also Peabody*, 492 F. Supp. 3d at 886; *Sysco*, 113 F. Supp. 3d at 33. If the monopolist could profitably impose such a price increase, then a relevant product market exists for antitrust purposes. *Peabody*, 492 F. Supp. 3d at 886 (citing Merger Guidelines § 4.1.1). (Federal agencies typically use a price increase—or SSNIP—of 5% when analyzing prospective mergers. *Id.* (citing Merger Guidelines § 4.1.2).) But if enough consumers would be able to substitute away from the hypothetical monopolist’s product to another product, thereby making the price increase unprofitable, then the relevant market cannot be limited to the hypothetical monopolist’s product and must also include the substitute products. *Sysco*, 113 F. Supp. 3d at 33; *see also H&R Block*, 833 F. Supp. 2d at 52.

In this case, then, the HMT inquiry asks: If a single firm controlled the entire HCP programmatic advertising market, as defined by the FTC, could it profitably impose a price increase? Or would that price increase result in customers moving enough of their business to other alternatives to make the price increase unprofitable? If the price increase would be profitable, then the FTC has defined the relevant product market accurately. If it would not be profitable, then the market is broader than the FTC has contended. *Cf. Sysco*, 113 F. Supp. 3d at 34.

i. Dr. Hatzitaskos’s Analysis

The FTC presented expert testimony from Dr. Hatzitaskos, who has a Ph.D. in economics and serves as Senior Vice President at Cornerstone Research, an economics litigation consulting firm. On the issue of market definition, Dr. Hatzitaskos opined that HCP programmatic advertising constitutes a relevant antitrust market. He included in his candidate market “all market participants that shared revenue through discovery,” as well as “anybody that IQVIA reported as [a] top customer of their HCP data.” The proposed market in his initial report included DeepIntent, Lasso, PulsePoint, and other DSPs providing HCP programmatic advertising. Dr. Hatzitaskos did not include social media platforms in the market he originally tested. Considering all the available evidence, he testified, these platforms did not “seem to be a reasonable substitute, a meaningful constraint.” Nor did he include endemic websites such as Medscape, concluding again that the evidence did not indicate that they were “meaningful competitive constraints.”²⁰

²⁰ The firms Dr. Hatzitaskos included in his initial report were: DeepIntent, Lasso, PulsePoint, Proclivity, AdTheorent, TI Health, eHealthcare, Amobee, Nativo, The Trade Desk, Viant, Doceree, and Medixx. In his reply report, he added Healio. Dr. Hatzitaskos also amended several figures in his reply report to reflect updated discovery. In a “conservative thought experiment,” moreover, he

Consistent with the case law discussed above, Dr. Hatzitaskos explained that market definition is “not an exercise in just listing every potential competitor.” Rather, the goal is to determine “who are the most important competitors, who are the most important for competitive constraints.” Defining the market as narrowly as possible allows for “a better prediction about competition.” [S]ee also *Merger Guidelines* § 4 (“Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market.”).

Based on the qualitative evidence he evaluated, Dr. Hatzitaskos concluded that “industry participants recognize HCP programmatic advertising as a distinct product.” He then used the HMT to confirm that HCP programmatic advertising is a relevant antitrust market. Dr. Hatzitaskos relied on two methods to apply the HMT: (1) critical loss analysis and (2) merger simulation. Under both approaches, he concluded that the HMT was satisfied for the market he tested.

First, critical loss analysis asks how many customers the hypothetical monopolist would have to lose to alternatives outside the market for the price increase to be unprofitable. [S]ee also *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 160 (D.D.C. 2000) (describing critical loss as “the largest amount of sales that a monopolist can lose before a price increase becomes unprofitable”). Dr. Hatzitaskos estimated that a 5% price increase for DeepIntent would result in a critical loss of 10.6%, meaning that the hypothetical monopolist would need to regain 10.6% of the customers switching away from DeepIntent. He also estimated that a 10% price increase for DeepIntent would result in a critical loss of 21.2%. For both calculations, he relied on a margin estimate of 47.3% for DeepIntent.

Dr. Hatzitaskos then compared the critical loss figures to an estimate of the aggregate diversion ratio. “The aggregate diversion ratio for any given product represents the proportion of lost sales that are recaptured by all other firms in the proposed market as the result of a price increase.” *H&R Block*, 833 F. Supp. 2d at 63. These sales remain within the proposed market and thus are not lost to the hypothetical monopolist. If the aggregate diversion ratio to products within the proposed market exceeds the critical loss threshold, then a price increase would be profitable for the hypothetical monopolist. *H&R Block*, 833 F. Supp. 2d at 63.

Here, Dr. Hatzitaskos used 79.4% as an estimate of the aggregate diversion ratio. That figure was based on his analysis of actual customer choices, which relied on DeepIntent’s internal “win/loss data” and campaign data from Lasso and PulsePoint. He found that 79.4% of customers who considered but did not choose DeepIntent ended up choosing Lasso or PulsePoint. Dr. Hatzitaskos characterized this figure as a

included additional firms proposed by one of Defendants’ experts, even though he found the evidence to be “inconsistent with the additional entities having competitive significance that is proportional to their estimated revenues.” The additional firms were: Videoamp, Acuity Ads, Stackadapt, Basis, Vericast, Facebook, Sermo, X (formerly known as Twitter), VDX.tv, and LinkedIn. *Id.* at 43, Exhibit R-2. These additions, Dr. Hatzitaskos concluded, did not “meaningfully change the broader picture of industry revenues.”

conservative estimate of the aggregate diversion ratio because the hypothetical monopolist would control all providers of HCP programmatic advertising in the candidate market rather than just those three firms.

To reiterate, the ultimate test is whether the aggregate diversion ratio is higher than the critical loss; if it is, then the candidate market passes the HMT. [S]ee also *H&R Block*, 833 F. Supp. 2d at 63. The aggregate diversion ratio was 79.4%, while the critical loss was either 10.6% (based on a 5% price increase) or 21.2% (based on a 10% price increase). In both cases, then, the aggregate diversion ratio exceeded the critical loss by a wide margin and thus the HMT was satisfied.

Second, Dr. Hatzitaskos conducted a merger simulation analysis. A merger simulation evaluates how the hypothetical monopolist would change prices after the merger and whether any price increase imposed on the merging firms' products would be more than 5%. Dr. Hatzitaskos's analysis considered a hypothetical merger of DeepIntent, Lasso, and PulsePoint.²¹ He asked whether, in those circumstances, the hypothetical monopolist would raise the price of either DeepIntent or Lasso by at least 5%. Dr. Hatzitaskos found that the hypothetical monopolist would increase prices by more than 43%—well above the 5% threshold.

In sum, Dr. Hatzitaskos found that “all of the evidence strongly confirms that HCP programmatic advertising constitutes a relevant antitrust market.”

ii. Dr. Israel's Analysis

Defendants challenged Dr. Hatzitaskos's conclusions through the expert testimony of Dr. Israel, who holds a Ph.D. in economics and serves as Senior Managing Director at Compass Lexecon, an economic consulting firm. Dr. Israel opined that the FTC's proposed market “is overly narrow and defines away important competition.”

Dr. Israel criticized both of Dr. Hatzitaskos's implementations of the HMT. First, with respect to the critical loss analysis, Dr. Israel stated that Dr. Hatzitaskos's aggregate diversion ratios were based on “fundamentally flawed” win/loss data. That data, Dr. Israel asserted, was limited to DeepIntent RFPs and thus did not include any substitution from agencies that decided to spend on social or other alternatives rather than sending an RFP to DeepIntent. Furthermore, the win/loss data failed to account for the tendency of agencies to work with multiple advertising platforms at the same time. If DeepIntent were to lose an RFP, Dr. Israel reasoned, “it's very likely, from what we have heard, that five or six different platforms get some of that money.” But Dr. Hatzitaskos's analysis treated any match in the win/loss data as a 100% substitution to either Lasso or PulsePoint. Dr. Israel cited one \$600,000 campaign that DeepIntent lost to Lasso and that Dr. Hatzitaskos treated as a 100% match with Lasso—when in fact, according to Dr. Israel, Lasso received only \$12,000 of that total budget.

The critical loss analysis was also flawed, in Dr. Israel's view, because Dr. Hatzitaskos assumed that the profit margin for DeepIntent and Lasso was “roughly

²¹ According to Dr. Hatzitaskos, this scenario again represented a conservative approach because the hypothetical monopolist would control additional providers of HCP programmatic advertising beyond those three firms.

50 percent.” That figure was too high, Dr. Israel asserted, because it accounted only for data and media costs while omitting the costs of running the platform.

As for the merger simulation, Dr. Israel concluded that Dr. Hatzitaskos’s model required market shares as an input and thus was based on “entirely circular logic” that assumed the proposed market was correct. This share-based model, Dr. Israel testified, essentially “says substitution is determined by your market share.” In other words, the analysis “doesn’t measure substitution. It assumes it is equal to share.” According to Dr. Israel, Dr. Hatzitaskos assumed that the market share for any firm outside his candidate market—that is, any firm other than the DSPs he included—was zero. In Dr. Israel’s view, this approach failed to establish the proposed market because “[i]t assumes the market by saying if you are not in the market, your share is zero and therefore there is no substitution.”

iii. The Court’s Conclusions

Having carefully weighed the testimony of both experts, the Court finds that Dr. Hatzitaskos’s conclusions further support the FTC’s assertion that HCP programmatic advertising is the relevant product market.

At the outset, Defendants argue that Dr. Hatzitaskos’s HMT analyses are legally defective because he asked whether the hypothetical monopolist could profitably increase the price of one product rather than all products in the market. Doc. 288 at 56. According to Defendants, “[i]t makes no sense to evaluate substitutability within the candidate market, because the whole point of the HMT is to determine whether firms outside the candidate market competitively constrain pricing.” *Id.* By this logic, instead of asking whether the hypothetical monopolist could profitably increase DeepIntent’s prices, Dr. Hatzitaskos should have asked whether the hypothetical monopolist could profitably increase the prices of all the firms in the proposed market.

The FTC’s position, by contrast, is that the test asks whether the hypothetical monopolist “could raise prices by 5 percent on one product.” The question then becomes whether the hypothetical monopolist would lose sales to options outside the candidate market. Potential alternatives such as social media and endemic, therefore, should be included only if, after a price increase, DeepIntent would lose so much business to those channels—rather than to Lasso, PulsePoint, or other DSPs in the candidate market—that the price increase would be unprofitable. Counsel for the FTC asserted that there is no evidence to suggest “that such a significant shift outside of the pool within the FTC’s defined market would occur at such a low change in price.”

Courts are not entirely consistent in how they frame the HMT, particularly with respect to whether it tests a price increase on one or all of the hypothetical monopolist’s products. *Compare, e.g., Peabody*, 492 F. Supp. 3d at 886 (“The HMT is an analytical method that asks ‘whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products.’ ” (citation omitted)), with [*United States v.*] *Aetna* [*Inc.*], 240 F. Supp. 3d [1,] at 20 [(D.D.C. 2017)] (“To determine whether a group of products could be an antitrust market, the hypothetical monopolist test asks whether a hypothetical monopolist of all the products within a proposed market would likely impose a [SSNIP]—typically of five or ten

percent—on at least one product in the market, including one sold by the merging firms.”).

Both the Merger Guidelines and Dr. Israel’s own report, however, suggest that it is permissible to test the effects of a price increase on a single product. Dr. Israel described the HMT as asking whether the hypothetical monopolist would impose a price increase “on at least one product in the market.” On cross examination, moreover, Dr. Israel was asked if the relevant question for the HMT is “whether the monopolist could profitably impose a SSNIP on one firm’s offering.” He answered: “I think that one is debated as a matter of law, so I’m not going to weigh in to the law there. . . . [A]s an economist, you could apply it that way. I think I have in cases where I have been instructed to.” The Merger Guidelines, likewise, characterize the HMT as evaluating whether the hypothetical monopolist would impose a price increase “on at least one product in the market, including at least one product sold by one of the merging firms.” *Merger Guidelines* § 4.1.1. In other words, the Guidelines indicate that the HMT does not require testing whether the hypothetical monopolist could profitably impose a price increase on all products in the candidate market.²²

Defendants do not identify any authority to sustain their position that the HMT requires analysis of whether the hypothetical monopolist would raise prices on all products in the candidate market. They cite *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016), but the language they rely on fails to prove their argument. In discussing the relevant geographic market, the Seventh Circuit described the HMT as asking “what would happen if a single firm became the only seller in a candidate geographic region.” *Id.* at 468. If the hypothetical monopolist can profitably raise prices, then the region is a relevant geographic market. *Id.* On the other hand, “if customers would defeat the attempted price increase by buying from outside the region, it is not a relevant market.” *Id.* This language hardly demonstrates that it is improper to run the HMT by testing whether the hypothetical monopolist could raise prices on one product. If prices increase on one product, customer substitution to products outside the candidate market might make the price increase unprofitable. To use the Seventh Circuit’s language, those customers might “defeat the attempted price increase by buying from outside” the relevant market. And again, several courts have adopted the same framing of the HMT that Dr. Hatzitaskos employed. *See, e.g., Aetna*, 240 F. Supp. 3d at 20; *Sysco*, 113 F. Supp. 3d at 33; *H&R Block*, 833 F. Supp. 2d at 60.²³

²² In addition, Dr. Hatzitaskos’s report suggests that the aggregate diversion ratio threshold would be even lower in a scenario where the hypothetical monopolist imposes a price increase on all products rather than a single product.

²³ Defendants also make a passing argument in both their pre-hearing and post-hearing briefs that Dr. Hatzitaskos failed to account for “the two-sided nature of HCP programmatic advertising.” A two-sided platform is “a business that ‘offers different products or services to two different groups who both depend on the platform to intermediate between them.’” *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 56 (2d Cir. 2019) (quoting *Ohio v. Am. Express Co. (Amex)*, 585 U.S. 529 (2018)). A credit card platform, for instance, includes merchants on one side and cardholders on the

Nor is the Court persuaded by Defendants' argument that Dr. Hatzitaskos made "economic errors" rendering his analysis unreliable. Dr. Hatzitaskos relied on two key inputs for his critical loss analysis: margins and aggregate diversion ratios. As discussed above, he found that the HMT was satisfied for either a 5% or 10% price increase. Dr. Hatzitaskos also explained, however, that the HMT was satisfied even using Dr. Israel's proposed inputs. More specifically, in his reply report, he ran the HMT using Dr. Israel's estimates of both DeepIntent's margins and the aggregate diversion ratio. Using a conservative approach, Dr. Israel estimated DeepIntent's margin to be [Redacted] for 2022. Using that margin, along with Dr. Israel's adjusted diversion ratios, Dr. Hatzitaskos still concluded that the HMT would be satisfied for a merger of just DeepIntent, Lasso, and PulsePoint.

To be sure, Dr. Israel maintained that his proposed adjustments did not address "the core limitations" of the win/loss data or resolve "all of the shortcomings in Dr. Hatzitaskos' analysis." But the Court is not convinced that the win/loss data is as flawed as Dr. Israel asserted. As Dr. Hatzitaskos observed in his reply report, DeepIntent itself relies on win/loss data to assess its own competitive environment. PX6504 at 62; see PX0505 at 191 (DeepIntent CEO stating that win/loss data was used to help "understand what the level of competition was looking like in the marketplace"); *id.* at 192 (win/loss data offered "the best available comprehensive idea

other. *Id.* The "value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases." *Id.* (quoting *Amex*, 138 S. Ct. at 2281).

These two-sided platforms "must be sensitive to the prices that they charge each side" of the platform." *Id.* (quoting *Amex*, 138 S. Ct. at 2281). They often "cannot raise prices on one side without risking a feedback loop of declining demand." *Id.* (quoting *Amex*, 138 S. Ct. at 2285). Economists refer to this phenomenon as "indirect network effects." *Id.* (quoting *Amex*, 138 S. Ct. at 2280-81). Furthermore, there is a subset of two-sided platforms that always receive two-sided treatment: transaction platforms. *Id.* "A transaction platform is a two-sided platform where the business 'cannot make a sale to one side of the platform without simultaneously making a sale to the other.'" *Id.* (quoting *Amex*, 138 S. Ct. at 2280). These platforms "exhibit more pronounced indirect network effects" because they require that "both sides of the platform simultaneously agree to use their services." *Id.* (quoting *Amex*, 138 S. Ct. at 2286). Accordingly, the relevant market must include both sides of the platform. *Id.*

Defendants argue that DSPs are two-sided transaction platforms that experience indirect network effects. As they put it: "If a DSP were to raise prices to advertisers and lose customer volume in hopes of increasing profit, that departure of customers would affect that [DSP's] ability to attract publishers, thereby reducing the value of the DSP and causing a further departure of advertiser customers."

As the FTC pointed out in its pre-hearing reply brief, however, Defendants do not cite any IQVIA, DeepIntent, or Lasso documents "supporting the claim that their pricing is affected by publisher relationships." Dr. Israel's report, likewise, does not cite any record materials to support his contention that DeepIntent and Lasso are two-sided platforms. Nor did Defendants spend time developing this theory at the evidentiary hearing. The sole hearing testimony Defendants rely on is the PulsePoint witness's statement that PulsePoint's parent company, Internet Brands, "provides digital marketing service in two sided marketplaces where professionals and consumers have complicated journeys." That is plainly insufficient for the Court to conclude that DSPs qualify as two-sided transaction platforms or that Dr. Hatzitaskos's analysis overlooked indirect network effects.

of what’s happening among our clients”). Other DSPs also rely on win/loss data: PulsePoint, for instance, tracks wins and losses, and in “the vast majority of cases,” the companies it loses business to are DeepIntent and Lasso. Furthermore, Dr. Hatzitaskos explained that he did not limit his consideration of win/loss opportunities to any particular channel; rather, his analysis “focused on opportunities that DeepIntent self-identified as losses to competition.” He also pointed out that Dr. Israel’s claims of campaign revenue that could have been won by a third party other than Lasso or PulsePoint were “inconsistent with the evidence that providers other than DeepIntent, Lasso, and PulsePoint have small revenues.” *Id.* at 64. Finally, Dr. Hatzitaskos testified that there was a wide margin of error in the results he measured: for the test to fail, he would need to have “overestimated the diversion to Lasso and PulsePoint not just by a little bit but by three times as much.” In the end, while the Court acknowledges that the win/loss data may not be a flawless metric, the Court largely finds persuasive Dr. Hatzitaskos’s responses—explained in part during his testimony and detailed more fully in his reply report—to Dr. Israel’s criticisms. And though the Court recognizes that Dr. Israel did not concede the correctness of relying on the win/loss data, the Court nonetheless finds it compelling that the HMT was satisfied even using Dr. Israel’s adjusted figures.

Taking a step back from the experts’ debates about specific inputs, moreover, the Court ultimately finds Dr. Hatzitaskos’s analysis of the market to be more consistent with the weight of the testimony and documentary evidence. Courts in similar proceedings have routinely recognized that, even where some questions have been raised about the precise methods used by expert economists, those experts’ conclusions may still support a proposed market definition where they are broadly consistent with the rest of the evidence in the record. See *Sysco*, 113 F. Supp. 3d at 36-37 (in case where Dr. Israel served as the FTC’s expert, court noted some issues with aggregate diversion calculations but concluded that, “when evaluated against the record as a whole, Dr. Israel’s conclusions are more consistent with the business realities of the food distribution market than [the defense expert’s]”); *H&R Block*, 833 F. Supp. 2d at 65 (court declined to treat expert’s hypothetical monopolist analysis as “conclusive” but found that it was “another data point” supporting the relevant product market); see also *[FTC v.] CCC Holdings, [Inc.]* 605 F. Supp. 2d [26,] at 41 [(D.D.C. 2009)] (despite gap in FTC expert’s analysis, “the real-world evidence shows that [the two products] are not part of the same product market”).

Conversely, the Court does not find Dr. Israel’s conception of the market persuasive. On cross examination, Dr. Israel was asked whether, in his opinion, a hypothetical monopolist controlling all the DSPs in the candidate market could profitably impose a price increase on one of those firms’ offerings. Dr. Israel testified that if a hypothetical monopolist of all those firms increased DeepIntent’s prices by 5%, there would be so much substitution to other channels—that is, firms other than those DSPs—that it would make the price increase unprofitable. He asserted that there would be “ample substitution elsewhere,” particularly given the size of Doximity and Medscape, which provide “really the same service.”

Having considered the record as a whole, the Court cannot agree with Dr. Israel's conclusion. As discussed above in the section concerning the *Brown Shoe* factors, the Court has found that it is not accurate to characterize Doximity and Medscape as providing "the same service" as the programmatic offerings of the DSPs in the FTC's proposed market. Substantial evidence throughout the record demonstrates that programmatic is distinct from social and endemic channels and is viewed as such by industry participants. As a result, the Court does not find it plausible that, in the event the hypothetical monopolist increased DeepIntent's prices, there would be so much substitution outside of the proposed market that the price increase would become unprofitable. *Cf. Sysco*, 113 F. Supp. 3d at 37 (rejecting expert testimony on market definition that was "inconsistent with business reality" and contradicted by "evidence from industry leaders").

To reiterate, the Court need not and does not conclude that Dr. Hatzitaskos's methods and conclusions are beyond any criticism. *See Aetna*, 240 F. Supp. 3d at 42 ("Although the Court does not (and does not need to) adopt his analysis in every detail, [the government's expert] has performed a battery of tests that all point to the same conclusion"); *H&R Block*, 833 F. Supp. 2d at 71 (expert's analysis "tends to confirm ... the relevant market" even though "the Court would not rely on his analysis exclusively"); *cf. [FTC v.] Whole Foods, [Inc.]* 548 F.3d [1028] at 1048 [(D.C. Cir. 2008)] (Tatel, J., concurring in the judgment) ("Although courts certainly must evaluate the evidence in section 13(b) proceedings and may safely reject expert testimony they find unsupported, they trench on the FTC's role when they choose between plausible, well-supported expert studies."). The Court simply finds that, all things considered, his testimony—including the adjustments he made in his reply report in response to Dr. Israel's critiques—tends to reinforce the conclusion that HCP programmatic advertising is a relevant product market.

...

The *PNB* Presumption



Merger Guidelines

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

Issued: December 18, 2023

Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market. Market concentration is often a useful indicator of a merger's likely effects on competition. The Agencies therefore presume, unless sufficiently disproved or rebutted, that a merger between competitors that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition.

2. Applying the Merger Guidelines

This section discusses the frameworks the Agencies use to assess whether a merger may substantially lessen competition or tend to create a monopoly.

2.1. Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.

Market concentration and the change in concentration due to the merger are often useful indicators of a merger's risk of substantially lessening competition. In highly concentrated markets, a merger that eliminates a significant competitor creates significant risk that the merger may substantially lessen competition or tend to create a monopoly. As a result, a significant increase in concentration in a highly concentrated market can indicate that a merger may substantially lessen competition, depriving the public of the benefits of competition.

The Supreme Court has endorsed this view and held that “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of [rebuttal] evidence.”⁹ In the Agencies' experience, this legal presumption provides a highly administrable and useful tool for identifying mergers that may substantially lessen competition.

An analysis of concentration involves calculating pre-merger market shares of products¹⁰ within a relevant market (see Section 4.3 for a discussion of market definition and Section 4.4 for more details on computing market shares). The Agencies assess whether the merger creates or further consolidates a highly concentrated market and whether the increase in concentration is sufficient to indicate that the merger may substantially lessen competition or tend to create a monopoly.¹¹

The Agencies generally measure concentration levels using the Herfindahl-Hirschman Index (“HHI”).¹² The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase.¹³ A merger that creates or further consolidates a highly

⁹ *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); see, e.g., *FTC v. v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 172-73 (3d Cir. 2022); *United States v. AT&T, Inc.*, 916 F.3d at 1032.

¹⁰ These Guidelines use the term “products” to encompass anything that is traded between firms and their suppliers, customers, or business partners, including physical goods, services, or access to assets. Products can be as narrow as an individual brand, a specific version of a product, or a product that includes specific ancillary services such as the right to return it without cause or delivery to the customer's location.

¹¹ Typically, a merger eliminates a competitor by bringing two market participants under common control. Similar concerns arise if the merger threatens to cause the exit of a current market participant, such as a leveraged buyout that puts the target firm at significant risk of failure.

¹² The Agencies may instead measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure shares in the relevant market.

¹³ For illustration, the HHI for a market of five equal firms is 2,000 ($5 \times 20^2 = 2,000$) and for six equal firms is 1,667 ($6 \times 16.67^2 = 1667$).

concentrated market that involves an increase in the HHI of more than 100 points¹⁴ is presumed to substantially lessen competition or tend to create a monopoly.¹⁵ The Agencies also may examine the market share of the merged firm: a merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.¹⁶

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

When exceeded, these concentration metrics indicate that a merger's effect may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger. This presumption of illegality can be rebutted or disproved. The higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it.

¹⁴ The change in HHI from a merger of firms with shares a and b is equal to $2ab$. For example, in a merger between a firm with 20% market share and a firm with 5% market share, the change in HHI is $2 \times 20 \times 5 = 200$.

¹⁵ The first merger guidelines to reference an HHI threshold were the merger guidelines issued in 1982. These guidelines referred to mergers with HHI above 1,000 as concentrated markets, with HHI between 1,000 and 1,800 as "moderately concentrated" and above 1,800 as "highly concentrated," while they referred to an increase in HHI of 100 as a "significant increase." Each subsequent iteration until 2010 maintained those thresholds. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1997); Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1992); U.S. Dep't of Justice, Merger Guidelines § 3(A) (1982). During this time, courts routinely cited to the guidelines and these HHI thresholds in decisions. *See, e.g., Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 (11th Cir. 1991). Although the Agencies raised the thresholds for the 2010 guidelines, based on experience and evidence developed since, the Agencies consider the original HHI thresholds to better reflect both the law and the risks of competitive harm suggested by market structure and have therefore returned to those thresholds.

¹⁶ *Phila. Nat'l Bank*, 374 U.S. at 364-65 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

FTC v. IQVIA HOLDINGS INC.,
710 F. Supp. 3d 329, 377-82 (S.D.N.Y. 2024)
(excerpt on the *PNB* presumption²³)

[EDGARDO] RAMOS, United States District Judge

[On July 18, 2023, the FTC filed a Section 13(b) complaint challenging the acquisition by IQVIA Holdings Inc. (IQVIA), the world’s largest health care data provider, of Propel Media, Inc. (PMI). The FTC alleged that the acquisition would substantially lessen competition by combining two of the top three providers of programmatic advertising for health care products, namely prescription drugs and other health care products, to doctors and other health care professionals (“HCP programmatic advertising”), resulting in increased prices, reduced choice, and diminished innovation. Programmatic advertising is the automated, data-driven purchase of digital ad space, using algorithms and real-time bidding to target audiences across multiple websites, social media, and apps. IQVIA’s Lasso Marketing and PMI’s DeepIntent are two of the top three providers of HCP programmatic advertising. The FTC argued that this form of advertising was not reasonably interchangeable with social media or endemic healthcare website advertising, which offered more limited reach, fixed inventory, and less flexibility. Defendants argued for a broader market including these other channels, claiming advertisers viewed them as viable substitutes. Applying the *Brown Shoe* factors and weighing both qualitative and quantitative evidence, the Court agreed with the FTC that HCP programmatic advertising is a distinct product market. Having determined the relevant market, the Court turned to the FTC’s evidence on the merger’s prima facie anticompetitive effect.]

...

3. Effects on Competition

Because the FTC has met its burden to define a relevant market, the next step is evaluating the effects of the proposed transaction on competition within that market. *E.g.*, [*FTC v.*] *Peabody [Energy Corp.]*, 492 F. Supp. 3d [865,] at 902 [(E.D. Mo. Oct. 5, 2020)]; [*FTC v.*] *Sysco [Corp.]*, 113 F. Supp. 3d [1,] at 52 [(D.D.C. 2015)]. If the FTC can make out a prima facie case that the acquisition “will result in a significant market share and an undue increase in concentration within [the relevant market], a presumption is established that it will substantially lessen competition.” [*FTC v.*] *Swedish Match*, 131 F. Supp. 2d [151,]at 166 [(D.D.C. 2000)]; *see also, e.g., Peabody*, 492 F. Supp. 3d at 902.

The FTC relies on two arguments to show that IQVIA’s acquisition of DeepIntent will substantially impair competition in the market for HCP programmatic advertising. First, the FTC looks to post-merger market shares and market concentration. It argues

²³ Record citations, internal cross-references, and footnotes omitted.

that the merged firm's market share will exceed the 30% threshold that triggers a presumption of anticompetitive effects. The FTC also contends that the Herfindahl-Hirschman Index (HHI), a tool commonly used to measure changes in market concentration, supports a finding that the merger will harm competition. Second, the FTC relies on the elimination of substantial direct competition between DeepIntent and Lasso, pointing to both qualitative and quantitative evidence to support that conclusion. Defendants raise numerous objections to these theories.

It is worth repeating that the Court's task at this stage "is to determine whether the FTC 'has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'" *Peabody*, 492 F. Supp. 3d at 907 (quoting [*FTC v. H.J. Heinz [Co.]*, 246 F.3d [708,] at 714-5 [(D.C. Cir. 2001)]). The Court finds that the FTC has met its burden. The FTC's market share and HHI calculations—set out in the reports and testimony of Dr. Hatzitaskos—establish a presumption that the proposed acquisition will harm competition in the market for HCP programmatic advertising. And that presumption is reinforced by ample evidence that the transaction would eliminate substantial head-to-head competition between DeepIntent and Lasso.

a. Market Shares and Market Concentration

First, the FTC argues that the post-merger market share of DeepIntent and Lasso would exceed both the 30% threshold first set out in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), and the relevant threshold for market concentration based on the HHI. At the outset, Defendants respond that the 30% threshold set out in *Philadelphia National Bank* has since been repudiated. Furthermore, they contend that there are significant errors in Dr. Hatzitaskos's market share calculations. The corrected figures, according to Defendants and Dr. Israel, fall short of both the 30% mark and the HHI threshold. The Court is not persuaded by Defendants' arguments.

i. The 30% Threshold

In *Philadelphia National Bank*, the Supreme Court addressed the standard under section 7 of the Clayton Act for determining whether a merger may substantially lessen competition in the relevant market. See 374 U.S. at 362. The Court explained:

This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Id. at 363. The Court observed that this test "lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of

Congress' design in [section] 7 to prevent undue concentration." *Id.* In that case, the merger would have resulted in a single bank's controlling 30% of the relevant market. *Id.* at 364. The Court held: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." *Id.*

Defendants contest the present-day validity of the 30% threshold. They suggest that intervening case law has "cut ... back sharply" on *Philadelphia National Bank*. *Id.* (omission in original) (quoting [*United States v.*] *Baker Hughes, [Inc.,]* 908 F.2d [981,] at 990 [(D.C. Cir. 1990)]). As a matter of economics, moreover, Dr. Israel testified that "nothing says above or below 30 percent tells you anything in particular." And Defendants assert that the Merger Guidelines focus solely on HHI without discussing the 30% threshold.

Still, the Court is hard-pressed to conclude that the *Philadelphia National Bank* presumption has been repudiated. Second Circuit precedent appears to directly contradict that conclusion. In *United States v. Waste Management*, 743 F.2d 976 (2d Cir. 1984), for example, the post-merger market share was 48.8%. *Id.* at 981. That figure, the Court held, was "sufficient to establish prima facie illegality under [*Philadelphia National Bank*] and its progeny." *Id.* A few years later, the Second Circuit observed that a post-merger market share of 32.3% was "above the 30% held by the Supreme Court to trigger a presumption of illegality in *Philadelphia Nat'l Bank*." *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir. 1989). That market share was "certainly sufficient to satisfy appellees' burden of showing likelihood of success on the merits." *Id.* More recently, courts have continued to invoke the 30% threshold as sufficient to establish a presumption of anticompetitive effects. *See, e.g., [New York v.] Deutsche Telekom [AG]*, 439 F. Supp. 3d [179,] at 205 [(S.D.N.Y. 2020)] ("By one measure, a merger will be presumptively anticompetitive if the merged firm would have more than a 30 percent market share."); [*United States v.*] *Energy Solutions, [Inc.,]* 265 F. Supp. 3d [415,] at 441 [(D. Del. 2017)] ("While there is no bright-line rule as to the minimum percentage that qualifies as undue, the Supreme Court has held that a post-merger market share of 30% triggered the presumption of anticompetitive effects."); *see also [United States v.] Bertelsmann, [SE & Co. KGaA,]* 646 F. Supp. 3d [1,] at 37 [(D.D.C. 2022)] (post-merger market share of 49% was "far above the levels deemed too high in other cases"). In light of the above, the Court cannot agree with Defendants' suggestion that the 30% threshold is no longer valid.²⁴

²⁴ To be sure, market shares alone are not dispositive. *See, e.g., Deutsche Telekom*, 439 F. Supp. 3d at 206 (noting that "market shares and HHIs establish only a presumption, rather than conclusive proof of a transaction's likely competitive impact"). But the case law indicates that objections to the competitive picture provided by market shares are more properly considered at the rebuttal phase of the burden-shifting framework. *See Baker Hughes*, 908 F.2d at 991 ("In the aftermath of *General Dynamics* and its progeny, a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition."); *see also [United States v.] Waste Mgmt., [Inc.,]* 743 F.2d [976,] at 981 [(2d Cir. 1984)] (explaining that under *Philadelphia National Bank*, "a merger resulting in a large market share

Here, Dr. Hatzitaskos calculated that the proposed merger would result in IQVIA's controlling 46% of the market. According to the FTC, Dr. Israel estimated that the combined firm's post-merger revenue share would be 30.6%.²⁵ As discussed below, Defendants object to Dr. Hatzitaskos's calculations on multiple grounds. But for the reasons just explained, the 30% threshold remains valid as a matter of law. Therefore, the FTC has established a presumption of anticompetitive effects if either expert's figure is accurate.

ii. The HHI Threshold

Setting the 30% threshold aside, the FTC argues that the market concentration would also be excessive under the HHI. *Id.* at 16. "The HHI is calculated by summing the squares of the individual firms' market shares." [*FTC v. Penn State [Hershey Med. Ctr.]*, 838 F.3d [327,] at 346 [(3d Cir. 2016)]. For instance, in a market with two firms each controlling 50% of the market, the HHI would be 5,000; by contrast, if one hundred firms each controlled 1% of the market, the HHI would be just 100. *Bertelsmann*, 646 F. Supp. 3d at 49 & n.35. "The HHI takes into account the relative size and distribution of the firms in a market, increasing both as the number of firms in the market decreases and as the disparity in size among those firms increases." *Staples*, 970 F. Supp. at 1081 n.12.

Consistent with the Merger Guidelines, courts consider "both the post-merger HHI number and the increase in the HHI resulting from the merger." *Penn State*, 838 F.3d at 347. If the post-merger market has an HHI above 2,500, then it is classified as "highly concentrated." *Id.* A merger that increases the HHI by more than 200 points is "presumed to be likely to enhance market power." *Id.* (quoting Merger Guidelines § 5.3). "The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers." *Id.*; see also *Saint Alphonsus [Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys.]*, 778 F.3d [775,] at 788 [(9th Cir. 2015)] ("The extremely high HHI on its own establishes the prima facie case."); *Heinz*, 246 F.3d at 716 ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive.").

In this case, Dr. Hatzitaskos calculated a post-merger HHI of 3,635 and an increase of 997. Both of those figures, if correct, would be well above the relevant threshold for the FTC to establish its prima facie case. See, e.g., *Heinz*, 246 F.3d at 716 (HHI increase of 510 points "creates, by a wide margin, a presumption that the merger will

is presumptively illegal, rebuttable only by a demonstration that the merger will not have anticompetitive effects").

²⁵ The Court notes that Dr. Israel qualified this calculation. Specifically, he asserted that Dr. Hatzitaskos erred by miscalculating revenues for several firms within his market and excluding other firms altogether. Dr. Israel thus explained that his approach was "necessarily conservative" because it omitted firms such as Doximity that, in his view, should have been included in the market but for whom he did not have any basis to estimate their revenues. *Id.* at 134. Nevertheless, the Court concludes that Dr. Israel's qualifications are largely irrelevant because the Court has accepted the FTC's proposed market definition. In other words, the Court has found that Doximity, Medscape, and other alternative channels are not reasonably interchangeable substitutes for HCP programmatic advertising, and thus their exclusion from Dr. Israel's estimated revenue shares is not dispositive.

lessen competition in the [relevant] market”). So if Dr. Hatzitaskos’s calculations are reliable, then the FTC has met its burden to establish a prima facie case based on the HHI as well as the 30% threshold.

[Defendants’ arguments omitted—All rejected by the Court]

NOTES

1. The IQVIA court offered a textbook application of the three standard ways of invoking *Philadelphia National Bank* to establish a prima facie case of likely anticompetitive effects under Section 7 in a horizontal merger case: (1) applying the *PNB* 30% threshold for the merged firm, which the court found satisfied based on the FTC’s expert’s accepted calculation of a 46 percent post-merger share and even on the defendants’ expert’s figure of 30.6 percent; (2) applying the *PNB* structural presumption using the HHI thresholds in the then-operative 2010 Merger Guidelines—2,500 points for a highly concentrated market and a 200-point increase as presumptively anticompetitive—which the court found exceeded by the FTC’s expert’s calculation of a postmerger HHI of 3,635 and a delta of 997 points; and (3) citing precedent finding Section 7 violations where HHI statistics were at or below those calculated in *IQVIA*. These methods are formally independent, although most courts apply at least methods 2 and 3 in tandem.

2. The 30% market share threshold from *Philadelphia National Bank*—long recognized in Second Circuit precedent²⁶—has not been universally cited and, until recently, was seldom used by agencies or courts as an independent test of prima facie anticompetitive harm in horizontal merger cases. Modern practice has focused more on HHI thresholds, and earlier Merger Guidelines omitted the 30% combined share threshold. In recent years, the agencies have sought to revive the 30% threshold as an independent method of proving a prima facie anticompetitive effect, and the agencies expressly include it in the 2023 Merger Guidelines, provided the postmerger share increase (“delta”) is at least 100 points. Recent cases, including *IQVIA* (46% share; 30.6% by defendants’ expert),²⁷ *Bertelsmann* (49%),²⁸ *EnergySolutions* (30%),²⁹ and

²⁶ See *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir. 1989) (“A post-acquisition Minorco would give Anglo and the Oppenheimer family control of 32.3% of that market. That percentage is above the 30% held by the Supreme Court to trigger a presumption of illegality in *Philadelphia Nat’l Bank*. It is certainly sufficient to satisfy appellees’ burden of showing likelihood of success on the merits.”); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 981 (2d Cir. 1984) (“Under [*PNB*’s] rationale, a merger resulting in a large market share is presumptively illegal, rebuttable only by a demonstration that the merger will not have anticompetitive effects.”).

²⁷ *FTC v. IQVIA Holdings, Inc.*, 710 F. Supp. 3d 329, 378-79 (S.D.N.Y. 2024).

²⁸ *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 37 (D.D.C. 2022) (post-merger market share of 49% was “far above the levels deemed too high in other cases”).

²⁹ *United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415, 441 (D. Del. 2017) (“While there is no bright-line rule as to the minimum percentage that qualifies as undue, the Supreme Court has held that a post-merger market share of 30% triggered the presumption of anticompetitive effects.”).

Deutsche Telekom (30%+),³⁰ have cited the 30% merged-firm threshold as part of their analysis of the plaintiff's prima facie case in horizontal mergers, but always in conjunction with an HHI analysis and citation of supporting case law.

3. The FTC filed its *IQVIA* Section 13(b) complaint in the Southern District of New York.³¹ Since late in the first term of the Trump administration, both the DOJ and FTC have sought to diversify away from the District of Columbia, a shift likely motivated by a desire to avoid D.D.C. precedent and judges. For decades, most government antitrust cases were brought in that district, producing a bench with substantial experience in trying and deciding merger cases and developing a body of precedent grounded in detailed economic analysis of competitive effects. That precedent, in turn, tended to be more lenient than the structurally oriented Supreme Court decisions of the 1950s and 1960s. In the Biden administration especially, the agencies have increasingly filed merger challenges in other districts—often drawing judges with little antitrust experience—believing they may be more receptive to the older structural precedent, which has not been formally abrogated.

4. Judge Edgardo Ramos, born in Ponce, Puerto Rico in 1960, moved to Newark, New Jersey as a child. He earned his B.A. from Yale University in 1982 and his J.D. from Harvard Law School in 1987. After law school, he worked in private practice at Simpson Thacher & Bartlett (1987-1992) before serving as an Assistant U.S. Attorney in the Eastern District of New York (1992-2002), where he prosecuted white-collar fraud, narcotics trafficking, labor racketeering, public corruption, and money laundering cases, and served as deputy chief of the Narcotics section. After returning to private practice as a partner at Day Pitney LLP (2002-2011), specializing in white-collar defense and internal investigations, President Barack Obama nominated him to the U.S. District Court for the Southern District of New York on May 4, 2011. The Senate confirmed him unanimously by a vote of 89-0 on December 5, 2011, and he received his commission the following day. *IQVIA* was his first merger antitrust case. However, he had previously presided over another complex antitrust litigation, *In re SSA Bonds Antitrust Litigation*,³² from 2016 through 2022, where he dismissed investors' claims against major banks accused of bond market manipulation before

³⁰ *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 205 (S.D.N.Y. 2020) (“By one measure, a merger will be presumptively anticompetitive if the merged firm would have more than a 30 percent market share.”).

³¹ The FTC's complaint alleged that venue “is proper in the Southern District of New York under 28 U.S.C. § 1391(c)(3), as well as under 28 U.S.C. § 1391(c)(2) and 15 U.S.C. § 53(b).” Under Section 1391(c)(2), venue is proper where a corporate defendant resides, meaning any district in which it is subject to personal jurisdiction; Section 1391(c)(3) provides venue where any defendant “may be found” if no other district is available under the general venue statute. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), independently provides that “[a]ny suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28.” These requirements are satisfied because DeepIntent, Inc.—the Propel Media subsidiary that created the principal competitive overlap with *IQVIA*'s Lasso platform—is headquartered in New York, New York, establishing corporate residence and presence within the Southern District of New York.

³² No. 16-cv-3711 (S.D.N.Y. 2016).

being forced to recuse himself in January 2022 after discovering he had owned stock in defendant banks Citigroup and Credit Suisse while the case was pending—a conflict that became part of broader ethics scrutiny regarding his financial disclosure practices.

5. Dr. Kostis Hatzitaskos, the FTC's testifying economic expert, is Senior Vice President and co-head of Cornerstone Research's antitrust and competition practice. He earned his B.Sc. in 2001 from the University of Warwick in the United Kingdom and his M.A. in statistics in 2004 and Ph.D. in economics in 2007 from the University of California, Berkeley. Dr. Hatzitaskos leads merger review teams for merging parties and government agencies in investigations. In Westlaw, he only appears as a testifying witness in *IQVIA*.

6. Dr. Mark Israel, IQVIA's testifying economic expert, has served as an economic expert in more than 100 matters across the United States, Canada, and Europe, providing live testimony more than 50 times on complex antitrust litigations and merger review proceedings. In April 2025, he joined Econic Partners as a founding partner after nearly 20 years as President and Member of the Global Executive Committee at Compass Lexecon. He earned his B.A. in Economics from Illinois Wesleyan University, his M.Sc. in Economics from the University of Wisconsin-Madison, and his Ph.D. in Economics from Stanford University in 2001. Dr. Israel previously served as an Associate Professor at Northwestern University's Kellogg School of Management before transitioning to economic consulting. His research has been published in leading, peer-reviewed scholarly and applied journals including *The American Economics Review*, *The Rand Journal of Economics*, *The Review of Industrial Organization*, *The Journal of Competition Law and Economics*, and *The Review of Network Economics*. We will see Dr. Israel in multiple case studies throughout the course.

FTC v. TAPESTRY, INC.
755 F. Supp. 3d 386, 456-64 (S.D.N.Y. 2024)
(excerpt on the *PNB* presumption*)

JENNIFER L. ROCHON, United States District Judge:

[The FTC brought an action alleging that Tapestry, Inc.’s proposed acquisition of Capri Holdings Limited violated Section 7 and seeking a preliminary injunction to prevent the transaction from closing pending an administrative trial. Tapestry owns Coach, Kate Spade, and Stuart Weitzman; Capri owns Michael Kors, Jimmy Choo, and Versace. The principal competitive overlap involved Coach, Kate Spade, and Michael Kors, each of which sells handbags described as “accessible luxury.” In August 2023, Tapestry agreed to acquire Capri for approximately \$8.5 billion.

The FTC alleged a United States market for accessible-luxury handbags—a category positioned between mass-market and “true luxury” handbags and generally distinguished by finer materials and craftsmanship at prices well below those of traditional luxury brands. The FTC’s economic expert, Dr. Loren K. Smith, treated crossbody bags, satchels, shoulder bags, and totes as a cluster market. He constructed a candidate market containing more than 200 brands by drawing on Tapestry’s ordinary course market-sizing materials and the “Bridge” and “Contemporary” brand classifications maintained by NPD, a third-party market-data service now known as Circana. Its participating retailers’ sales data supplied wholesale-channel figures that Smith used, with other sales data, to estimate brand-level market shares. To estimate substitution among brands, Smith also relied on four consumer surveys commissioned by Tapestry in 2021 and 2022 that asked purchasers which other handbag brands they had considered before making a purchase. Defendants denied that accessible luxury handbags constituted a distinct antitrust market and, through their economic expert, Professor Fiona Scott Morton, and other witnesses, challenged Smith’s selection of brands and his use of the survey responses.

Following a seven-day evidentiary hearing, the district court granted the FTC’s motion for a preliminary injunction. Without resolving the parties’ disagreement over the governing Section 13(b) standard, the court assumed that the FTC was required to make a clear showing of likely success on the merits and held that it had done so. The court concluded that accessible luxury handbags constituted a relevant product market under both the qualitative *Brown Shoe* factors and Smith’s hypothetical monopolist test. The following excerpt addresses the structural presumption, the market-share and HHI evidence, and Defendants’ objections to the reliability of the market-share estimates. Coach and Kate Spade belonged to Tapestry; Michael Kors belonged to Capri. Table 7 reports sales by brand and the combined firms’ post-merger share of 58.7 percent.]

...

* Record citations and cross-references omitted without notation.

LIKELIHOOD OF SUCCESS

I. `Prima Facie Case

...

A. Market Definition

...

B. Anticompetitive Effects

“After the relevant product and geographic markets are determined, a prima facie case is established if the plaintiff proves that the merger will probably lead to anticompetitive effects in that market.” *FTC v. Hackensack [Meridian Health, Inc.]*, 30 F.4th [160] at 172 [(3d Cir. 2022)] (quotation marks omitted). As noted, a plaintiff usually does so “by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition.” *New York v. Deutsche Telekom [AG]*, 439 F. Supp. 3d [179] at 199 [(S.D.N.Y. 2020)] (citation omitted); *accord [FTC v. IQVIA [Holdings, Inc.]]*, 710 F. Supp. 3d [329] at 377 [(S.D.N.Y. Jan. 8, 2024)]. Here, the FTC presents powerful quantitative evidence that the merger of Tapestry and Capri would result in the combined firm holding excessive market share and market concentration, thus establishing a presumption that the merger’s effects will be anticompetitive.

1. Market Share and Market Concentration

a. The 30-Percent Threshold

Under longstanding precedent, “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence ... showing that the merger is not likely to have such anticompetitive effects.” *Phila. Nat'l Bank*, 374 U.S. at 363; *accord United States v. Phillipsburg Nat'l Bank & Tr. Co.*, 399 U.S. 350, 366-67 (1970); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 981 (2d Cir. 1984); *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 816 (2d Cir. 1979) (per curiam); *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1213-16 (11th Cir. 2012); *IQVIA*, 710 F. Supp. 3d at 378-79; *[United States v.] Bertelsmann [SE & Co. KGaA]*, 646 F. Supp. 3d [1] at 35-38 [(D.D.C. 2022)]; *Deutsche Telekom*, 439 F. Supp. 3d at 205-06.³³ “Without attempting to specify the smallest market share which would still

³³ Although “the Philadelphia National Bank presumption . . . remains alive and well in horizontal merger analysis,” Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2018 (2018), one aspect of the decision appears to have been jettisoned. *Philadelphia National Bank* stated that, to overcome the presumption of anticompetitive effects, there must be “evidence clearly showing that the merger is not likely to have such anticompetitive effects.” 374 U.S. at 363 (emphasis added). In subsequent decisions, the Supreme Court “discarded *Philadelphia [National] Bank*’s insistence that a defendant ‘clearly’ disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a ‘showing.’” *[United States v.] Baker Hughes [Inc.]*, 908 F.2d [981] at 990-91 [(D.C. Cir. 1990)]; see

be considered to threaten undue concentration,” the Supreme Court has stated that “30% presents that threat.” *Phila. Nat’l Bank*, 374 U.S. at 364; *see IQVIA*, 710 F. Supp. 3d at 378-79 (rejecting the argument that “the 30% threshold is no longer valid” to trigger the *Philadelphia National Bank* presumption).

After defining the relevant product market, Dr. Smith calculated the pre-merger and post-merger market shares. For his market share calculations, Dr. Smith uses sales data from the parties and third parties in the accessible-luxury-handbag market where available. Where data was unavailable for third parties, Dr. Smith used a combination of NPD data and reasoned estimations to calculate those participants’ respective market shares. Using this method, Dr. Smith calculated that Tapestry’s acquisition of Capri would result in the combined firm accounting for an approximately 59 percent share of the accessible-luxury-handbag market.³⁴ Table 7 from Dr. Smith’s report depicts the post-merger shares held by Defendants and other accessible-luxury handbag brands:

**Table 7: 2023
Accessible Luxury Handbag Market Shares and Concentration**

Brand	Total Sales (\$M) ^{1, 2}	Share
Coach	\$1,399	29.3%
Kate Spade	\$562	11.8%
Tapestry ³	\$1,962	41.1%
Michael Kors	\$843	17.6%
	\$485	10.1%
	\$400	8.4%
	\$113	2.4%
	\$110	2.3%
	\$85	1.8%
	\$83	1.7%
	\$83	1.7%
	\$63	1.3%
	\$55	1.1%
	\$50	1.0%
OTHER	\$448	9.4%
Total	\$4,779	
Combined Share		58.7%
Delta HHI		1,449
Post HHI		3,646

Source: NPD; Parties’ Retail Data, Product Data, and Store Data; Third-Party Productions

[In re] *AMR [Corp.]*, No. 22-901,] 2023 WL 2563897, at *2 (2d Cir. Mar. 20, 2023 (citing *Baker Hughes* with approval).

³⁴ Dr. Smith also included a sensitivity in his report based on Euromonitor data. The shares held by the merged Defendants in the sensitivity were generally in line with those in his baseline case.

Post-merger, the Defendants' combined approximately 59% market share is well over 30 percent and thus creates a presumption of anticompetitive effects. *See, e.g., IQVIA*, 710 F. Supp. 3d at 379 (structural presumption of anticompetitive effects applied where combined firm's post-merger market share would be between 30.6 percent and 46 percent); *Bertelsmann*, 646 F. Supp. 3d at 36-37 (same for post-merger market share of 49 percent); *Deutsche Telekom*, 439 F. Supp. 3d at 206 (same for post-merger market share between 34.4 percent and 37.8 percent).

Dr. Smith also noted in his report that he reviewed ordinary-course documents from Capri tracking the Michael Kors luxury leather goods sales at the "Total Market" level and the "Accessible Luxury Mkt" level. Per Capri's own calculations, Michael Kors comprised 39.5 percent, Coach comprised 29.4 percent, and Kate Spade comprised 8.2 percent of the accessible-luxury-leather-goods market. Together, Defendants' combined brands would account for 77 percent of the market—more than double the 30 percent threshold. Dr. Smith also pulled data from Tapestry documents that purported to separately identify and calculate shares for "accessible luxury" brands. Using that data, Dr. Smith calculated that post-merger, Defendants' combined brands would account for 83 percent of the accessible-luxury market. Although the Court need not rely on these figures, these calculations further illustrate the large market share—well over 30 percent—that Defendants would hold post-merger.

b. The HHI

Courts also look to the Herfindahl-Hirshman Index (the "HHI"), "a tool commonly used to measure changes in market concentration," to evaluate anticompetitive effects of a contemplated merger. *IQVIA*, 710 F. Supp. 3d at 377. The HHI is calculated by summing the squares of each market participant's share of the relevant market. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 n.9 (D.C. Cir. 2001). By squaring individual firms' market shares, "[t]he HHI takes into account the relative size and distribution of the firms in a market, increasing both as the number of firms in the market decreases and as the disparity in size among those firms increases." [*FTC v. Wilh. Wilhelmsen [Holding ASA]*], 341 F. Supp. 3d [27] at 58-59 [(D.D.C. 2018)] (citation omitted); accord [*FTC v. Tronox [Ltd.]*], 332 F. Supp. 3d [187] at 207 [(D.D.C. 2018)]. "Under the convention commonly used in antitrust that market shares are expressed in percentages rather than fractions (e.g., a 10 percent share is expressed by the percentage 10 rather than the fraction 0.10), the HHI ranges from close to zero for competitively structured markets up to 10,000 for a monopoly." AREEDA & HOVENKAMP ¶ 931d3. For example, "a market with five firms of share A = 30, B = 30, C = 20, D = 10, E = 10, would have an HHI of 900 + 900 + 400 + 100 + 100, or 2400." *Id.* ¶ 930a.

"In determining whether the HHI demonstrates a high market concentration, [courts] consider both the post-merger HHI number and the increase in the HHI resulting from the merger." [*FTC v. Penn State [Hershey Med. Ctr.]*], 838 F.3d [327] at 346-47 [(3d Cir. 2016)]; accord *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015); *Bertelsmann*, 646 F. Supp. 3d at

37. A plaintiff “can establish a prima facie case simply by showing a high market concentration based on HHI numbers.” *Penn State*, 838 F.3d at 347; *accord Saint Alphonsus*, 778 F.3d at 785; *H & R Block*, 833 F. Supp. 2d at 71. Under the 2023 Merger Guidelines, which the Court deems persuasive on this point, markets with an HHI greater than 1,000 are considered “concentrated,” markets with an HHI greater than 1,800 are considered “highly concentrated,” and a change of more than 100 points is regarded as a “significant increase.” 2023 Merger Guidelines §§ 2.1, 2.4 n.21. “A merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly.” *Id.* § 2.1 (footnote omitted).³⁵

Here, Dr. Smith calculated the post-merger HHI to be 3,646, with a merger-induced change in HHI of 1,449. As for the post-merger HHI, 3,646 is double the 1,800 threshold considered to be “highly concentrated” by the 2023 Merger Guidelines. 2023 Merger Guidelines § 2.1. And with respect to the merger-induced change in HHI, 1,499 [sic; the table and the opinion’s final analysis report 1,449] is obviously far greater than the 100 points presumed to substantially lessen competition under the 2023 Merger Guidelines. *Id.* § 2.1. In sum, these HHI levels are more than high enough to create a presumption—indeed, a strong presumption—of anticompetitive effects.

c. Defendants’ Central Critiques

Defendants do not critique any of Dr. Smith’s mathematical calculations of post-merger market share and market concentration. Instead, Defendants claim that Dr. Smith’s reliance on NPD categorizations and data as the core of his market share calculations results in several flaws that overemphasize Defendants’ market share. Defendants claim that Dr. Smith’s market-share calculations are flawed because they: (1) fail to account for preowned handbag sales; (2) exclude all handbags categorized as “designer,” “moderate,” and “better” by NPD; (3) exclude brands that NPD does not track; and (4) utilize unreasonable estimates and projections of sales data for a significant number of brands for which he only has NPD data. These critiques do not alter the Court’s conclusion.

As a threshold matter, these critiques underscore Defendants’ general view that Dr. Smith’s proposed accessible-luxury-handbag market is improperly defined because it excludes certain competitors. But “the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included

³⁵ Since the introduction of the HHI to the Merger Guidelines in 1982, nearly every iteration has used these same figures as the relevant thresholds, *see* 2023 Merger Guidelines § 2.1 n.15 (citing 1982, 1992, and 1997 versions), and courts have routinely cited them in assessing the effects of a merger on market concentration, *see, e.g., Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d [410] 534 F.3d at 431 [(5th Cir. 2008)]; [*FTC v. H.J. Heinz [Co.]*, 246 F.3d [708] at 716 [(D.C. Cir. 2001)]; [*FTC v. Univ. Health, [Inc.]* 938 F.2d [1206] at 1211 n.12. [(11th Cir. 1991)]. In this respect, the 2010 Horizontal Merger Guidelines were an outlier by adopting higher thresholds. *See [FTC v. Staples, Inc.] Staples II*, 190 F. Supp. 3d [100] 3d at 128 [(D.D.C. 2016)] (describing the thresholds under the 2010 Horizontal Merger Guidelines); *see also* AREEDA & HOVENKAMP ¶ 901.1b (“The belief that the 2010 concentration levels were too tolerant seems well substantiated.”).

in the relevant product market for antitrust purposes.” *Deutsche Telekom*, 439 F. Supp. 3d at 200 (citation omitted). And it is fundamental that “even if alternative submarkets exist . . . , or if there are broader markets that might be analyzed, the viability of such additional markets does not render the one identified by the [plaintiff] unusable.” *Bertelsmann*, 646 F. Supp. 3d at 28. Dr. Smith conducted an HMT that this Court finds to be reliable. If the market defined by Dr. Smith were too narrow, the HMT would fail—that is, he would find that it would be unprofitable for a hypothetical monopolist in the market as defined to raise prices by at least five percent. See *Optronix [Techs., Inc. v. Ningbo Sunny Elec. Co.]*, 20 F.4th 466, 482 n.1 [(9th Cir. 2021)]; [*United States v. Am. Express Co.*] *AmEx I*, 838 F.3d [179] at 199 [(2d Cir. 2016), *aff’d sub nom. Ohio v. Am. Express Co.*, 585 U.S. 529 (2018)]. Yet Dr. Smith’s candidate market passed the HMT—by leaps and bounds. Thus, the candidate market is an appropriate market to evaluate the anticompetitive effects here (and therefore, to evaluate the post-merger market share and market concentration). Because the Court analyzes the accessible-luxury-handbag market as defined here, comparisons of the Defendants’ market shares as against a broader market are irrelevant. Cf. DFOF ¶ 161 (explaining that Professor Scott Morton calculated market shares to be approximately 16 percent using different methodology than the methodology accepted by the Court here). Nevertheless, the Court proceeds to analyze in more detail particular criticisms raised by the Defendants regarding the exclusion and inclusion of certain handbags from the market and Dr. Smith’s reliance on the NPD data.

i. The Resale Market

Defendants take issue with the fact that Dr. Smith did not include pre-owned handbags in his relevant market. Numerous Tapestry and Capri witnesses testified generally that “resale platforms have been an increased source of competition” over an unspecified period of time. The recent growth of the resale market for handbags, according to Defendants, undermines Dr. Smith’s market analysis by excluding a portion of products that compete in the relevant market, thereby exaggerating anti-competitive effects. The Court does not agree.

First, there is insufficient evidence that the resale market for handbags has increased so dramatically over the past several years to render Dr. Smith’s market share calculations unreliable. Although many witnesses testified vaguely that the resale market has generally grown, Defendants failed to present reliable evidence quantifying that growth. During the hearing, Defendants’ expert Professor Scott Morton presented a demonstrative with a chart that seemed to indicate that sales of preowned handbags nearly doubled from 2020 to 2023. In presenting this opinion during the hearing, Professor Scott Morton was missing data from a major reseller, [Redacted], which she testified was “nonexistent in 2020.” Yet it is unclear whether that claim is accurate. The company’s website—which Professor Scott Morton and Giberson cite in their respective expert reports—states that the company was founded in [Redacted]. That company’s revenues from 2022 and 2023 were higher than any other reseller listed on Professor Scott Morton’s summary. Therefore, the lack of 2020 data for that company could substantially impact her conclusion that there was a jump in reseller growth from

2020 to 2023, especially because the chart reflects that total resale revenues were essentially stable from 2021 to 2023. Because Professor Scott Morton was unable to adequately explain the discrepancies in the reseller data, the Court finds unreliable her testimony that the resale market has grown significantly from 2020 to 2023.

Regardless of the size of the resale market, however, Dr. Smith's proposed market without preowned handbags passes the HMT and thus does not need to be expanded to contain other potential lines of competition. But even if the Court assumes that preowned handbags belong in the relevant market, the data presented by Professor Scott Morton regarding the volume of sales of preowned handbags would still not alter the Court's conclusion. Professor Scott Morton opined that Dr. Smith erred by "[n]ot accounting for any preowned handbag sales," and that "[s]ales information collected from a subset of just seven resellers of handbags shows revenues of handbags under \$1,000 that exceed \$400 million in 2023."³⁶ Although Dr. Smith testified that he believed there was "no basis" to include preowned handbags in his relevant market, even if he included an additional \$400 million in sales in the denominator of his calculation of market shares, the merging parties' market shares would still well exceed 50 percent. Defendants argue in their papers that it is immaterial that Dr. Smith's market shares are not substantially affected by the addition of \$400 million in sales of used handbags, because "a subset of eight resellers" have annual sales of "nearly \$1.2 billion." Putting aside the fact that the majority of those \$1.2 billion in sales are for handbags selling for over \$1,000, and therefore are unlikely to be appropriately within the market here, this critique also falls flat, because Dr. Smith testified that the merging parties' market shares would still exceed 45 percent if he added an additional \$1.2 billion in sales to the denominator—again, well in excess of the 30 percent threshold. For these reasons, Defendants' arguments regarding the resale market are unpersuasive.

ii. Exclusion and Inclusion of Certain Handbags

Defendants also assert that Dr. Smith's market share analysis is flawed because he excludes sales of handbags sold by brands that NPD categorizes as "designer," "moderate," and "better," even when the prices of those handbags overlap with the prices that Defendants charge or that are charged by others in the accessible luxury market, and he excludes sales by handbag brands that NPD does not track.

Again, as explained above, the Court credits Dr. Smith's market definition, which passes the HMT by a large margin. That Defendants now point to certain handbags that could possibly have been included in another relevant market, or certain handbags

³⁶ Defendants' industry expert Jeff Gennette, who is not an economist, also asserted that "[Redacted]" Yet in 2023, according to [Redacted], approximately [Redacted] of its handbag sales were from "[Redacted]" and the "average resale price of a handbag on [Redacted] is approximately [Redacted]." Gennette further testified that he "did not do any analysis of cross elasticity between new handbags and secondhand handbags." Gennette also relied on a document that he asserted "confirm[s] the importance of resale to department stores today," but was unable to answer questions about what particular data in the document represented. The Court therefore does not give weight to his opinion on specific parameters of the resale market.

that they assert should have been excluded, does not mean that Dr. Smith's market share calculations for this relevant market are incorrect. This critique also misunderstands Dr. Smith's approach to defining the market. Although accessible-luxury handbag brands typically charge prices below \$1,000 and generally not less than \$100, Dr. Smith does not define the market by a hard price range. Thus, the existence of certain handbags within this general price range that are not in the relevant market (and, on the other hand, the existence of certain handbags outside of this general price range that are in the relevant market) does not undermine the market shares calculated by Dr. Smith. *Cf. Bertelsmann*, 646 F. Supp. 3d at 51 (self-published books not a competitive constraint on the market for anticipated top-selling books even when certain self-published books were top-sellers, and therefore irrelevant for market share calculations even if such books competed).

iii. Extrapolation from NPD Data

Finally, Defendants assert that Dr. Smith's market share analysis was flawed because of his estimation approach for sales data for certain portions of his market share analysis. Dr. Smith had actual sales data for the merging parties and some third parties in the accessible luxury handbag market. Dr. Smith also used NPD's data for wholesale data for all of the accessible luxury handbag firms. For firms in the relevant market for which Dr. Smith did not have actual sales data, he estimated those firms' non-wholesale sales by extrapolating from their wholesale sales as reported by NPD. Specifically, Dr. Smith supplemented NPD's wholesale data with an estimate of sales through the non-wholesale channels, calculated based on the average percentage of sales by channel—here, Dr. Smith found that the average ratio of wholesale sales to total sales is approximately 40 percent.

Defendants claim that this approach was flawed. They note that Dr. Smith lacked actual non-wholesale sales for approximately 200 companies included in his relevant market. Defendants further note that for certain companies, Dr. Smith's projections of sales for certain handbag brands are incorrect as compared to actual sales data. Defendants also point to extrapolations by Dr. Smith that resulted in obviously erroneous estimates, such as the calculation that J Crew's estimated handbag sales in 2023 were a total of \$197. Defendants also point out that Dr. Smith's methodology would have underestimated the revenues of Coach (had Dr. Smith applied his estimation methodology to Coach). These arguments do not undermine the overall reliability of Dr. Smith's conclusions regarding market share.

Defendants do not claim that Dr. Smith erred in finding that the average percentage of sales through wholesale channels for brands in this market is approximately 40 percent. Rather, Defendants simply point to particular examples where his estimation approach did not comport with other evidence or resulted in clearly inaccurate results for some brands. However, as Defendants' examples show, some of Dr. Smith's estimates underrepresented total sales and some overestimated total sales, which is not surprising, given that the approach is based on averages. Moreover, Dr. Smith testified that "approximately . . . 75 percent or so of the revenues that [he] used in the share calculation are actual sales data from the parties and third parties," and

that “less than 10 percent” of the portion of the sales in his market calculations relied on imputed sales. Most importantly, Defendants’ post-merger market shares calculated by Dr. Smith are so significant that even if Dr. Smith underestimated the market shares held by some third parties, the Court agrees with Dr. Smith and the FTC that the post-merger market share held by Defendants would still be so significant as to be presumptively anticompetitive.³⁷

Dr. Smith’s market-share and market-concentration calculations may not be perfect. But they need not be. A leading antitrust treatise describes the proper approach:

[T]he plaintiff has the burden of proving the violation. The fact that share data may be incomplete, however, does not necessarily mean that the plaintiff has failed. It depends on the apparent significance of what is unknown. If the apparent market shares are barely sufficient to cross the threshold of presumptive illegality, then the failure to count additional sales by others making the market larger would be fatal to the plaintiff’s case. In sharp contrast, where the defendant’s apparent aggregate share is, say, 80 percent in a concentrated market, the true magnitude of total sales could be doubled without making the merger small enough to be lawful. If there is no satisfactory way to make a reasonable estimate of what has been left out, the defendant must prevail. But where we know that what has been omitted cannot be large enough to make the defendant’s share lawfully small, the plaintiff should prevail, notwithstanding uncertainty about the defendant’s exact share.

AREEDA & HOVENKAMP ¶ 929d. 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 [D]efendant[s]’ exact share.” *Id.*

d. Final Analysis

As explained, a plaintiff that has properly defined a relevant market can establish a prima facie case under Section 7 by showing a sufficiently high post-merger market share or sufficiently large post-merger HHI numbers. *See, e.g., Phila. Nat’l Bank*, 374 U.S. at 363 (market share); *Penn State*, 838 F.3d at 347 (HHI); *Saint Alphonsus*, 778 F.3d at 785-86 (HHI); *Waste Mgmt.*, 743 F.2d at 981 (market share); *IQVIA*, 710 F. Supp. 3d at 377-82 (both); *Bertelsmann*, 646 F. Supp. 3d at 35-38 (both). Because the FTC has shown both a sufficiently (and significantly) high post-merger

³⁷ Defendants also argue that NPD does not report actual wholesale data, but “instead [reports] a mashup of sales data and projections.” Defendants point to a portion of the NPD user guide, which states that NPD “projects the data it receives from its retail/data partners to a larger universe that includes stores that are not included in the panel,” and that “projections may not accurately represent market trends within non-panel retailers/data partners.” Defendants therefore assert that Dr. Smith’s reliance on the NPD data renders his analysis unreliable. There was no testimony regarding these provisions of the NPD User Guide and, on its face, the guide’s reference to projections and trends for other non-panel retailers does not establish that the NPD does not receive actual sales data from its panel retailers. Tapestry and third-party accessible-luxury-handbag sellers regularly rely on NPD data in the ordinary course, and it was appropriate for Dr. Smith to do so here.

market share (59 percent) and a sufficiently (and significantly) large post-merger HHI of 3,646 with a merger-induced change in HHI of 1,449, the Court finds that the FTC has established a strong prima facie case under Section 7.³⁸

NOTES

1. *Disposition of the proposed merger.* On October 24, 2024, the district court granted the FTC’s motion for a preliminary injunction, barring Tapestry and Capri from completing their merger while the FTC’s administrative proceeding remained pending.¹ The companies filed a notice of appeal on October 28, and the Second Circuit set an expedited briefing schedule.² Before the appeal was decided, however, the companies agreed to terminate the merger agreement. They announced the termination on November 14, explaining that the litigation was unlikely to be resolved before the agreement’s February 10, 2025 outside date.³ The parties stipulated to dismissal of the appeal, which ended without an appellate decision on the merits; the FTC subsequently dismissed its administrative complaint without prejudice.⁴ The preliminary injunction thus prevented this transaction from closing, although the district court had not entered a final judgment that the merger violated Section 7.

Of course, the February 10 outside date did not itself require the parties to abandon the transaction; they could have agreed to extend the outside date. In the absence of an extension, however, either party generally could unilaterally terminate without cause if the merger had not closed by that date.⁵ An extension therefore required both parties to remain willing to pursue the deal. After considering the district court’s decision, one

³⁸ The Court recognizes that Section 7 plaintiffs, including the FTC here, often “present other evidence as part of the prima facie case.” *Saint Alphonsus*, 778 F.3d at 786; *accord Illumina, Inc. v. FTC*, 88 F.4th 1036, 1057 (5th Cir. 2023). For the sake of organizational clarity, the Court will consider the FTC’s evidence of additional anticompetitive effects after reviewing Defendants’ rebuttal case.

¹ *FTC v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 498 (S.D.N.Y. 2024).

² See [Notice of Interlocutory Appeal, FTC v. Tapestry, Inc.](#), No. 1:24-cv-03109 (JLR) (BCM) (S.D.N.Y. Oct. 28, 2024); [Defendants-Appellants’ Emergency Motion for Expedited Proceedings, FTC v. Tapestry, Inc.](#), No. 24-2848 (2d Cir. Oct. 29, 2024); [Federal Trade Commission’s Memorandum of Law in Opposition to Appellants’ Motion for Expedited Proceedings](#), *id.* (Nov. 5, 2024); [Order](#), *id.* (Nov. 6, 2024) (granting motion for expedited appeal).

³ *Tapestry, Inc.*, Current Report (Form 8-K) (Nov. 14, 2024); *Tapestry, Inc. Announces Termination of Merger Agreement With Capri Holdings Limited* (Nov. 14, 2024); *Capri Holdings Limited, . Capri Holdings Announces Termination of Merger With Tapestry* (Nov. 14, 2024).

⁴ Stipulation of Dismissal, *FTC v. Tapestry, Inc.*, No. 24-2848 (2d Cir. filed Nov. 19, 2024); [Joint Motion To Dismiss the Complaint, Tapestry, Inc.](#), No. 9429 (F.T.C. Nov. 15, 2024); [Joint Status Report at 1, Tapestry, Inc.](#), No. 9429 (F.T.C. Dec. 2, 2024) (reporting the Second Circuit’s November 20 disposition); [Order Dismissing Complaint, Tapestry, Inc.](#), No. 9429 (F.T.C. Dec. 4, 2024).

⁵ [Agreement and Plan of Merger](#) § 8.1(d) (Aug. 10, 2023) (outside date termination right, subject to the stated limitation for a party whose material breach principally caused the failure to close); [Termination Agreement § 1](#) (Nov. 13, 2024) (termination by mutual consent).

or both parties may have concluded that the prospects of overturning the injunction did not justify continuing the transaction and the appeal. Citing the approaching outside date was likely a more palatable public explanation than acknowledging that they likely had a losing case. This is an inference: the public record does not disclose the parties' actual evaluations of the appeal.

2. The FTC's economic expert was Dr. Loren K. Smith. Smith received his Ph.D. in economics from the University of Virginia in 2006 and served as an FTC staff economist from 2005 to 2013. He later held senior positions at Compass Lexecon and the Brattle Group, and served as executive vice president at Compass Lexecon during the Tapestry litigation. Since February 2025, he has been a founding partner and head of North American Antitrust and Competition at Econic Partners. He has testified for government agencies and private parties in merger and other antitrust cases.

3. The merging parties' economic expert was Professor Fiona M. Scott Morton. She received her Ph.D. in economics from MIT in 1994 and has taught at the Yale School of Management since 1999, where she is the Theodore Nierenberg Professor of Economics. From 2011 to 2012, she served as chief economist of the DOJ Antitrust Division. Her research focuses on competition and antitrust, and she has also worked as an economic consultant.

Explicit Theories of Anticompetitive Harm: Coordinated Interaction

Horizontal Merger Guidelines



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

Issued: August 19, 2010

7. Coordinated Effects

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

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

retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals' responses to a price change or other competitive initiative. Under some circumstances, a merger can result in market concentration sufficient to strengthen such responses or enable multiple firms in the market to predict them more confidently, thereby affecting the competitive incentives of multiple firms in the market, not just the merged firm.

7.1 Impact of Merger on Coordinated Interaction

The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction. The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct. There are, however, numerous forms of coordination, and the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof. Therefore, the Agencies evaluate the risk of coordinated effects using measures of market concentration (see Section 5) in conjunction with an assessment of whether a market is vulnerable to coordinated conduct. See Section 7.2. The analysis in Section 7.2 applies to moderately and highly concentrated markets, as unconcentrated markets are unlikely to be vulnerable to coordinated conduct.

Pursuant to the Clayton Act's incipency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place. The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.

7.2 Evidence a Market is Vulnerable to Coordinated Conduct

The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly. Previous express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market. Failed previous attempts at collusion in the relevant market suggest that successful collusion was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely. Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.

A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent. Price transparency can be greater for relatively homogeneous products. Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation. Regular monitoring by suppliers of one another's prices or customers can indicate that the terms offered to customers are relatively transparent.

A market typically is more vulnerable to coordinated conduct if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.

A firm is more likely to be deterred from making competitive initiatives by whatever responses occur if sales are small and frequent rather than via occasional large and long-term contracts or if relatively few customers will switch to it before rivals are able to respond. A firm is less likely to be deterred by whatever responses occur if the firm has little stake in the status quo. For example, a firm with a small market share that can quickly and dramatically expand, constrained neither by limits on production nor by customer reluctance to switch providers or to entrust business to a historically small provider, is unlikely to be deterred. Firms are also less likely to be deterred by whatever responses occur if competition in the relevant market is marked by leapfrogging technological innovation, so that responses by competitors leave the gains from successful innovation largely intact.

A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase. Similarly, a market is more apt to be vulnerable to coordinated conduct if a firm that first offers a lower price or improved product to customers will retain relatively few customers thus attracted away from its rivals after those rivals respond.

The Agencies regard coordinated interaction as more likely, the more the participants stand to gain from successful coordination. Coordination generally is more profitable, the lower is the market elasticity of demand.

Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct. The prospect of harm depends on the collective market power, in the relevant market, of firms whose incentives to compete are substantially weakened by coordinated conduct. This collective market power is greater, the lower is the market elasticity of demand. This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.

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



Merger Guidelines

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

Issued: December 18, 2023

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

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

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

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

2.3.A. Primary Factors

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

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

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

described below. Where a market is not highly concentrated, the Agencies may still consider other risk factors.

Prior Actual or Attempted Attempts to Coordinate. Evidence that firms representing a substantial share in the relevant market appear to have previously engaged in express or tacit coordination to lessen competition is highly informative as to the market's susceptibility to coordination. Evidence of failed attempts at coordination in the relevant market suggest that successful coordination was not so difficult as to deter attempts, and a merger reducing the number of rivals may tend to make success more likely.

Elimination of a Maverick. A maverick is a firm with a disruptive presence in a market. The presence of a maverick, however, only reduces the risk of coordination so long as the maverick retains the disruptive incentives that drive its behavior. A merger that eliminates a maverick or significantly changes its incentives increases the susceptibility to coordination.

2.3.B. Secondary Factors

The Agencies also examine whether secondary factors demonstrate that a merger may meaningfully increase the risk of coordination, even absent the primary risk factors. Not all secondary factors must be present for a market to be susceptible to coordination.

Market Concentration. Even in markets that are not highly concentrated, coordination becomes more likely as concentration increases. The more concentrated a market, the more likely the Agencies are to conclude that the market structure suggests susceptibility to coordination.

Market Observability. A market is more susceptible to coordination if a firm's behavior can be promptly and easily observed by its rivals. Rivals' behavior is more easily observed when the terms offered to customers are readily discernible and relatively observable (that is, known to rivals). Observability can refer to the ability to observe prices, terms, the identities of the firms serving particular customers, or any other competitive actions of other firms. Information exchange arrangements among market participants, such as public exchange of information through announcements or private exchanges through trade associations or publications, increase market observability. Regular monitoring of one another's prices or customers can indicate that the terms offered to customers are relatively observable. Pricing algorithms, programmatic pricing software or services, and other analytical or surveillance tools that track or predict competitor prices or actions likewise can increase the observability of the market.

Competitive Responses. A market is more susceptible to coordination if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by its rivals' likely responses. This is more likely to be the case the stronger and faster the responses from its rivals because such responses reduce the benefits of competing more aggressively. Some factors that increase the likelihood of strong or rapid responses by rivals include: (1) the market has few significant competitors, (2) products in the relevant market are relatively homogeneous, (3) customers find it relatively easy to switch between suppliers, (4) suppliers use algorithmic pricing, or (5) suppliers use meeting-competition clauses. The more predictable are rivals' responses to strategic actions or changing competitive conditions, and the more interactions firms have across multiple markets, the greater the susceptibility to coordination.

Aligned Incentives. Removing a firm that has different incentives from most other firms in a market can increase the risk of coordination. For example, a firm with a small market share may have

less incentive to coordinate because it has more to gain from winning new business than other firms. The same issue can arise when a merger more closely aligns one or both merging firms' incentives with the other firms in the market. In some cases, incentives might be aligned or strengthened when firms compete with one another in multiple markets ("multi-market contact"). For example, firms might compete less aggressively in some markets in anticipation of reciprocity by rivals in other markets. The Agencies examine these and any other market realities that suggest aligned incentives increase susceptibility to coordination.

Profitability or Other Advantages of Coordination for Rivals. The Agencies regard coordinated interaction as more likely to occur when participants in the market stand to gain more from successful coordination. Coordination generally is more profitable or otherwise advantageous for the coordinating firms the less often customers substitute outside the market when firms offer worse terms.

Rebuttal Based on Structural Barriers to Coordination Unique to the Industry. When market structure evidence suggests that a merger may substantially lessen competition through coordination, the merging parties sometimes argue that anticompetitive coordination is nonetheless impossible due to structural market barriers to coordinating. The Agencies consider this rebuttal evidence using the framework in Section 3. In so doing, the Agencies consider whether structural market barriers to coordination are "so much greater in the [relevant] industry than in other industries that they rebut the normal presumption" of coordinated effects.²⁰ In the Agencies' experience, structural conditions that prevent coordination are exceedingly rare in the modern economy. For example, coordination is more difficult when firms are unable to observe rivals' competitive offerings, but technological change has made this situation less common than in the past and reduced many traditional barriers or obstacles to observing the behavior of rivals in a market. The greater the level of concentration in the relevant market, the greater must be the structural barriers to coordination in order to show that no substantial lessening of competition is threatened.

²⁰ See *H.J. Heinz Co.*, 246 F.3d at 724.

²¹ *United States v. Marine Bancorp.*, 418 U.S. 602, 630 (1974). A concentrated market is one with an HHI greater than 1,000 (See Guideline 1, n.15).

**FTC. v. OSF HEALTHCARE SYS.,
852 F. Supp. 2d 1069, 1086 (N.D. Ill. 2012)
(excerpt on coordinated effects¹)**

FREDERICK J. KAPALA, J.

[The FTC sought a preliminary injunction under FTC Act § 13(b) to enjoin the defendants, OSF Healthcare System (“OSF”) and Rockford Health System (“RHS”), from consummating their affiliation agreement executed on January 31, 2011, or otherwise acquiring each other’s assets or interests. The FTC alleged, among other things, that the arrangement would create a highly concentrated market and increase the likelihood of coordinated effects.]

. . .

b. Coordinated effects

Defendants next argue that the FTC has no evidence that the merger will result in any unlawful coordination. “A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers.” Merger Guidelines § 7; *see also Hosp. Corp. [v. FTC]*, 807 F.2d [1381] at 1387 [7th Cir. 1986] (“The fewer competitors there are in a market, the easier it is for them to coordinate their pricing . . .”). Although “the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof,” such a risk can be evaluated by reviewing market concentration and any history of collusion in the relevant market. Merger Guidelines § 7.1. Here, the relevant market is highly concentrated and there is at least some history of coordinated efforts among the Rockford hospitals.

Generally, once “the government has established its prima facie case [through the *PNB* presumption], the burden is on the defendants to produce evidence of ‘structural market barriers to collusion’ specific to this industry that would defeat the ‘ordinary presumption of collusion’ that attaches to a merger in a highly concentrated market.” *H & R Block*, 833 F. Supp. 2d at 76 (quoting *[FTC v. H.J.] Heinz [Co.]*, 246 F.3d [708] at 725 [(D.C. Cir. 2001)]). In this case, however, the FTC has not relied solely on its prima facie case, but has also detailed several incidents which it claims demonstrate coordinated activity. While the court finds that some of the claimed coordination is fairly benign, such as hiring a consultant to help evaluate the healthcare market in the region, there is some evidence that suggests that there is a risk of coordinated activity by the hospitals in Rockford after the merger, especially once “communication becomes easier and more effective” with only two competitors.

The first example showing at least some history of coordination involves efforts by one hospital to determine if it was in a bidding war against a competitor for a contract

¹ Citations to briefs and the evidentiary record and to footnotes omitted.

with a health insurance company. The first hospital contacted the Managed Care Director for the competitor and was told that they were not in contract negotiations with the insurance company at that time. “[T]he ultimate effect [of this coordinated activity] was that they did not agree to give the larger discount to the health plan in question, but instead held out for a higher amount” of reimbursement from the health plan. Another example involves two of the hospitals allegedly contacting a health plan and stating that, if the health plan wanted to contract with either one of them, it had to exclude the third hospital from its network. This evidence of hospitals putting up a type of “united front in negotiations with the third-party payors” is an example of the dangers of collusion that the antitrust laws seek to prevent. *Hosp. Corp.*, 807 F.2d at 1389.

Defendants try to rebut the FTC’s charge that the proposed merger comes with an increased risk of unlawful coordination by arguing generally that the FTC’s theory is implausible, that the facts it relies on are stale, and that the executives at all three hospitals have testified that they would not allow coordinated behavior to occur in the future. These arguments are insufficient to overcome the presumption of collusion that arises from the combination of the FTC’s strong *prima facie* case, see *H & R Block*, 833 F. Supp. 2d at 76–77, and the evidence of coordinated behavior discussed above. First, defendants’ argument that it is implausible to suggest that the merger would allow OSF Northern Region to both exclude and collude with SwedishAmerican misconstrues the FTC’s position. Although the court agrees that OSF Northern Region could not simultaneously both exclude and collude, plaintiff’s expert explained that the combined entity could use the threat of exclusion to induce collusive behavior from SwedishAmerican. Second, the court disagrees with defendants’ characterizations of the FTC’s evidence as stale, where the conduct the court finds most damaging occurred within the past seven years. Finally, relying on the testimony of hospital executives adds little to the analysis of this particular issue, as they would be expected to publically disavow any improper conduct and not condone such conduct in the future.

Based on the foregoing, the court agrees with the FTC that the proposed merger in this case does involve an increased risk of coordinated conduct in the relevant market, and that defendants have failed to successfully rebut this aspect of the FTC’s case. To be clear, the court is not finding that the hospitals would necessarily collude after the merger, only that this merger adds to the risk of such behavior. Accordingly, the court finds that the FTC has raised serious and substantial questions on the issue of coordinated behavior that require further investigation and determination during the merits trial.

NOTES

1. *OSF* unfortunately followed *H&R Block* in concluding its analysis of the DOJ’s *prima facie* case with nothing more than the *PNB* presumption. It did not follow the rubric of the 2010 DOJ/FTC Horizontal Merger Guidelines and look at the other evidence the DOJ presented to strengthen the *PNB* presumption as more modern courts do.

IN RE TRONOX LTD.,
Slip op. at 33-43, No. 9377 (F.T.C. Dec. 14, 2018) (initial decision)
(excerpt on coordinated effects¹)

D. MICHAEL CHAPPELL, Chief Administrative Law Judge

[The FTC sought a preliminary injunction under FTC Act § 13(b) to enjoin the acquisition by Tronox Limited of the National Titanium Dioxide Company's titanium dioxide (TiO₂) business (known as "Cristal") for \$1.67 billion in cash and a 24% equity stake in the combined firm. TiO₂ is a pigment used to add whiteness, brightness, and opacity to products like paints, plastics, and paper. It is manufactured by subjecting raw titanium ores to either a chloride or a sulfate production process. A central issue in the case was the relevant product market definition. The FTC alleged, among other things, that the acquisition created a highly concentrated market and increased the likelihood of coordinated effects.]

. . .

2. Reasonable probability of anticompetitive effects

a. Overview

As the court explained in *ProMedica Health Systems v. FTC*, anticompetitive effects of a merger can include coordinated effects and/or unilateral effects.

[T]he idea behind coordinated effects is that, "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels." *H&R Block*, 833 F. Supp. 2d at 77. . . . Unilateral effects theory, on the other hand, holds that "[t]he elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition." Merger Guidelines § 6 at 20.

749 F.3d 559, 568-69 (6th Cir. 2014). In the instant case, to support the argument that the Acquisition is likely to have anticompetitive effects, Complaint Counsel asserts: (1) the Acquisition will facilitate coordination among competitors, in a highly concentrated market that is vulnerable to coordination (coordinated effects); and (2) the Acquisition will enable the combined entity to engage in strategic output withholding, in a market with incentives for and a history of such conduct (unilateral effects). Respondents dispute that anticompetitive effects are likely, arguing that the evidence fails to show that coordination among competitors or unilateral strategic output withholding by the combined entity is likely. The question of likely coordinated effects is analyzed below.

¹ Citations to briefs and to factual findings with parentheticals omitted.

b. Likelihood of coordinated effects**i. Legal principles**

“Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.” *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). *See also* Merger Guidelines § 7 (Coordinated interaction includes an implied understanding or parallel accommodating conduct not pursuant to a prior understanding.).

Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm’s incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm’s incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Merger Guidelines § 7.

“It is a central object of merger policy to obstruct the creation or reinforcement by merger” of market structures in which tacit coordination can occur. [*FTC v.*] *Heinz*, 246 F.3d [246,] at 725 [D.C. Cir. 2001)]. “Tacit coordination is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws.” *Id.* “[P]ermit[ing] mergers to be challenged prior to their occurrence and thus before the harm from coordinated interaction has materialized . . . is particularly valuable in situations where coordinated interaction is difficult to detect and remedy directly under § 1 of the Sherman Act.” Herbert Hovenkamp, *Prophylactic Merger Policy*, HASTINGS L.J. (August 2018) at 12.

It is not necessary to prove that tacit coordination has already occurred in order to demonstrate a reasonable probability of future coordination. *See* [*FTC v.*] *Arch Coal, [Inc.,]* 329 F. Supp. 2d [109,] at 116 [D.D.C. 2004)] (“While proof of prior cooperative behavior is relevant, it is not a necessary element of likely future coordination in violation of Section 7.”)

ii. Analysis

Under the Merger Guidelines, a merger may substantially lessen competition if: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct; and (3) the merger is likely to enhance that vulnerability. Merger Guidelines § 7.1. As shown above, the evidence proves that the Acquisition in this case would significantly increase concentration in the relevant market and lead to a highly concentrated market. As discussed below, the evidence further proves that the North American chloride TiO₂ market is vulnerable to coordinated conduct, and that this vulnerability will be enhanced by the Acquisition. *See generally* Merger Guidelines § 7.2 (discussing factors evidencing vulnerability to coordination).

October 11, 2021

First, with only five participants selling chloride TiO₂ in North America, the number of firms in the relevant market is small. “The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act . . .” *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986). In the instant case, the Acquisition will reduce the number of firms to four, thereby making it easier for the remaining firms to coordinate on price or output. *See [FTC v.] Elders Grain, [Inc.]* 868 F.2d. [901,] at 905 [(D.C. Cir. 1989)] (holding that acquisition reducing firms from six to five would make it easier for leading members of the industry to collude on price and output); *[FTC v.] Univ. Health, [Inc.]* 938 F.2d [1206,] at 1219 [(11th Cir. 1991)] (holding that four businesses remaining after merger could easily collude to raise price and decrease output without committing detectable violations of the Sherman Act). In particular, the Acquisition would not only simplify coordination by eliminating Cristal, a current competitor, but would also create a new firm of a similar size to Chemours, the current market leader. Indeed, the Acquisition will result in only two firms—Tronox and Chemours—in control of [redacted—nearly three-quarters] of North American sales, and over of [redacted] North American capacity. “With only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom.” *[FTC v.] CCC Holdings [Inc.]*, 605 F. Supp. 2d [26,] at 67 [(D.D.C. 2009)].

Second, chloride TiO₂ is a commodity product. Markets for homogenous products are more susceptible to coordination. One reason for this is that reactions by rivals to attempts to steal their business are likely to be strong, given that each firm’s product is largely interchangeable with its rivals’ products. In this case, given the small number of market participants in the relevant market, and the commodity nature of chloride TiO₂, the market is fairly characterized as an oligopoly. *See* [4A PHILLIP E.] AREEDA [& HERBERT HOVENKAMP, ANTITRUST LAW] ¶ 1429a at 221 [(3d ed. 2009)]; *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1031 n.3 (8th Cir. 2000) (quoting Black’s Law Dictionary 1086 (6th ed. 1990)); *see also* Preliminary Injunction Opinion, *[FTC v. Tronox Ltd.]*, 332 F. Supp. 3d 187, 195 (D.D.C. 2018)] (“The titanium dioxide market has been described as an ‘oligopoly,’ as TiO₂ is a ‘commodity-like product with no substitutes, the market is dominated by a handful of firms, and there are substantial barriers to entry.’” (quoting *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 190 (3d Cir. 2017))).

Third, mutually recognized interdependence is indicative of a market that is vulnerable to coordination. In such a market, each [competitor] knows that his choice will affect the others, who are likely to respond, and that their responses will affect the profitability of his initial choice. Each knows that expanding his sales or lowering his price will reduce the sales of rivals, who will notice that fact, identify the cause, and probably respond with a matching price reduction. Unless he can somehow conceal his price reduction, or unless his own position is improved by a lower market price, he will hesitate to reduce prices at all. Areeda ¶ 1410b at 65 (emphasis and footnote omitted). Recognized interdependence is a distinct characteristic of an oligopolistic

market. Areeda ¶ 404a; *see also Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995) (“[b]y definition, oligopolists are interdependent . . .” (citation omitted)); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359 (3rd Cir. 2004) (explaining that a participant in an oligopoly market “‘must take into account the anticipated reaction of the other [] firms’”) (citation omitted)).

In the instant case, the evidence proves that the North American chloride TiO₂ market is characterized by mutually recognized interdependence. As acknowledged in a November 2016 Tronox presentation, the “TiO₂ market shows oligopoly pricing behavior (one supplier can drive price down, action of all suppliers needed to pull prices up).” Indeed, the record is replete with testimony and documents from Tronox and Cristal demonstrating recognized interdependence among market participants. *E.g.*, F. 207 (Tronox’s Mr. Romano testifying that “it only takes one to make the price go down. The whole market has to go up. But any one competitor can make pricing go down.”); F. 212 (Tronox’s Mr. Romano testifying that success of a price increase “depends on what our competition is doing”); F. 213 (Tronox’s Mr. Casey stating in an email: “[T]he success of this [Tronox December 2015 price increase] initiative will be materially affected by how Huntsman [now Venator], Cristal and Kronos respond. Chemours announced an equivalent price increase yesterday . . .”); F. 208 (Mr. Gigou of Cristal testifying that when considering whether to issue a price increase and for what amount, Cristal takes into account information from customers regarding other TiO₂ suppliers); F. 217 (Mark Stoll, general manager of mergers and acquisitions for Cristal, stating in a 2012 email: “In current market conditions of excessive inventory we cannot raise price and gain market share at the same time unless all suppliers support the price movement.”).

In addition, the evidence shows mutual accommodating conduct by chloride TiO₂ producers in order to support market discipline and avoid triggering adverse competitor responses. For example, in a July 2015 email discussing pricing for a customer, Mr. Duvekot of Tronox wrote: “Especially on a highly visible account like [this particular customer] any price move will be seen by the competitors, even more so if we use it to take a piece of the pie. That will cause a reaction from the competition, at this account or elsewhere in the market, which will just lead to more price erosion in the market. Tronox does not want to play this game (anymore).” In a March 2016 email, Tronox’s Mr. Mouland wrote to two salespeople: “We will have to pass on this opportunity as I do not want to undercut a competitor. The price increase is taking hold and any attempt to get volume at the expense of price could undermine our progress.” F. 246. *See also* F. 231 (“The problem we face is that pricing is falling and if we take action to go after market share, price will deteriorate further and we do not want [to] facilitate or fuel that process. Everyone is defending their business and matching offers from the competition to maintain their share as no one want[s] to loose [sic] business.”); F. 235 (Cristal email stating: “All of the large global TiO₂ suppliers are still acting in a disciplined manner, respecting each other’s market positions and share and holding on to price. No volume stalking of any great consequence is taking place yet, which is very good news.”).

Fourth, “[a] market typically is more vulnerable to coordinated conduct if each competitively important firm’s significant competitive initiatives can be promptly and confidently observed by that firm’s rivals. . . . Regular monitoring by suppliers of one another’s prices or customers can indicate that the terms offered to customers are relatively transparent.” Merger Guidelines § 7.2. *See also* [*United States v.*] *Oracle, [Corp.]* 331 F. Supp. 2d [1098,] at 1166 [N.D. Cal. 2004]) (“Without homogeneity or transparency, the market conditions are not conducive to coordinated effects, either tacit or express.”). The evidence in this case shows that TiO₂ suppliers monitor, and are able to observe, significant moves by their competitors, including as to price and output, from public statements by competitors and information obtained from customers.

Tronox and Cristal monitor and analyze public statements by competitors such as quarterly earnings updates, presentations at industry conferences, and ratings agency meetings. For example, Tronox’s Mr. Engle, vice president of marketing, listens to competitors’ earnings calls to learn about their production plans and other announcements, and to obtain competitive intelligence. Indeed, these sources represent Tronox’s largest source of competitor intelligence. Reports and analyses are provided to Tronox’s executives. Cristal also monitors TiO₂ competitors’ public calls and circulates detailed analyses to executives, highlighting information such as production curtailments, capacity utilization, and planned price increases.

The information provided in public earnings calls and similar public presentations can be specific. Tronox discusses in its quarterly results earnings calls such matters as changes in sales volume, changes in the selling prices by region, margin information, and operation related information such as relative plant utilization rate and inventory levels. Tronox publicly announced in a second quarter 2015 earnings call its decision to reduce production at two facilities, including Tronox’s Hamilton plant, and specifically noted that “these processing line curtailments represent approximately 15% of total pigment production.” In a first quarter 2016 conference call, Tronox described its plan to continue to be “disciplined” about production and not to bring back “full production” on the first sign of price recovery. In a second quarter 2016 earnings call, Chemours stated its prediction that for “the rest of the year, you’ll see a cadence up in our price as you look at third quarter” At a basic materials conference sponsored by Goldman Sachs, the executive vice president of Huntsman (now Venator) stated: “Well, there’s the April 1 effective price increase. It was roughly \$235 a ton, nominated. And we have communicated and signaled that we would expect the realization on that price would be on the upper end of what we’ve been realizing over the last 3 or 4 quarters. That is closer to 2/3, 70% realization.”.

Publicly disclosing information in a market characterized by interdependence can serve as a signal to the market, enhancing predictability and the potential for tacit coordination. North American chloride TiO₂ producers over the years have increased TiO₂ prices typically in close proximity to each other in time. For example, Chemours announced a price increase of \$150 per metric ton on December 17, 2015. Within about a half hour of learning this information, Mr. Casey of Tronox reacted by directing that “[w]e will put out a [redacted] global price increase announcement of our own before

9:30 tomorrow,” which Tronox did. In an internal email, Tronox explained that, with its price increase, Tronox was “testing whether [the market] is ready for price increases or at least to stop declines.” Cristal learned of the price increase by Tronox on the same day it was announced, and remarked in an internal email: “Tronox follows the trend. . . . Expectedly, other TiO₂ manufacturer’s [sic] may follow the trend.” Cristal characterized these announced pricing moves as “an initiative to taste the market readiness to accept this announced price increase.” Later that day on December 18, 2015, Cristal confirmed that both Chemours and Huntsman had also announced price increases. From Cristal’s perspective, the December 2015 price increase announcements were “[n]ot based on supply/demand dynamics.”

In another example, shortly after Tronox publicly announced in its second quarter 2015 earnings call its decision to reduce production at its Hamilton plant, Chemours closed its Edge Moor plant in Delaware, and shut down a production line at its Johnsonville, Tennessee plant, removing 150,000 metric tons of capacity. Tronox considered this “Good news!!” with then-CEO Mr. Casey responding that “[i]t’s good that [Chemours] can follow the leader!”

The Acquisition will increase the competitive information available to market participants through earnings calls and similar public presentations. Tronox, Chemours, Kronos, and Venator are publically traded companies, and therefore required to report earnings and similar business information to investors and others in the ordinary course of business. Presently, Cristal is a privately held company. With the merger, all participants will be reporting as public companies.

Chloride TiO₂ producers also monitor competitive actions in the market through information obtained from their customers. It is part of Tronox’s price increase implementation process to collect competitive intelligence on its competitors’ pricing in order to assess whether its competitors are “maintain[ing] a disciplined approach” with respect to a price increase. Customer-provided information is included in reports provided to senior management and is used to make pricing decisions. In many instances, this can include specific pricing information. *E.g.*, F. 276 (“Per [redacted] , Purchasing Mgr, Kronos and DuPont have moved their price by [redacted]”); F. 276 (“customer confirmed Kronos is taking them up ”; F. 276 (describing that Cristal is offering [redacted] per pound lower than Tronox at [redacted]); F. 279 (Cristal email reporting that customer “indicated that Huntsman offered [redacted] for volume . . . ”); F. 279 (internal Cristal email stating: “Our refusal to . . . meet [redacted] price resulted in [a customer] moving 5 trucks per month away from us and over to [redacted] . . .”). Competitor price information, once disclosed, gets further communicated within the market “from competitor to customer to other supplier.”¹⁰

¹⁰ Respondents contend that customer-provided pricing information is not reliable because customers in a negotiation may not necessarily be truthful about competing offers. RRFF 476-85. However, the fact that suppliers report and rely on customer-provided competitor pricing information in making their own pricing decision is indicative of the information’s reliability. In addition, Cristal’s redbook, a data compilation, uses customer-provided sales information to track suppliers’ sales volumes, and market share data calculated from the data proved to be a close match to market

Fifth, the fact that the chloride TiO₂ market has low demand elasticity makes coordination more profitable, which increases incentives to coordinate. Price elasticity of demand is how responsive demand is to changes in price. Inelastic demand makes a market more susceptible to coordination because if prices of all firms were to rise, few sales would be lost, which makes the reward for coordinating greater. Here, the price elasticity of demand for chloride TiO₂ in North America is low.¹¹

iii. Respondents' opposing arguments

Respondents argue that Complaint Counsel has failed to prove that coordinated effects are likely, citing *United States v. Oracle Corporation*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004). RB at 57. Oracle does not support Respondents' argument. In that case, the court denied a preliminary injunction under Section 7, finding, among other things, that "the products of Oracle and SAP are not homogeneous, but are differentiated products, and that the pricing of these products is not standardized or transparent." 331 F. Supp. 2d at 1109. Indeed, the plaintiffs in Oracle did not contend that any of those conditions were present in the proposed merger. *Id.* at 1113. In the instant case, by contrast, the evidence proves that chloride TiO₂ is a commodity product and suppliers are able to gain relatively detailed and specific information about competitors' pricing.

Respondents further assert that the evidence fails to show coordination has occurred in the past. However, as explained above, proof of prior tacit coordination is not necessary to demonstrate a reasonable probability of future coordination. *See Arch Coal*, 329 F. Supp. 2d at 116. Respondents additionally contend that coordination would be difficult to conceive, monitor, or enforce because announced prices are not necessarily the actual price paid by customers; rather, prices are individually negotiated with each customer. Respondents' argument ignores the facts that suppliers obtain reliable information about actual prices being offered by the competition directly from customers, among other sources, and that such information spreads to other suppliers in the market. Moreover, knowledge of precise competitor pricing is not necessary to be able to coordinate price movements through parallel price increases, which are publicly disclosed. In any event, it is not necessary to demonstrate that market participants can form and enforce an agreement. Coordinated interaction includes a range of conduct, and can involve parallel conduct "in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence but nevertheless emboldens price increases and

shares calculated from actual data derived from suppliers' invoices. The totality of the evidence belies the notion that customers routinely provide false information as part of the negotiation process.

¹¹ It is also noteworthy that customers in the relevant market are concerned about the increased consolidation of suppliers post-Acquisition. F. 293 (Mr. Vanderpool of True Value testifying: "[We're] going from five major suppliers down to four major suppliers . . . [redacted]. So we see raw material prices continue to go up and tightening in the market from allocation, and that's a very big concern of ours"); F. 294 (Ampacet email stating, "The acquisition of Cristal by Tronox is cause for concern for Ampacet" noting the "20% reduction in [its] supply base").

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weakens competitive incentives to reduce prices or offer customers better terms.” Merger Guidelines § 7.

Respondents also argue that TiO₂ sales are subject to “fierce competition.” Respondents assert that most customer contracts do not set price but rather provide for prices to be negotiated; that contracts typically contain an option to switch suppliers if they find a better price (a “meet or release” clause), which can result in a lower price; and that buyers “pit” suppliers against each other to obtain a lower price. However, such evidence does not logically preclude a finding that the market is also vulnerable to coordination, particularly where, as here, the market is characterized by oligopolistic interdependence, exacerbated by relative transparency and product homogeneity.¹² Furthermore, “[a]s the statutory language suggests, Congress enacted Section 7 to curtail anticompetitive harm in its incipency.” [*In re*] *Polypore*, [Int’l, Inc., 150 F.T.C. 586, 598 (FTC Nov. 5, 2010) (No. D-9327),] 2010 WL 9549988 at *8 (citing *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d [410,] at 423 [(5th Cir. 2008)]) (emphasis added). *See also* Merger Guidelines § 7.1 (“Pursuant to the Clayton Act’s incipency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.”).

iv. Summary

Based on the foregoing, the evidence proves that the North American chloride TiO₂ market is vulnerable to coordinated conduct, and that this vulnerability will be enhanced by the Acquisition.

NOTES

1. The theory of coordinated effects has two elements: (a) the relevant market must be susceptible to coordinated interaction (oligopolistic interdependence); and (b) the merger must increase the likelihood or success of coordinated interaction. In the *Tronox* excerpt, be sure you know the headline factual findings supporting each element. Note that most of the factual findings go to susceptibility; if a market is susceptible to coordinated interaction, the then elimination of the independence of a major competitor through a horizontal merger is usually enough to support a finding of increased likelihood or success.

¹² According to the Merger Guidelines, “meet or release” clauses tend to increase the vulnerability of a market to coordinated interaction by increasing visibility of competitive initiatives. *See* Merger Guidelines § 7.2 (“A market typically is more vulnerable to coordinated conduct if a firm’s prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.”).

**NEW YORK V. DEUTSCHE TELEKOM AG,
439 F. Supp. 3d 179, 234-37 (S.D.N.Y. 2020)
(excerpt on coordinated effects¹)**

VICTOR MARRERO, J.

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

...

C. ADDITIONAL EVIDENCE OF ANTICOMPETITIVE EFFECTS

Defendants' rebuttal of Plaintiff States' prima facie case now leaves Plaintiff States with the ultimate burden of proof. Plaintiff States attempt to carry this burden by showing that: (1) the Proposed Merger would increase the likelihood that the three remaining MNOs [mobile network operators] would effectively agree, whether explicitly or merely through mutual awareness, that competing less strenuously and thus delivering fewer consumer benefits would be in their collective interests ("coordinated effects" of the merger); and (2) the lost competition between Sprint and T-Mobile would cause New T-Mobile to charge higher prices than T-Mobile ordinarily would have without the merger, regardless of its remaining competitors' actions ("unilateral effects" of the merger). As evidence that these two effects are likely, Plaintiff States relied primarily on the testimony of [Professor Carl] Shapiro as supplemented by various emails and internal presentations suggesting that during the course of merger discussions, T-Mobile and Sprint considered the possibility that the Proposed Merger might create opportunities to charge higher prices or otherwise decrease competition.

The Court addresses each type of effect in turn and concludes that neither is reasonably likely, particularly in the short term. As further detailed in Section II.D. below [omitted in this excerpt], each type of effect would require that T-Mobile

¹ Record citations omitted.

reverse course and effectively disestablish the business strategy and reputation it has developed over the past decade, even though the Proposed Merger gives it the ability to simply continue that business strategy on a greater scale and thus compete more effectively with the current market leaders AT&T and Verizon. The likelihood of coordinated or unilateral effects is further diminished by Sprint's decline and DISH's entry into the RMWTS Markets.

1. Coordinated Effects

Coordinated effects analysis reflects the theory that “where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.” *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986). The Merger Guidelines set forth the framework by which the DOJ and FTC assess whether a given merger will cause coordinated effects. Beyond the market share analysis used to establish a prima facie case described above, the DOJ and FTC's coordinated effects analysis considers whether the relevant market “shows signs of vulnerability to coordinated conduct” and whether there is “a credible basis on which to conclude that the merger may enhance that vulnerability.” Merger Guidelines § 7.1.

Plaintiff States' economic expert Shapiro calculated that the coordinated effects of the Proposed Merger would result in annual consumer harm of \$8.7 billion. Under Shapiro's theory, this harm would result from New T-Mobile [the merged company], AT&T, and Verizon “pulling their punches,” or competing less strenuously and allowing market prices to stabilize or decline at a lower rate than the 6.3 percent decline in average revenue per user (“ARPU”) observed from 2014 to 2017. Shapiro stated that this behavior would in turn result from several industry characteristics that he claims make the RMWTS Market vulnerable to anticompetitive coordination: that there are only a few large firms in the market, that the firms are very similar, that consumer demand is both predictable and inelastic (that is, not greatly affected by price changes), that there are high barriers to entry, and that prices are transparent and rapidly monitored.

Defendants challenge both that the RMWTS Market is vulnerable to coordination and that without the merger prices would continue to decline at the rate claimed by Shapiro. They note that technically ARPU is not the price that consumers pay, and that instead the Bureau of Labor Statistics' producer price index indicates that the prices for cellular and wireless communications have not declined from 2018 to 2019 despite declining in earlier years. Their economic expert, [Professor Michael] Katz, adds that if the producer price index is followed instead, the \$8.7 billion harm calculated by Shapiro disappears completely. Katz also questions how similar the major competitors are, considering the various degrees to which they differentiate their mobile wireless services beyond price, such as particular handset deals, various family or data plans, and bundling with content or other communications services beyond the RMWTS Market itself. Katz claims that these various non-price differentials also complicate Plaintiff States' picture of a market with transparent prices, given firms' incentives to continue innovating and distinguishing themselves from their competitors.

The Court agrees . . . that the RMWTS industry is not particularly vulnerable to coordination. As both sides acknowledge, price is not the only dimension on which competition occurs. The non-price factors listed above demonstrate the various strategies that competitors in the market might pursue, drawing also into question whether the firms' pricing is truly so transparent. For example, while T-Mobile might try to compete primarily on the basis of its capacity advantages, AT&T might try to leverage the entertainment content provided by its merger with Time Warner, and a cable MVNO [mobile virtual network operators] like Comcast might advertise the convenience of bundling mobile wireless services with fixed in-home broadband and cable services. Considering also the rapidly changing nature of mobile wireless technological offerings, opportunities for innovation and differentiation may abound and materially alter the terms of competition. Indeed, that Plaintiff States characterize two of the largest four firms in the RMWTS Market as "mavericks" reflects that the market is not so vulnerable as they otherwise suggest. The DOJ's efforts to surmount the industry's admittedly high barriers to entry and position DISH as a new maverick also contradict the claim that the RMWTS Market is vulnerable to coordination. Finally, Shapiro conceded that asymmetric capacity utilization decreases the likelihood of coordination, which is particularly relevant because of the evidence indicating that New T-Mobile would have significantly more unused capacity than AT&T and Verizon.

As evidence that the Proposed Merger presents a credible threat in a vulnerable market. Plaintiff States also cite a number of documents in which employees of Defendants appear to have considered the prospect of anticompetitive coordination. While Defendants do not contest that evidence of intent may be relevant in a Section 7 case, the Court notes an apparent tension with the Second Circuit's guidance that "it is elementary that [one merging party's] intentions in acquiring [the other merging party] are not to be considered in determining whether a Section 7 Clayton Act violation occurred." *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 30 (2d Cir. 1973). But even if this Court could not consider Defendants' intentions in this exact manner, it will nevertheless weigh the evidence cited by Plaintiff States because it might shed light on whether the RMWTS Market is vulnerable to coordination, and whether the Proposed Merger presents a credible threat of coordination in the market.

The main evidence that Plaintiff States cite for the potential of coordination are statements from DT executives suggesting that they supported a "4-to-3" merger of MNOs in the United States because they believed a consolidated market would be more profitable. Plaintiff States also cite some documentary evidence from Sprint suggesting this potential; for example, Sprint's Chief Marketing Officer Roger Sole-Rafols ("Sole-Rafols") suggested to Claure that the Proposed Merger could "end up accommodating plus \$5 ARPU in a three-player scenario [including AT&T and Verizon]" and that this demonstrated "the benefit of a consolidated market." Plaintiff States additionally cite multiple T-Mobile and Sprint communications for the proposition that anticompetitive price signaling is already occurring in the RMWTS Market.

The Court is not persuaded that the evidence Plaintiff States point to forms a sufficiently credible or plausible basis to conclude that the Proposed Merger will substantially lessen competition. First, the Court disagrees that the DT statements merit the weight that Plaintiff States ascribe to them.^[2] Though DT is T-Mobile's controlling shareholder, the Court places less weight on DT executives' theories regarding the effects of consolidation in a foreign market than T-Mobile's actual history of aggressive competition and the incentives for the company to continue competing that the Proposed Merger would provide. Sole-Rafol's statements lack significant probative value for similar reasons, including that Sole-Rafols lacks any input on T-Mobile pricing or regulatory strategy and stressed at trial that he expressed this hypothetical without any underlying basis. In any event, that DISH will become a fourth MNO in the RMWTS Market effectively nullifies the value of any speculation regarding the potential coordinated effects of a 4-to-3 merger.

Finally, the signalling emails also do not merit the weight they might warrant at first glance. For example, Langheim's notes clearly indicate that any attempts by T-Mobile at signalling failed and that the market was in fact "now at war."^[3] Similarly, the correspondence between the two Sprint employees described above appears to have been speculation, in fact largely contradicted by the employees' own observations in the same discussion that "[Legere's] antagonistic approach to competition destroys profitability for the whole industry" and that "[Claire] may take a while [to start anticompetitively colluding] because of strong ego and competitiveness."^[4] The other two documents cited by Plaintiff States do little to indicate that the market is actually vulnerable to coordination, either. Since they are hardly probative of the market's vulnerability to coordination, the Court is also not persuaded that they indicate the Proposed Merger would likely present a credible threat of coordination.

Even putting aside the infirmities that undermine the value of the preceding evidence, the Court has spent two full weeks assessing the credibility of each witness and their claims regarding whether coordination would be more or less likely in the RMWTS Market. "Antitrust theory and speculation cannot trump facts, and . . . cases must be resolved on the basis of the record evidence relating to the market and its probable future." *FTC v. Arch Coal, [Inc.]*, 329 F. Supp. 2d [109] at 116-17 (D.D.C. 2004)]. The Court finds that the fact of aggressive competition over the past decade is not so easily reversed, a point the Court elaborates on in Section II.D below. T-Mobile has built its identity and business strategy on insulting, antagonizing, and otherwise challenging AT&T and Verizon to offer pro-consumer packages and lower pricing, and the Court finds it highly unlikely that New T-Mobile will simply rest satisfied with its increased market share after the intense regulatory and public scrutiny of this transaction. As Legere and other T-Mobile executives noted at trial, doing so would essentially repudiate T-Mobile's entire public image. The evidence indicated that the

^[2] *Ed.*: Deutsche Telekom AG ("DT") was the controlling shareholder of T-Mobile.

^[3] *Ed.*: Thorsten Langheim was a DT board member.

^[4] *Ed.*: John Legere was T-Mobile's CEO. Marcelo Claire was Sprint's CEO.

same executive team that has brought T-Mobile success will continue to lead New T-Mobile, and the merger will provide T-Mobile with the increased capacity that enabled it to pursue the Un-carrier strategy in the first place. Having heard Defendants emphasize the asymmetric capacity advantage that New T-Mobile would have over AT&T and Verizon, the Court concludes that New T-Mobile would likely make use of that advantage by cutting prices to take market share from its biggest competitors. [record citations]; *see also* Merger Guidelines § 2.1.5 (“A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick, as can a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.”).

Finally, the Court reiterates that the entry of DISH undermines the notion that there will be fewer firms in the market and that coordination will thus be more likely. Even if DISH will initially enter the market at a relatively small scale, the tendency toward anticompetitive coordination “may well be thwarted by the presence of small but significant competitors” such as DISH would be. *See Stanley Works v. FTC*, 469 F.2d 498, 507 (2d Cir. 1972) (internal quotation marks omitted). Trial witnesses were virtually unanimous that DISH chairman [Charles] Ergen is a tough businessman not known to be particularly accommodating of his rivals. Indeed, their numerous references to Ergen as a “poker player” suggest that anticompetitive signaling with DISH would be a difficult endeavor. Having assessed the credibility of DISH’s witnesses at trial, the Court is persuaded that, given its extensive preparations and the favorable remedies arranged by the DOJ, DISH fully intends to enter the RMWTS Markets vigorously and assume the mantle of a new maverick. This fact, combined with the high likelihood that New T-Mobile will compete aggressively, renders improbable any potential coordinated effects of the Proposed Merger.

NOTES

1. In an interesting paper, Thomas W. Hazlett & Robert Crandal argue that the T-Mobile/Sprint merger produced consumer gains, while at the same time finding that the consent decree requiring T-Mobile to divest assets—including Sprint’s prepaid businesses (Boost Mobile, Virgin Mobile, and Sprint-branded prepaid customers), Sprint’s 800 MHz spectrum licenses, and access to at least 20,000 cell sites and hundreds of retail locations to Dish Network—to create a new fourth network has had no plausible procompetitive impact. Price trends indicate a decline in real wireless service prices, with the Bureau of Labor Statistics data showing an 11.79% decrease in the three years following the merger, compared to an 8.22% reduction in the three years prior. Service quality also improved markedly, especially with the rapid expansion of T-Mobile’s 5G network, which soon surpassed Verizon and AT&T in coverage and download speeds. Network investment saw a significant boost, with U.S. mobile carriers increasing their capital expenditures from \$58.9 billion in 2018-2019 to \$63.5 billion in 2020-2021. Subscriber growth also accelerated, with a 20.3% increase in the ten quarters following the merger, up from a 13.0% increase in the ten

previous quarters. Additionally, T-Mobile's stock outperformed the market, while Verizon and AT&T lagged, suggesting that the merger gave T-Mobile competitive advantages without diminishing market competition. Finally, T-Mobile continued to lead with its "Un-Carrier" strategy, offering consumers lower prices and more flexible plans compared to its rivals, ultimately enhancing consumer choice and affordability. See Thomas W. Hazlett & Robert Crandall, *Competitive Effects of T-Mobile/Sprint: Analysis of a '4-to-3' Merger*, Proceedings of the TPRC2024 The Research Conference on Communications, Information and Internet Policy (Feb. 20, 2024).

**UNITED STATES V. BERTELSMANN SE & CO. KGAA,
646 F. Supp. 3d 1, 44-46 (D.D.C. Nov. 15, 2022)
(excerpt on coordinated interaction¹)**

FLORENCE Y. PAN, United States Circuit Judge

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

. . .

ii. Coordinated Effects

Another avenue for the government to prove competitive harm is by showing a likelihood of “coordinated effects,” which occur when market participants mutually decrease competition in the relevant market. [*United States v.*] *AT&T*, 310 F. Supp. 3d [161] at 246 [D.D.C. 2018]] (“A proposed merger may violate Section 7 by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers.” (cleaned up)) [, *aff’d*, 916 F.3d 1029 (D.C. Cir. 2019)]; *see also* Merger Guidelines § 7 (“Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.”). Coordinated effects can arise from an express or implied agreement among competitors, *see F.T.C. v. CCC Holdings*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009); or from “parallel accommodating conduct” among competitors without a prior agreement, Merger Guidelines § 7. Parallel accommodating conduct involves “situations in which each rival’s response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price [decreases] and weakens competitive incentives to [raise advances] or offer [authors] better terms.” *Id.*

Coordinated effects are likelier in concentrated markets; indeed, the idea that concentration tends to produce anticompetitive coordination is central to merger law. *See [FTC v. H.J.] Heinz [Co.]*, 246 F.3d [708] at 716 [(D.C. Cir. 2001)] (“Merger law ‘rests upon the theory that, where rivals are few, firms will be able to coordinate their

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

behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.”) (quoting *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986)). Therefore, when the government has shown that a merger will substantially increase concentration in an already concentrated market—as it has done here—“the burden is on the defendants to produce evidence of ‘structural market barriers to collusion’ specific to this industry that would defeat the ‘ordinary presumption of collusion’ that attaches to a merger in a highly concentrated market.” *H&R Block*, 833 F. Supp. 2d at 77 (quoting *Heinz*, 246 F.3d at 725).

As an initial matter, a history of collusion or attempted collusion is highly probative of likely harm from a merger. See *Hosp. Corp. [v. FTC]*, 807 F.2d [1381] at 1388 [(7th Cir. 1986)]; see also *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (“[A]n acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful in the absence of special circumstances.”); *H & R Block*, 833 F. Supp. 2d at 78; *Tronox*, 332 F. Supp. 3d at 208–210; Merger Guidelines § 7.2. Thus, it is significant that in *United States v. Apple, Inc.*, the Second Circuit upheld a finding that between 2009 and 2012, all the “Big Six”³¹ publishers, except for Random House, participated in a “horizontal conspiracy . . . to raise e[-]book prices.” See 791 F.3d at 339. This coordination involved “numerous exchanges between executives at different Big Six publishers,” “constant communication” among the publishers “regarding their negotiations with both Apple and Amazon,” and “frequent telephone calls among the Publisher Defendants.” *Id.* at 302, 318. “[T]he Big Six operated in a close-knit industry and had no qualms communicating about the need to act together.” *Id.* at 300. The Second Circuit concluded that the publishers engaged in “express collusion” that was a per se violation of antitrust law. *Id.* at 316, 321–29. Although Random House did not participate in the conspiracy, Penguin Books and S&S both did, see *id.* at 308, and this “history of successful cooperation establishes a precondition to effective collusion—mutual trust and forbearance.” See *Hosp. Corp.*, 807 F.2d at 1388. The case portrays an industry already “prone to collusion,” which may become “even more prone to collusion” after the proposed merger of its largest and third-largest competitors. See *Elders Grain*, 868 F.2d at 905-06.

The *Apple* case provides the backdrop for trends in the industry that appear to demonstrate that the Big Five are already engaging in tacit collusion or parallel accommodating conduct when acquiring books. Recent years have seen the industry-wide standardization of certain contract terms—involving payment structure, audio rights, and e-book royalties—in ways that favor publishers over authors, suggesting that the top publishers have engaged in coordinated conduct. Advances used to be paid to authors in two installments, but publishers uniformly moved to paying them in three installments and then four installments, thereby delaying authors’ compensation. After audiobooks became a significant source of revenue in the industry, publishers uniformly refused to acquire books without audio rights included, thereby limiting authors’ ability to maximize their compensation and preventing authors from diversifying their sources of income. See *id.* In addition, during the early years of e-books, publishers uniformly shifted e-book royalty rates from 50 percent to 25 percent,

thereby reducing authors' compensation. Thus, in an industry where the competition to acquire anticipated top sellers is intense, the competing publishers nevertheless choose, almost always, not to gain advantage by offering more favorable contract terms. This phenomenon bespeaks a tacit agreement among the publishers to compete only on the basis of advance level because it collectively benefits them not to yield on other contract terms. *Accord H & R Block*, 833 F. Supp. 2d at 77-78 (“[A] highly persuasive historical act of cooperation between [competitors]” supports the theory that “coordination would likely take the form of mutual recognition that neither firm has an interest in an overall ‘race to free’”).

One example involving audio rights is illustrative. When selling the publishing rights to [Redacted] highly sought-after book, her agent attempted to hold an auction that excluded audio rights. S&S wanted the book but refused to bid because “[t]he only way to prevent agents from breaking off audio rights like this is to hold firm to our policy of no deals without audio rights.” An S&S editor ruminated, “It will be very interesting to see whether PRH, Hachette, Harper or Macmillan participate. M[y] understanding is that they too have the ‘no audio, no deal’ rule.” *Id.* The agent was forced to restart the auction with audio rights included, presumably because the book received insufficient offers or only received offers that included audio. See PX 320 at 1 (in the first round, PRH bid for bundled audio rights in violation of the auction’s initial rules). In the renewed auction that included audio rights, the bidding was fervid and reflected vigorous competition. This episode starkly demonstrates that the publishers, despite their great enthusiasm for the book, initially engaged in parallel conduct to deny the author the ability to exclude audio rights from the auction. The parallel conduct was effective and mutually beneficial, as the publishers all retained the opportunity to acquire the book, with their preferred contract term concerning audio rights. Based on this evidence, the Court finds that the Big Five publishers have engaged in tacit coordination that is profitable for those involved.

Finally, it is significant that in a market already prone to collusion, where coordinated conduct already appears to be rampant, PRH’s acquisition of S&S would reinforce the market’s oligopsonistic structure and create a behemoth industry leader that other market participants could easily follow. The Big Five publishers already control 91 percent of the relevant market. The merger would distill the Big Five to a Big Four, with an overwhelmingly dominant top firm, PRH-S&S, controlling 49 percent of the market and dwarfing its nearest competitors. In the newly reconfigured market, the top two firms, the merged entity and [Redacted] would have a 74-percent market share. Under such circumstances, coordinated effects are likely through “sheer market power” because the “post-merger market would feature two firms that control roughly three quarters” of the market. *Tronox*, 332 F. Supp. 3d at 209; *see also Heinz*, 246 F.3d at 724 n.23 (recognizing that “price leadership” is “a danger” in a “duopoly” market). The merger would thus increase the market’s already high susceptibility to coordination.

NOTES

1. Judge Florence Pan was a district court judge at the time of trial. Before she rendered her decision in the case, she was elevated to the United States Court of Appeals for the District of Columbia.

2. After a three-week trial in the summer of 2022, Judge Pan entered final judgment permanently enjoining the acquisition on November 2, 2022. Although Bertelsmann's response to the decision was to seek an expedited appeal, on November 21, 2022, the extended drop-dead date of the acquisition agreement, ViacomCBS exercised its unilateral right to terminate the contract, mooted any appeal.² Subsequently, Bertelsmann paid ViacomCBS a \$200 million antitrust reverse breakup fee. ViacomCBS reacquired Simon & Schuster, where it was purchased by KKR, a private equity firm, for \$1.62 billion.

3. The decision marks the first victory for the Biden DOJ in a merger challenge litigated to a decision. Until this decision, the DOJ had suffered multiple losses in merger cases, including failed challenges to Booz Allen's acquisition of EverWatch,³ UnitedHealth Care's acquisition of Change Healthcare,⁴ and U.S. Sugar's purchase of Imperial Sugar.⁵

² See Porter Anderson, [On the Termination of the PRH-Simon & Schuster Deal](#), PublishingPerspectives.com, Nov. 22, 2022.

³ United States v. Booz Allen Hamilton Inc., No. CV CCB-22-1603, 2022 WL 9976035 (D. Md. Oct. 17, 2022) (denying DOJ's motion for a preliminary injunction), *denying injunctive relief pending appeal*, No. CV CCB-22-1603, 2022 WL 16553230 (D. Md. Oct. 31, 2022).

⁴ United States v. UnitedHealth Grp. Inc., No. 1:22-CV-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 21, 2022) (final judgment in favor of merging parties), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023).

⁵ United States v. U.S. Sugar Corp., C.A. No. 21-1644 (MN), 2022 WL 4544025 (D. Del. Sept. 9, 2022) (final judgment in favor of merging parties), *aff'd*, 73 F.4th 197 (3d Cir. 2023).

Elimination of a Maverick

**U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N,
HORIZONTAL MERGER GUIDELINES § 2.1.5 (REV. AUG. 19, 2010) (MAVERICKS)**

2.1.5 Disruptive Role of a Merging Party

The Agencies consider whether a merger may lessen competition by eliminating a “maverick” firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers. For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition. Likewise, one of the merging firms may have the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices. A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick, as can a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.

**U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N,
MERGER GUIDELINES § 2.3.A (REV. DEC. 18, 2023)**

Elimination of a Maverick. A maverick is a firm with a disruptive presence in a market. The presence of a maverick, however, only reduces the risk of coordination so long as the maverick retains the disruptive incentives that drive its behavior. A merger that eliminates a maverick or significantly changes its incentives increases the susceptibility to coordination.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

In the Matter of

**Edgewell Personal Care Company,
a corporation**

and

**Harry's, Inc.,
a corporation.**

Docket No. 9390

PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Edgewell Personal Care Company ("Edgewell") and Harry's, Inc. ("Harry's") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. NATURE OF THE CASE

1. On May 9, 2019, [REDACTED], Edgewell signed an agreement to purchase Harry's, a rival manufacturer and seller of razors. Harry's successful 2016 leap from online, direct-to-consumer sales into brick-and-mortar retail stores interrupted over a decade of routine price increases by a once-stable duopoly. This interruption has led to lower prices and new product offerings for razor consumers. The Proposed Acquisition would neutralize "one of the most successful challenger brands ever built," eliminating head-to-head competition between Harry's and Edgewell, and removing the independent competitor that disrupted Edgewell and P&G's longstanding and stable duopoly.

2. Historically, P&G's Gillette brand and Edgewell's Schick brand have dominated the system razors and disposable razors ("wet shave razors") industry. Throughout the years of their shared dominance, Gillette led price increases [REDACTED]. [REDACTED]

██ P&G and Edgewell rolled out new and fancier products. Razor manufacturers enjoyed exceptionally high margins, while consumers suffered.

3. As the 2010s progressed, P&G and Edgewell raised their prices ever higher. Purchasers of razors were, as Harry's founders put it, tired of "overpaying for overdesigned razors." Harry's saw an opening: a market ripe for disruption and an untapped platform—the Internet—on which to disrupt. Harry's founders correctly recognized that the market was looking for a no-frills, value-priced system razor product that delivered "a great shave at a fair price." Seizing this opportunity, Harry's, like fellow start-up Dollar Shave Club, launched an Internet-based business to market and sell men's razors directly to consumers at a lower price point than the most comparable razors then available in brick-and-mortar retail stores.

4. Harry's and Dollar Shave Club quickly succeeded in—and largely filled—the previously untapped online space. But the successful entry by Harry's and Dollar Shave Club with their online Direct to Consumer (“DTC”) models did not stop the price increases by P&G and Edgewell, both of which sold their products primarily through brick-and-mortar retailers.

5. Significant change came when Harry's made the first—and, to date, only—successful jump from an online DTC platform into brick-and-mortar retail. In August 2016, Harry's launched exclusively at Target with suggested retail prices several dollars below the most comparable Schick and Gillette products, a significant discount. Harry's arrival in Target made a substantial impact, with Harry's immediately winning customers from Edgewell and P&G. Edgewell described Harry's trajectory as one of "[REDACTED]" and observed that Harry's took "[REDACTED]."

6. Harry's entry at Target ended the long-standing practice of reciprocal price increases by Gillette and Edgewell. Shortly after Harry's successful launch at Target, P&G implemented a "[REDACTED]" price reduction across its portfolio of razors, reversing course on its practice of leading yearly price increases. Edgewell changed course as well, abandoning its strategy of being a "[REDACTED]" of Gillette's pricing actions. Rather than match Gillette's [REDACTED] price decrease, Edgewell began tracking Harry's growth and increased promotional spend (funding for discounts and other promotions) [REDACTED]. Edgewell hoped that this effort would "[REDACTED]," [REDACTED]

7. But Harry's continued its competitive advance. In May 2018, Harry's launched at Walmart—again, successfully stealing shelf space and customers from Edgewell and Gillette.

8. Harry's successful launch at Walmart, coupled with Harry's ongoing success at Target, "[REDACTED]." Bowing to this competitive pressure, Edgewell implemented its own significant [REDACTED] price decrease, lowering the prices on its razors by as much as [REDACTED]. Edgewell also [REDACTED] with a variety of other competitive initiatives [REDACTED], competing on price and non-price attributes, including creating "[REDACTED]" razors:

9. Head-to-head competition between Harry's and Edgewell further intensified when, in October 2018, Harry's launched its first women's razor under the Flamingo brand. Edgewell preemptively reduced prices on its Hydro Silk women's razors and ran aggressive promotions [REDACTED] in anticipation of, [REDACTED], Flamingo's entry into Target. Again, Edgewell's efforts did not stop Harry's, although they may have slowed its momentum. Flamingo has taken significant market share from both Edgewell and Gillette at Target, and Target made room on its shelves for Flamingo at [REDACTED] expense.

10. Harry's significant entry into brick-and-mortar retail transformed the wet shave razor market from a comfortable duopoly to a competitive battleground. Edgewell, in particular, has found itself fighting the threat that Harry's poses to both its branded products and its private label offerings (i.e., razors manufactured by Edgewell for a retailer partner, to be sold under the retailer's brand). Consumers benefited from the resulting price discounts and the introduction of additional Edgewell branded and private label choices.

11. The Proposed Acquisition is likely to result in significant harm by eliminating competition between important head-to-head competitors. The Proposed Acquisition also will harm competition by removing a particularly disruptive competitor from the marketplace at a time when that competitor is currently expanding into additional retailers.

12. The Proposed Acquisition would significantly increase concentration in relevant markets that are already highly concentrated today. As a result, the Proposed Acquisition is presumptively anticompetitive. Current market share statistics and concentration measures understate Harry's future competitive significance, however, because Harry's continues to expand into additional retailers with its men's and women's products.

13. Both Edgewell and P&G have publicly recognized that the Proposed Acquisition is likely to benefit them rather than consumers. Edgewell's CEO, who spent more than a decade at P&G before coming to Edgewell, recently explained on a quarterly earnings call that Edgewell is "not interested" in escalating price competition once the Proposed Acquisition is complete, or in "lead[ing] a new round . . . of value destruction"—that is, in lowering prices. On a recent quarterly earnings call, P&G's CEO explained that the Proposed Acquisition does not create a significant competitive threat to P&G's Gillette brand; to the contrary, "Edgewell's [sic] going to have to make money. They bought a company. . . . And to me, that's not a bad thing for the overall value-creation opportunities in the industry."

14. Respondents cannot show that the Proposed Acquisition will induce new entry that would be timely, likely, or sufficient to counteract the anticompetitive effects of the Proposed Acquisition. Significant barriers exist for potential new entrants into the manufacture and sale of wet shave razors, including substantial capital investment in a manufacturing facility; significant intellectual property rights and trade secret protections; the time and difficulty of attracting a broad customer base to secure placement on retailer shelves; and the fact that the market gaps in wet shave in brick-and-mortar and online that Harry's successfully exploited have been largely filled. These barriers make entry difficult and unlikely to constrain the merged entity. Nor is the Proposed Acquisition likely to induce the remaining razor manufacturers to expand or reposition to offset the Proposed Acquisition's likely anticompetitive effects.

15. Respondents cannot show cognizable, merger-specific efficiencies that would offset the likely and substantial competitive harm resulting from the Proposed Acquisition.

II. JURISDICTION

16. Respondents are, and at all relevant times have been, engaged in activities in or affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

17. The Acquisition constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

18. Edgewell is a consumer products company based in Chesterfield, Missouri, with a diversified portfolio of over 25 established brand names, including multiple razor brands, such as Schick, Intuition, Hydro Silk, Skintimate, Bulldog, American Safety Razor, and Jack Black. Edgewell also offers private label razor manufacturing for retailers and razor companies selling throughout North America, including [REDACTED]. In 2018, Edgewell’s total branded razor sales were approximately [REDACTED], broken down as follows: men’s system razors ([REDACTED]), women’s system razors ([REDACTED]), and disposable razors ([REDACTED]). Additionally, Edgewell’s total sales in 2018 for its private label business were approximately [REDACTED], broken down as follows: men’s system razors ([REDACTED]), women’s system razors ([REDACTED]), and disposable razors ([REDACTED]).

19. Harry’s, based in New York, New York, manufactures wet shave system razors and sells them through its DTC platform, online retailers, and brick-and-mortar retailers under the Harry’s and Flamingo brands. Harry’s total branded razor sales in 2018 were approximately [REDACTED]. Harry’s also manufactures private label system razors [REDACTED], and has annual private label revenue of approximately [REDACTED]. In addition to wet shave razors, Harry’s sells a variety of other personal care items such as face wash, shave creams, and body wash.

IV. THE ACQUISITION

20. On May 9, 2019, Edgewell and Harry’s signed an Agreement and Plan of Merger, pursuant to which Edgewell would acquire Harry’s. Total consideration for the Acquisition is approximately \$1.37 billion in stock and cash.

V. RELEVANT MARKETS

21. The relevant market in which to evaluate the effects of the Proposed Acquisition is no broader than the manufacture and sale of wet shave system razors and disposable razors (“wet shave razors”) sold in the United States.

22. It is also appropriate to analyze the effects of the Proposed Acquisition in narrower relevant markets within the wet shave razor market. The razor industry recognizes several distinct segments within the wet shave razor market. The relevant market may be divided by gender lines into markets of men’s and women’s products. Additionally, the relevant

market may be separated into markets for system razors and disposable razors. Finally, the relevant market may be divided by channel of sale, resulting in separate markets for brick-and-mortar sales and online sales. Analyzing the Proposed Acquisition in these segments individually would focus attention on specific narrower markets where the harm is most acute—for example, a market for men’s system razors sold in brick-and-mortar retailers. Given consumer preferences for particular retailers or retail categories, relevant markets may even be defined as narrowly as a single retailer or a cluster of retailers in which competitive conditions are similar, such as brick-and-mortar retailers where Harry’s is currently available.

A. Relevant Product Markets

23. The relevant product market is no broader than the manufacture and sale of wet shave razors, which includes system razors and disposables.

24. System razors consist of a reusable handle and a detachable razor cartridge. Consumers are able to replace the razor cartridge with refill cartridges sold by the same manufacturer without the need to replace the handle.

25. Disposable razors comprise a single assembly of handle with permanently affixed blade(s). Consumers throw away disposable razors once they are finished using them.

26. Other forms of hair removal, such as electric (or “dry”) shaving razors and alternative hair removal products (*e.g.*, hair removal creams or waxes) are not close substitutes for wet shave razors. Industry participants and Respondents recognize that wet shave razors are distinct from dry shave razors and alternative hair removal products and sell these products at distinct price points to distinct consumers.

27. Customers would not switch from wet shave razors to dry shave razors or alternative hair removal products in sufficient numbers to defeat a small but significant non-transitory increase in price (“SSNIP”) by a hypothetical monopolist of wet shave razors.

28. A relevant product market is the manufacture and sale of wet shave system razors and disposable razors.

29. Industry participants also recognize narrower product markets divided along gender lines (men’s versus women’s), by product type (system or disposable), and by channel of sale (brick-and-mortar versus online). Industry participants recognize each segment as distinct from others, and conduct their business accordingly.

30. The Proposed Acquisition would produce anticompetitive effects within multiple narrower relevant markets, in addition to producing anticompetitive effects in the broader wet shave razor market. The Proposed Acquisition would harm competition in narrower relevant markets for the sale of: (i) men’s wet shave razors; (ii) women’s wet shave razors; (iii) system razors (including both men’s and women’s); (iv) men’s system razors; and (v) women’s system razors.

31. The Proposed Acquisition would also harm competition in relevant markets for sales through brick-and-mortar retailers of: (i) wet shave razors (including both men’s and

women's); (ii) men's wet shave razors; (iii) women's wet shave razors; (iv) system razors (including both men's and women's); (v) men's system razors; and (vi) women's system razors.

32. In each of these narrower relevant markets, a hypothetical monopolist could profitably impose a SSNIP on purchasers of the relevant product.

B. Relevant Geographic Market

33. A relevant geographic market in which to analyze the Proposed Acquisition is the United States. Razor manufacturers negotiate distinct terms of sale with customers for different countries and, in some cases, offer distinct product assortments in different countries. Respondents and other industry participants generally do not make granular or distinctive purchasing decisions for smaller regions within the United States.

34. A hypothetical monopolist of wet shave razors in the United States profitably could impose a SSNIP on U.S. customers. Customers based in the United States cannot defeat a price increase in the United States via arbitrage or substitution.

VI. MARKET PARTICIPANTS

35. Edgewell is the number two manufacturer of wet shave razors and [REDACTED] the dominant supplier of private label razors in the United States. It manufactures and sells wet shave system and disposable razors for men and women. Edgewell's branded and private label products are available at many brick-and-mortar retailers and, in 2017, Edgewell launched a DTC website through which consumers may now purchase the Hydro Connect razor online directly from Edgewell. Edgewell owns over 25 consumer brands, including popular wet shave brands such as Schick, Intuition, Hydro Silk, Skintimate, Wilkinson Sword, Personna/American Safety Razor, Bulldog, and Jack Black.

36. Harry's launched in March 2013 as an online-only DTC men's system razor subscription service. Harry's does not manufacture or sell disposable razors. Harry's broke into brick-and-mortar retail in 2016 and has steadily expanded its retail distribution of men's wet shave razors since then. After launching exclusively in Target, Harry's expanded into Walmart in 2018 ([REDACTED]); and then in Hy-Vee, Meijer, Wegmans, and Kroger in 2019. In addition to its men's system razor, Harry's launched a women's system razor under the brand name Flamingo in October 2018. Shortly thereafter, Flamingo launched exclusively at Target. Flamingo is expected to reach additional retailers' shelves in the near future. In addition to its branded men's and women's razors, Harry's also manufactures a private label system razor for [REDACTED]. Harry's owns and operates its own razor factory, Feintechnik, in Eisfeld, Germany.

37. P&G is the leading manufacturer and seller of branded system and disposable razors for men and women. P&G's razors are available for purchase online and in brick-and-mortar stores. P&G owns over 50 established brand names, including razor brands Gillette Venus, Gillette Fusion, Gillette Mach3, Gillette Skinguard, Joy, Bevel, and the Art of Shaving.

38. Société BiC ("BiC") manufactures and sells primarily disposable razors for men and women. BiC razors are available for purchase online and in brick-and-mortar stores.

39. Dollar Shave Club, Inc. (“Dollar Shave Club”), now owned by Unilever plc/Unilever N.V. (“Unilever”), sells system razors marketed primarily to men using an online, DTC model. Dollar Shave Club does not manufacture or sell disposable razors, and Dollar Shave Club razors are generally not available in brick-and-mortar retail stores. [REDACTED]

40. Dorco Company Ltd. (“Dorco”) is a manufacturer and supplier of disposable and system razors for men and women. [REDACTED]

[REDACTED]. Dorco-manufactured products are available at brick-and-mortar stores and online, [REDACTED].

VII. THE PROPOSED ACQUISITION IS PRESUMPTIVELY ILLEGAL

41. The Proposed Acquisition would lead to significant increases in concentration in already highly concentrated markets for wet shave razors and in narrower relevant markets.

42. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”), a post-acquisition market concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index (“HHI”), and an increase in HHI of more than 200 points renders an acquisition presumptively unlawful. Transactions in highly concentrated markets—markets with an HHI above 2,500 points—with an HHI increase of more than 100 points potentially raise significant competitive concerns and warrant scrutiny. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market pre- and post-acquisition.

43. The market for the manufacture and sale of wet shave razors in the United States is already highly concentrated, with an HHI of over 3,000. The Proposed Acquisition increases the concentration in this market by more than 200 points and is therefore presumptively illegal.

44. All narrower relevant markets are also highly concentrated, and the Proposed Acquisition would cause significant increases in concentration therein. For example, the manufacture and sale of wet shave system razors sold through brick-and-mortar retail in the United States is already highly concentrated, with an HHI of over 5,000. The Proposed Acquisition increases the concentration in this highly concentrated market by more than 350 points, and is therefore presumptively illegal. In the following narrower relevant markets, the Proposed Acquisition increases the HHI by more than 200 points and results in a post-merger HHI of more than 2,500, rendering the Proposed Acquisition presumptively illegal:

- a. sale of wet shave razors at brick-and-mortar retailers;
- b. sale of system razors;
- c. sale of system razors at brick-and-mortar retailers;
- d. sale of men’s wet shave razors;

- e. sale of men's wet shave razors at brick-and-mortar retailers;
- f. sale of men's system razors;
- g. sale of women's system razors;
- h. sale of men's system razors at brick-and-mortar retailers;
- i. sale of women's system razors at brick-and-mortar retailers; and
- j. a cluster market composed of sales of wet shave razors at retailers where Harry's is currently available.

45. In the following narrower relevant markets, the Proposed Acquisition increases the HHI by more than 100 points and results in a post-merger HHI of more than 2,500, and potentially raises significant competitive concerns and warrants scrutiny:

- a. sale of women's wet shave razors; and
- b. sale of women's wet shave razors at brick-and-mortar retailers.

46. Changes in HHI based on current market shares understate the competitive significance of the Proposed Acquisition because Harry's continues to expand into additional brick-and-mortar retailers. Recognizing that the Proposed Acquisition will arrest Harry's independent expansion, it is appropriate to analyze Harry's competitive significance by using prior entry events to project future competitive significance. Moreover, current market shares especially understate the competitive significance of Harry's in markets that include sales of women's razors because Harry's Flamingo product launched very recently.

47. [REDACTED], the timing, scope, and competitive impact of that entry is speculative and likely would not counteract the Proposed Acquisition's competitive harm or presumptive illegality, especially when balanced against a fair projection of Harry's continued growth as a value razor product already established at retail.

VIII. ANTICOMPETITIVE EFFECTS

48. In the relevant market of wet shave razors, and in each narrower relevant market within that market, the Proposed Acquisition is likely to result in unilateral and coordinated competitive effects. The Proposed Acquisition would eliminate substantial head-to-head competition between Edgewell and Harry's, leading to higher prices for consumers—sufficient harm, on its own, to render the merger illegal. In addition, the Proposed Acquisition would also make an already susceptible market more vulnerable to coordination by eliminating a disruptive competitor.

49. P&G and Edgewell have dominated the wet shave razor market for decades, [REDACTED]. This effective duopoly was good for manufacturers and bad for consumers:

Edgewell secured gross margins as high as [REDACTED] on its branded razors while Edgewell and Gillette focused their efforts on selling high-priced razors. Prices ratcheted up, [REDACTED].

50. By the early 2010s, the wet shave razor market was ripe for disruption. Harry's founders recognized that P&G and Edgewell were failing to offer consumers a quality, no-frills system razor at a value price point. In March 2013, Harry's used the Internet to launch a men's system razor that filled this market gap by selling directly to the consumer, avoiding the initial need for distribution through brick-and-mortar retailers. As Harry's website explains: "Our founders, Jeff and Andy, created Harry's because they were tired of overpaying for overdesigned razors, and of standing around waiting for the person in the drugstore to unlock the cases so they could actually buy them. When they asked around, they learned lots of guys were upset about the situation too, so they decided to do something about it." Harry's was not alone in seeing this opportunity: Dollar Shave Club launched its online DTC platform in 2011.

51. Harry's and Dollar Shave Club soon built an online customer base, but this did not stop Edgewell and P&G from continuing their annual price increases in brick-and-mortar retail stores. Edgewell's internal documents demonstrate that [REDACTED]. As Edgewell's then-CEO explained in an earnings call, "the jury's out" on shave clubs because they would have to "become more than a shave club to really survive."

52. Everything changed in August 2016, when Harry's expanded into brick-and-mortar retail. Harry's made Target the exclusive brick-and-mortar retailer for Harry's [REDACTED]. [REDACTED] taking shelf space away from Edgewell's Schick brands, among others.

53. Harry's entry into Target marked the beginning of meaningful head-to-head competition between Harry's and Edgewell. One of Harry's general objectives was to [REDACTED] and to "[REDACTED]," and, specifically, to "[REDACTED]" at Target.

54. Harry's launch at Target was successful. At the time of its launch, Harry's [REDACTED] retail prices were roughly \$10 cheaper than P&G's Gillette and Edgewell's Schick five blade products. This pricing advantage, coupled with prime product placement, enabled Harry's to take share quickly from Edgewell and P&G.

55. Witnessing Harry's successful launch at Target, Edgewell [REDACTED] began tracking Harry's progress and started to respond competitively. Edgewell's first competitive strategy was to launch extensive promotional programming, such as [REDACTED]. Nonetheless, Edgewell lost share to Harry's.

56. In February 2017, months after Harry's successful launch at Target, P&G refrained from implementing its yearly price increase. Instead, P&G announced a significant [REDACTED] price reduction across its portfolio of wet shave razor products.

57. Edgewell decided not to follow the price cuts. Instead, Edgewell held its [REDACTED] prices steady while launching new products and offering temporary promotional programs. Because of these efforts, [REDACTED] despite Gillette's reduced prices. These efforts, however, did not prevent Edgewell from continuing to lose share to Harry's.

58. By early 2018, it was clear to an Edgewell senior executive that the industry had experienced "[REDACTED]," and it was "[REDACTED]" that Edgewell could count on "[REDACTED]."

59. In May 2018, Harry's products appeared on Walmart's shelves. Harry's [REDACTED] [REDACTED] to secure distribution, and again took substantial shelf space and sales from Edgewell.

60. As Edgewell's CEO explained to investors, Harry's launch at Walmart represented "the most significant impact" on Edgewell's wet shave business in fiscal year 2018.

61. In the end, the competitive pressure generated by Harry's successful launches at Target and Walmart defeated Edgewell's plan to maintain [REDACTED] prices. By the end of 2018, Edgewell had reduced its [REDACTED] prices significantly, by as much as [REDACTED] on some razors. At the time, Edgewell's then-CEO [REDACTED] to explain the reason for the price cuts to his board. He wrote: "[REDACTED]."

62. Not only did the competitive pressure result in price cuts by Edgewell on existing products, it also forced Edgewell to innovate by [REDACTED]. Edgewell launched [REDACTED] razors—[REDACTED] [REDACTED]—alone and in partnership with retailers.

63. On the heels of its men's system razor's growing success, Harry's launched a women's system razor under the Flamingo brand in late 2018. This time, Edgewell acted aggressively before Flamingo razors hit brick-and-mortar retail shelves, implementing preemptive price cuts on its women's system razors as part of the 2018 [REDACTED] price reduction. Edgewell also developed a [REDACTED] in response to news of Flamingo's impending entry. Despite Edgewell's efforts, Harry's gained at Edgewell's expense: Flamingo established a significant competitive foothold, and took [REDACTED] shelf space from Edgewell products.

64. This head-to-head competition continues to the present day. Harry's, with its men's and women's products at value price points, continues to be a fierce competitor. Harry's recently expanded its brick-and-mortar footprint again, selling its products in Hy-Vee, Meijer, and Kroger. And Harry's products are likely to expand into additional retailers in the near term regardless of whether Harry's is acquired by Edgewell.

65. The Proposed Acquisition is anticompetitive because it will eliminate the growing competition between Harry's and Edgewell that has been highly beneficial to consumers. As a result of that competition, consumers today enjoy lower prices on many different types of wet shave razors, and they have a broader selection of razors at value price points.

66. Edgewell recognizes the many ways it can benefit at consumers' expense by acquiring Harry's. As Edgewell's CFO put it, the "[REDACTED] [REDACTED]." Edgewell's Vice President [REDACTED] has discussed how [REDACTED]: the combined company could offer "[REDACTED]" Or, Edgewell could simply "[REDACTED] [REDACTED]."

67. In addition to the loss of important head-to-head competition between Harry's and Edgewell, the Proposed Acquisition would eliminate Harry's as a uniquely disruptive competitor that interrupted the P&G/Edgewell duopoly that Harry's founders and Edgewell's leaders variously called a "[REDACTED]," a "[REDACTED]," and "[REDACTED]." Prior to Harry's entry into brick-and-mortar retail, each year Gillette raised [REDACTED] prices; and each year Edgewell would do the same, [REDACTED]. Edgewell maintained a "[REDACTED]" strategy—[REDACTED], maintaining a consistent discount to the market leader.

68. On one occasion in 2010, Edgewell employees [REDACTED]. As a result, Edgewell [REDACTED]. Edgewell management was incensed: “[REDACTED]” [REDACTED]. Moreover, Edgewell immediately [REDACTED]. Executives subsequently noted that they had “[REDACTED]”

69. Competitive conditions for the sale of wet shave razors and narrower relevant markets display various features that make a market vulnerable to coordination as identified in the Merger Guidelines. For example, competitors can promptly and confidently observe the competitive initiatives of their rivals. And relatively few customers would switch to the deviating firm before rivals are able to respond, limiting the incentives to deviate from the terms of coordination.

70. As the above demonstrates, the Proposed Acquisition likely would result in both unilateral and coordinated competitive effects in the relevant market of wet shave razors. The anticompetitive effects alleged in paragraphs 48-69 are also illustrative of the type of harm likely to occur in each of the narrower relevant markets as a result of the Proposed Acquisition.

IX. LACK OF COUNTERVAILING FACTORS

71. Respondents cannot show that the Proposed Acquisition will induce new entry or repositioning by existing razor manufacturers that would be timely, likely, or sufficient to counteract the anticompetitive effects of the Proposed Acquisition.

72. In particular, existing competitors for the manufacture and sale of wet shave razors P&G/Gillette, Dollar Shave Club, and BiC are unlikely to reposition in a way that would deter or counteract the anticompetitive effects of the Proposed Acquisition. P&G [REDACTED] lead yearly price increases before Harry's disrupted the market rather than to compete vigorously on price. [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

73. The market for the manufacture and sale of wet shave razors, and narrower relevant markets within the wet shave category, have high barriers to entry that make timely, sufficient entry unlikely to occur.

74. In order to be a significant competitor, a razor company must be able to manufacture and sell its own blades: in other words, the razor company must build or buy a factory. Building a razor factory is expensive and can take years even with significant resources. Acquiring and running a factory may be even more costly, and few manufacturing facilities exist today.

75. Even having secured a razor factory, an entrant must navigate a thicket of intellectual property rights and trade secret protections to gain the necessary know-how to deploy its manufacturing capacity and equipment effectively. Among other things, it takes significant time, and significant investment, to develop a competitive razor blade.

76. Once the razor manufacturer has a competitive razor blade, the manufacturer must secure distribution and premier product placement at brick-and-mortar retail in order to scale. In order to secure brick-and-mortar distribution with premier shelf space, Harry's spent years establishing its brand online and then used a slow, staged rollout [REDACTED]. [REDACTED]. Replicating that process is likely to render entry or repositioning untimely, but failing to replicate that process decreases the likelihood of success.

77. Any aspiring de novo entrant seeking to follow in Harry's footsteps faces a much steeper path to scale than the one that Harry's trod. Harry's identified and exploited a market opportunity in the form of a previously unmet demand for a quality, no-frills system razor at a value price point. Harry's was successful in developing its brand through the then-nascent online market, using the Internet to sell directly to consumers. More importantly, Harry's was the first to place its product in brick-and-mortar, where it exploited a large gap in product offerings to reach a scale that allowed it to disrupt the industry giants. Any new entrant would lack Harry's early-mover advantage in the now-mature DTC space and on the now-crowded shelves of brick-and-mortar retailers. Because the size of the opportunity to be exploited is now smaller, entry is less profitable. In effect, Harry's has plucked the low-hanging fruit online and in stores.

78. Respondents cannot demonstrate cognizable and merger-specific efficiencies that would be sufficient to rebut the presumption and evidence of the Proposed Acquisition's likely anticompetitive effects.

X. VIOLATION

Count I – Illegal Agreement

79. The allegations of Paragraphs 1 through 78 above are incorporated by reference as though fully set forth.

80. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Count II – Illegal Acquisition

81. The allegations of Paragraphs 1 through 80 above are incorporated by reference as though fully set forth.

82. The Merger, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the thirtieth day of June, 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended,

the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Edgewell and Harry's were offering and planning to offer prior to the Merger.
2. A prohibition against any transaction between Edgewell and Harry's that combines their businesses in the relevant markets, except as may be approved by the Commission.
3. A requirement that, for a period of time, Harry's and Edgewell provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets
4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Harry's as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this second day of February, 2020.

By the Commission.

April J. Tabor
Acting Secretary

SEAL:

NOTES

1. One week after the complaint was filed, the parties terminated the merger agreement and abandoned the transaction. Interestingly, Edgewell's press release noted that Harry's indicated it was willing to pursue litigation.¹ The FTC complaint counsel moved to dismiss its administrative complaint as moot, and the Commission entered an order formally dismissing the case on February 25, 2020.²

¹ Press Release, Edgewell Personal Care Co., [Edgewell Personal Care to Pursue Standalone Value Creation Strategy](#) (Feb. 10, 2020).

² [Order Dismissing Complaint, Edgewell Personal Care Co.](#), No. 9390 (F.T.C. Feb. 25, 2020).

Unilateral Effects

Horizontal Merger Guidelines



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

Issued: August 19, 2010

6. Unilateral Effects

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

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

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

6.1 Pricing of Differentiated Products

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

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

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

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

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

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

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

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

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

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

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

6.2 Bargaining and Auctions

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

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

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

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

6.3 Capacity and Output for Homogeneous Products

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

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

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

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

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

6.4 Innovation and Product Variety

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

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

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

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

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

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

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

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



Merger Guidelines

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

Issued: December 18, 2023

2.2. Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.

A merger eliminates competition between the merging firms by bringing them under joint control.¹⁷ If evidence demonstrates substantial competition between the merging parties prior to the

¹⁷ The competitive harm from the elimination of competition between the merging firms, without considering the risk of coordination, is sometimes referred to as unilateral effects. The elimination of competition between the merging firms can also lessen competition with and among other competitors. When the elimination of competition between the merging firms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WILLIAM H. ORRICK, United States District Judge

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

. . .

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

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

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

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

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

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

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

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

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

Frequency of Competitors in Bazaarvoice Win/Loss Opportunities

IR500, Core R & R Products Only

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

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

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

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

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

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

Ratings and Reviews Deals Only

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

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

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

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

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

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

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

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

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

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

...

NOTES

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

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

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

UNITED STATES V. ANTHEM, INC.
236 F. Supp. 3d 171, 178-79, 215-20 (D.D.C. 2017)
(excerpt on unilateral effects¹)

AMY BERMAN JACKSON, J.

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

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

...

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

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

¹ Citations to briefs and the evidentiary record and to footnotes omitted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition, Dr. Israel searched Anthem’s data to cull out the competitive situations in which Anthem must have viewed Cigna as a particularly weak competitor because Cigna’s discounts were six to eight percentage points lower than Anthem’s. He explained that if Cigna were a close competitor, Anthem would be expected to raise its price when Cigna’s discounts were not competitive to its own. But he found that Cigna’s competitiveness on the discount factor had no statistically significant effect on Anthem’s bid.¹⁹

¹⁹ This analysis does not take into account the fact that even with its discount advantage, Anthem has been forced to fend off Cigna not by lowering its ASO fees, but by offering trend guarantees or making other concessions.

Each witness went to great lengths to discredit the other's economic evaluation of the intensity of the direct competition between the two companies. As noted above, Dr. Dranove compared the RFP [request for proposal] bidding situation to the economic model of an auction, *see, e.g.*, Dranove Tr. 943 (“[I]t’s the competition between the two top bidders that ultimately drives the price.”), while Dr. Israel favored the model of a negotiation. Dr. Dranove maintained that Dr. Israel’s negotiation model unrealistically assumed that customers would be armed with perfect knowledge about the carriers’ actual costs and profit margins when responding to a bid, and that they would know “exactly how much the insurance company is willing to sell the product for.”²⁰ According to Dr. Dranove, incorporating this assumption into the merger simulation meant that Dr. Israel’s calculation “dramatically reduce[d] the amount of harm resulting from the price increases.” Dr. Dranove also criticized Dr. Israel for failing to factor in incumbency, and the role that would play in the outcome of any solicitation. Dranove Tr. 2281–82, 2284–85, 2415–16 (“There’s a final two bidders in every single RFP What’s relevant for the win-loss is finding out when they are one and two. As I’ve testified, we don’t know who’s two, so I conditioned on incumbency.”). In response, Dr. Israel insisted that it was important to consider all instances where one of the carriers bid and lost instead of just those situations when an incumbent was unseated. He characterized Dr. Dranove’s diversion analysis as a switching study that used too small a sample and inappropriately assumed that the incumbent was always the customer’s second best option. Meanwhile, Dr. Dranove observed that Dr. Israel’s regression analysis, which was based on the ASO [administrative services only] fees in Anthem bids, did not take into account occasions when Anthem may have made other concessions to improve its offer without reducing its fees.

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

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

²⁰ In the Court’s view, neither economic model provides a perfect analogy. Dr. Dranove’s criticism that customers would not have the level of information assumed in Dr. Israel’s model has some force; notwithstanding the evidence that customers were aided by brokers who gather considerable intelligence concerning discounts and other factors, the notion that customers would be certain of a carrier’s bottom line was not established by the evidence. But there was testimony from brokers in Phase II to support Dr. Israel’s supposition that at least in some instances, the customer may initiate another round of negotiation after the final two bids have been submitted and ranked

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

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

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

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

VICTOR MARRERO, J.

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

...

2. Unilateral Effects

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

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

¹ Record citations omitted.

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

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

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

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

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

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

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

FLORENCE Y. PAN, United States Circuit Judge

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

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

...

2. Other Evidence

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

i. Unilateral Effects

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

¹ Footnotes and record citations omitted.

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

a. Head-to-Head Competition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTES

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

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

YOUNG, JUDGE of the United States¹

. . .

I. INTRODUCTION

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

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

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

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

¹ Record citations omitted.

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

October 12, 2024

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

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

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

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

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

...

2. Direct Evidence of Anticompetitive Effects

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

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

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

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

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

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

Ease of Entry Defenses

Horizontal Merger Guidelines



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

Issued: August 19, 2010

9. Entry

The analysis of competitive effects in Sections 6 and 7 focuses on current participants in the relevant market. That analysis may also include some forms of entry. Firms that would rapidly and easily enter the market in response to a SSNIP are market participants and may be assigned market shares. See Sections 5.1 and 5.2. Firms that have, prior to the merger, committed to entering the market also will normally be treated as market participants. See Section 5.1. This section concerns entry or adjustments to pre-existing entry plans that are induced by the merger.

As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.

The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate.

A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

The Agencies examine the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ. An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements. Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts. They also can be informative regarding the scale necessary for an entrant to be successful, the presence or absence of entry barriers, the factors that influence the timing of entry, the costs and risk associated with entry, and the sales opportunities realistically available to entrants.

If the assets necessary for an effective and profitable entry effort are widely available, the Agencies will not necessarily attempt to identify which firms might enter. Where an identifiable set of firms appears to have necessary assets that others lack, or to have particularly strong incentives to enter, the Agencies focus their entry analysis on those firms. Firms operating in adjacent or complementary markets, or large customers themselves, may be best placed to enter. However, the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.

In assessing whether entry will be timely, likely, and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

9.1 Timeliness

In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.

Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them. This requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry.

The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.

9.2 Likelihood

Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits. Profitability depends upon (a) the output level the entrant is likely to obtain, accounting for the obstacles facing new entrants; (b) the price the entrant would likely obtain in the post-merger market, accounting for the impact of that entry itself on prices; and (c) the cost per unit the entrant would likely incur, which may depend upon the scale at which the entrant would operate.

9.3 Sufficiency

Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable. Entry may also be insufficient due to constraints that limit entrants' competitive effectiveness, such as limitations on the capabilities of the firms best placed to enter or reputational barriers to rapid expansion by new entrants. Entry by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient. Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage.



Merger Guidelines

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

Issued: December 18, 2023

3.2. Entry and Repositioning

Merging parties sometimes raise a rebuttal argument that a reduction in competition resulting from the merger would induce entry or repositioning⁶⁵ into the relevant market, preventing the merger from substantially lessening competition or tending to create a monopoly in the first place. This argument posits that a merger may, by substantially lessening competition, make the market more profitable for the merged firm and any remaining competitors, and that this increased profitability may induce new entry. To evaluate this rebuttal evidence, the Agencies assess whether entry induced by the merger would be “timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.”⁶⁶

Timeliness. To show that no substantial lessening of competition is threatened by a merger, entry must be rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur. Entry in most industries takes a significant amount of time and is therefore insufficient to counteract any substantial lessening of competition that is threatened by a merger. Moreover, the entry must be durable: an entrant that does not plan to sustain its investment or that may exit the market would not ensure long-term preservation of competition.

Likelihood. Entry induced by lost competition must be so likely that no substantial lessening of competition is threatened by the merger. Firms make entry decisions based on the market conditions they expect once they participate in the market. If the new entry is sufficient to counteract the merger’s effect on competition, the Agencies analyze why the merger would induce entry that was not planned in pre-merger competitive conditions.

The Agencies also assess whether the merger may increase entry barriers. For example, the merging firms may have a greater ability to discourage or block new entry when combined than they would have as separate firms. Mergers may enable or incentivize unilateral or coordinated exclusionary

Liquidation value is the highest value the assets could command outside the market. If a reasonable alternative offer was rejected, the parties cannot claim that the business is failing.

⁶³ *Citizen Publ’g*, 394 U.S. at 139.

⁶⁴ The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill; and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition. Because firms can allocate costs, revenues, and intra-company transactions among their subsidiaries and divisions, the Agencies require evidence that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

⁶⁵ Repositioning is a supply-side response that is evaluated like entry. If repositioning requires movement of assets from other markets, the Agencies will consider the costs and competitive effects of doing so. Repositioning that would reduce competition in the markets from which products or services are moved is not a cognizable rebuttal for a lessening of competition in the relevant market.

⁶⁶ *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019).

strategies that make entry more difficult. Entry can be particularly challenging when a firm must enter at multiple levels of the market at sufficient scale to compete effectively.

Sufficiency. Even where timely and likely, the prospect of entry may not effectively prevent a merger from threatening a substantial lessening of competition. Entry may be insufficient due to a wide variety of constraints that limit an entrant's effectiveness as a competitor. Entry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient. The Agencies typically do not credit entry that depends on lessening competition in other markets.

As part of their analysis, the Agencies will consider the economic realities at play. For example, lack of successful entry in the past will likely suggest that entry may be slow or difficult. Recent examples of entry, whether successful or unsuccessful, provide the starting point for identifying the elements of practical entry barriers and the features of the industry that facilitate or interfere with entry. The Agencies will also consider whether the parties' entry arguments are consistent with the rationale for the merger or imply that the merger itself would be unprofitable.

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

ROBINSON, Senior District Judge

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

1. Ease of entry and expansion

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

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

1. Record citations and footnotes omitted

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

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

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

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

STEVEN M. COLLOTON, United States Circuit Judge

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

. . .

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

NOTES

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

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

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

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

FLORENCE Y. PAN, United States Circuit Judge

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

. . .

2. Barriers to Entry and Expansion

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

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

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

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

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

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

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

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

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

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

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

[EDGARDO] RAMOS, United States District Judge

[On July 18, 2023, the FTC filed a Section 13(b) complaint alleging that the acquisition by IQVIA Holdings Inc. (IQVIA), the world’s largest health care data provider, of Propel Media, Inc. (PMI) would substantially lessen competition by combining two of the top three providers of programmatic advertising for health care products, namely prescription drugs and other health care products, to doctors and other health care professionals (“HCP programmatic advertising”), resulting in increased prices, reduced choice, and diminished innovation. Programmatic advertising is the automated buying and selling of digital ad space using software and data-driven technologies. Unlike traditional ad buying, which involves manual negotiations and requests for proposals, programmatic advertising uses algorithms and real-time bidding (RTB) to place ads in front of targeted audiences—in this case, healthcare professionals—across websites, social media, and apps. IQVIA’s Lasso Marketing and PMI’s DeepIntent are two of the top three providers of HCP programmatic advertising. The complaint also alleges that the acquisition would increase IQVIA’s incentive to withhold key information to prevent rival companies and potential entrants from effectively competing, the complaint states. After the court found that the FTC had made out its prima facie case, the court turned to the defendants’ rebuttal arguments.]

...

b. Ease of Entry

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

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

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

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

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

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

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

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

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

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

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

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

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

Efficiencies Defense

Horizontal Merger Guidelines



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

Issued: August 19, 2010

10. Efficiencies

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets. In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a

coordinated effects context, incremental cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. Even when efficiencies generated through a merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.

The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.¹³ Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.¹⁴ To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price

¹³ The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.

¹⁴ The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.

increases in that market.¹⁵ In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.

In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly. Just as adverse competitive effects can arise along multiple dimensions of conduct, such as pricing and new product development, so too can efficiencies operate along multiple dimensions. Similarly, purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value.

The Agencies have found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost, are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.

¹⁵ The Agencies normally give the most weight to the results of this analysis over the short term. The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict. Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive.



Merger Guidelines

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

Issued: December 18, 2023

3.3. Procompetitive Efficiencies

The Supreme Court has held that “possible economies [from a merger] cannot be used as a defense to illegality.”⁶⁷ Competition usually spurs firms to achieve efficiencies internally, and firms also often work together using contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger.

Merging parties sometimes raise a rebuttal argument that, notwithstanding other evidence that competition may be lessened, evidence of procompetitive efficiencies shows that no substantial lessening of competition is in fact threatened by the merger. This argument asserts that the merger would not substantially lessen competition in any relevant market in the first place.⁶⁸ When assessing this argument, the Agencies will not credit vague or speculative claims, nor will they credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market. Rather, the Agencies examine whether the evidence⁶⁹ presented by the merging parties shows each of the following:

Merger Specificity. The merger will produce substantial competitive benefits that could not be achieved without the merger under review.⁷⁰ Alternative ways of achieving the claimed benefits are considered in making this determination. Alternative arrangements could include organic growth of one of the merging firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies.

⁶⁷ *Phila. Nat’l Bank*, 374 U.S. at 371; *Procter & Gamble Co.*, 386 U.S. at 580 (“Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”).

⁶⁸ *United States v. Anthem*, 855 F.3d 345, 353-55 (D.C. Cir. 2017) (although efficiencies not a “defense” to antitrust liability, evidence sometimes used “to rebut a prima facie case”); *Saint Alphonsus Medical Center-Nampa*, 778 F.3d at 791 (“The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.”).

⁶⁹ In general, evidence related to efficiencies developed prior to the merger challenge is much more probative than evidence developed during the Agencies’ investigation or litigation.

⁷⁰ If inter-firm collaborations are achievable by contract, they are not merger specific. The Agencies will credit the merger specificity of efficiencies only in the presence of evidence that a contract to achieve the asserted efficiencies would not be practical. See *Anthem*, 855 F.3d at 357.

Verifiability. These benefits are verifiable, and have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents. Procompetitive efficiencies are often speculative and difficult to verify and quantify, and efficiencies projected by the merging firms often are not realized. If reliable methodology for verifying efficiencies does not exist or is otherwise not presented by the merging parties, the Agencies are unable to credit those efficiencies.

Prevents a Reduction in Competition. To the extent efficiencies merely benefit the merging firms, they are not cognizable. The merging parties must demonstrate through credible evidence that, within a short period of time, the benefits will prevent the risk of a substantial lessening of competition in the relevant market.

Not Anticompetitive. Any benefits claimed by the merging parties are cognizable only if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners.⁷¹

Procompetitive efficiencies that satisfy each of these criteria are called cognizable efficiencies. To successfully rebut evidence that a merger may substantially lessen competition, cognizable efficiencies must be of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market. Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly.

⁷¹ The Agencies will not credit efficiencies if they reflect or require a decrease in competition in a separate market. For example, if input costs are expected to decrease, the cost savings will not be treated as an efficiency if they reflect an increase in monopsony power.

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

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

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

15. Record citations and footnotes omitted.

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

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

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

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

St. Luke's appealed.

HURWITZ, Circuit Judge

...

2. The St. Luke's Efficiencies Defense

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

It is not enough to show that the merger would allow St. Luke's to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the *prima facie* case is inaccurate. *See [FTC v.] Univ. Health, [Inc.],* 938 F.2d [1206] at 1222

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

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

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

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

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

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

QUESTIONS

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

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

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

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

JUDITH W. ROGERS, United States Circuit Judge

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

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

¹ Record citations omitted.

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

II.

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

...

III.

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

A.

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

C.

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

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

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

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

...

NOTES

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

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

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

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

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

TANYA S. CHUTKAN, District Judge

The Federal Trade Commission (“FTC”) has moved for a preliminary injunction to block a proposed merger between defendants Wilhelmsen Maritime Services AS (“WMS”), Wilhelmsen Ship Services (“WSS”) (collectively “Wilhelmsen”), and The Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. (collectively “Drew”), two large providers of marine water treatment chemicals and related services. The FTC objects to the merger on the grounds that Defendants are each other’s closest and only realistic competition for supplying these chemicals and services on a global scale, and the merger threatens to reduce or eliminate tangible consumer benefits resulting from market competition. Having considered the evidence presented through live testimony, as well as extensive pleadings, exhibits, and other submissions, the court hereby GRANTS the motion for preliminary injunction.

[The court found, for the purpose of deciding whether to enter a preliminary injunction, that the supply of marine water treatment (MWT) products and services, including boiler water treatment (BWT) chemicals, cooling water treatment (CWT) chemicals, and associated products and services, to global fleets, constituted a relevant antitrust market and that, within this market, the FTC had established a prima facie case of anticompetitive effect. In response, the merging parties advanced entry, power buyer, and efficiencies defenses.]

...

c. Efficiencies

1. LEGAL STANDARD

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

1. Record citations omitted.

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

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

2. ANALYSIS

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

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

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

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

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

...

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

D. MICHAEL FISHER, Circuit Judge

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

...

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

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

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

October 13, 2023

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

NOTES

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

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

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

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

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

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

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

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

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

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

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

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

FLORENCE Y. PAN, United States Circuit Judge

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

. . .

ii. Efficiencies

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

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

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

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

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

12 APPEARANCES:

13 FOR THE PLAINTIFF: John R. Read, Esquire
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17 FOR THE DEFENDANTS Daniel M. Petrocelli, Esquire
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19 PENGUIN RANDOM HOUSE: Megan Smith, Esquire
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20 Los Angeles, California 90067

1 THE COURT: I understand that. Thank you.

2 MR. FRACKMAN: Thank you.

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

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

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

12 THE COURT: Okay. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 guidelines and are not reliable under Rule 702.

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

6 The applicable legal standards are as follows:

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

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

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

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

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

8 Horizontal merger guideline section 10.

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

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

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

25 Therefore, the merger guidelines say, it is incumbent

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

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

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

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

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

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

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

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

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

25 Without verification, the efficiencies analysis could

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

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

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

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

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

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

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

1 revenue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 factor in those projections.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 After the November 2020 model was created,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. SCHWARZ: No, Your Honor.

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

24 THE COURT: Okay. Thank you.

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

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

FTC File No. 131-0087

April 11, 2014

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

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

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

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

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

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

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

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

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

² *Id.*

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

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

⁴ MERGER GUIDELINES § 10.

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

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

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

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

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

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

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

⁷ MERGER GUIDELINES § 10.

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

⁹ See MERGER GUIDELINES § 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ See *id.* § 10.

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

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

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

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

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

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

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

⁸ Dissenting Statement of Commissioner Wright at 5.

⁹ 2010 Horizontal Merger Guidelines § 10.

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

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