

MERGER ANTITRUST LAW

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Class 20 (Tuesday, November 3): *Meta/Within* and Nascent Competition (Unit 11)

Unit 10 examined mergers that may eliminate a firm's future entry into a market or the competitive influence the firm already exerts from outside it. This class completes that discussion with *Meta/Within*, in which the FTC relied on both potential competition theories to challenge Meta's acquisition of a virtual reality fitness app developer. We then turn to *Edwards/JenaValve*, which shows that firms developing competing products can already be competitors before either product reaches the market, so that a challenge can rest on existing development rivalry without invoking the traditional potential competition doctrines. The rest of the unit addresses acquisitions of "nascent" competitive threats: firms that may someday challenge a dominant incumbent but whose development remains uncertain. We will see why these acquisitions are difficult to challenge under the traditional actual potential competition doctrine, how *Microsoft* supplies an alternative under Section 2 of the Sherman Act, and how the 2023 Merger Guidelines address the problem. Three case studies show how the enforcement agencies have framed these challenges: *Mallinckrodt/Synacthen*, *Visa/Plaid*, and *Facebook/Instagram/WhatsApp*. We close with the policy debate over whether existing law adequately addresses them.

The unit moves through three kinds of proof: proof that a firm would probably enter a market or that the perceived threat of its entry already constrains incumbents, proof that rivalry is already occurring before commercial sales, and proof that an acquisition eliminates a developing threat to an incumbent's position. Keep them distinct as you read. Three of the cases have no assigned reading: *Edwards/JenaValve*, *Microsoft*, and *Visa/Plaid*. Use this guidance and the class notes for those cases; the discussion of them below is correspondingly more detailed.

Meta/Within

Meta/Within applies the traditional actual and perceived potential competition doctrines to a young technology market. The FTC sought to push the boundaries of those doctrines by asking the court to infer probable independent entry and existing competitive influence from Meta's capabilities, incentives, and position in virtual reality. The court accepted the doctrinal framework but found the evidence insufficient to support an injunction.

Meta supplied the leading virtual reality headset, with about 80 percent of headset sales, and operated the Quest Store, through which users obtained VR apps for its headsets. It also owned Beat Saber, a popular rhythm game that provided exercise as an incidental benefit. Within supplied Supernatural, a subscription app designed specifically for fitness, which accounted for more than 80 percent of revenue among VR dedicated fitness apps (Unit 11, slide 4). Keep Within's position in mind. It was by far the largest firm in the relevant market, so under the perceived potential competition theory, its perceptions and conduct mattered most.

The FTC's amended complaint challenged Meta's proposed acquisition of Within under Section 7 on actual and perceived potential competition theories. Under the actual potential competition theory, the FTC alleged that Meta would develop its own dedicated fitness app, perhaps by extending Beat Saber if it could not acquire Within. Under the perceived potential competition theory, the FTC alleged that the prospect of Meta's entry already constrained Within and other incumbents. Under either theory, acquiring Within would eliminate the competitive contribution Meta would otherwise make absent the acquisition from outside the market. The amended complaint did not allege that Meta was already developing a dedicated fitness app or had plans to develop one (Unit 11, slide 5).

The original complaint also alleged a loss of existing horizontal competition between Beat Saber and Supernatural in a broader market for VR fitness apps. That theory would have allowed the FTC to invoke the *Philadelphia National Bank* presumption, but in my view it was more an afterthought than a central theory of harm. In any event, the FTC dropped it in the amended complaint. The case before the court therefore concerned only Meta's competitive significance as a potential entrant into the narrower market for VR dedicated fitness apps (Unit 11, slide 5).

Read the parties' public statements with that narrowing in mind. The FTC's press release accompanied the original complaint. It described the acquisition as an expansion of Meta's "virtual reality empire" and emphasized the existing rivalry between Beat Saber and Supernatural, the theory the FTC later dropped. Meta's response argued that the FTC's prediction of independent entry was speculative and that the challenge discounted the benefits of investment in a young industry. The amended complaint retained a broader entrenchment narrative: acquiring attractive content would draw more users to Meta's headsets, encourage more developers to supply apps, and reinforce Meta's platform position in a self-reinforcing cycle (Am. Compl. ¶ 6). Its claims, however, rested on the two potential competition theories, which the court ultimately decided.

Read the FTC's press release (pp. 4-6) and Meta's response (pp. 7-9), together with the class notes on the transaction (Unit 11, slides 4-5). You can skim the amended complaint (pp. 10-35).

The FTC sought a preliminary injunction under Section 13(b) of the FTC Act to preserve the status quo pending its administrative case (Unit 11, slide 6). After a seven-day evidentiary hearing, Judge Davila denied the injunction in a sealed ruling and released a public version of his opinion on February 3, 2023. Read the opinion's factual background, procedural history, and preliminary injunction standard before turning to its competitive analysis (pp. 36-51). Indeed, you will need to read the entire opinion for class (pp. 36-100), and you might want to read it straight through rather than piecemeal following the guidance below.

The relevant market. The court accepted the FTC's alleged national market for VR dedicated fitness apps. Defendants argued that the market should also include VR apps not dedicated to fitness, such as Beat Saber, and non-VR connected fitness products and services (such as Peloton bikes, Tonal equipment, and Apple Fitness+), because consumers could use those alternatives for exercise. The court recognized competition from these broader fitness offerings but found that VR dedicated fitness apps constituted a distinct economic submarket.

The court relied on the *Brown Shoe* practical indicia: industry or public recognition, distinctive product characteristics and uses, unique production facilities, distinct customers, and distinct prices. The evidence included the features that set dedicated fitness apps apart from other VR apps and from non-VR fitness offerings, such as trainer-led workouts, trackable progress, and an

immersive workout on a portable device; the combination of VR engineering, fitness expertise, workout content, and studio production needed to supply them; and differences in their users, who skewed older and more female than VR users generally. The FTC also offered a hypothetical monopolist test based on survey evidence. The court expressed concerns about the survey but did not decide its validity because the *Brown Shoe* evidence sufficed. A relevant market need not be proved through the hypothetical monopolist test. Read the market definition discussion with the corresponding class notes (pp. 51-68; Unit 11, slides 7-8).

Actual potential competition. The actual potential competition theory compares competition with the acquisition to competition without it, in which the putative potential entrant remains independent. Independence alone, however, does not mean that the firm would enter the relevant market. The plaintiff must connect the firm's abilities and incentives to a feasible route of entry and establish a reasonable probability that the firm would enter in the absence of the acquisition. The plaintiff must also show that entry, if it occurred, would have a reasonable probability of a substantial procompetitive effect. For that reason, the market must offer room for competitive improvement. Adding a firm to an already competitive market does not necessarily produce the substantial competitive benefit the theory requires.

Although the Supreme Court reserved the validity of the actual potential competition doctrine in *Falstaff* and *Marine Bancorporation*, the *Meta/Within* court accepted the doctrine as a basis for challenging an acquisition under Section 7. It rejected defendants' argument that the theory was not viable because the Supreme Court had never endorsed it (pp. 74-75; Unit 11, slide 10).

The class notes organize the inquiry into the five elements you studied in Unit 10: a noncompetitive market with room for competitive improvement, a relatively unique potential entrant, available feasible means of independent entry, a reasonable likelihood of entry in the near future, and a reasonable probability of a substantial procompetitive effect (Unit 11, slide 9). The court organized its analysis differently. After addressing market concentration, it framed the central question as whether there was a reasonable probability that Meta would have entered the market de novo if it could not acquire Within. It examined that question in two parts: whether Meta had "available feasible means" of entry (its ability) and whether it had the incentive to enter. The court ultimately rested its conclusion on the absence of available feasible means, folding into that inquiry its finding that independent entry was not reasonably probable (Unit 11, slides 11-12). As you read, map the court's analysis onto the five elements. The discussion below follows the order of the class notes.

1. *A noncompetitive market with room for competitive improvement.* The FTC showed that market concentration was well above the thresholds in the 2010 Horizontal Merger Guidelines (the 2023 Guidelines had not yet been issued), and the court accepted that showing as a prima facie case that the market was a candidate for the theory.¹ The court also rejected defendants' argument that the FTC had to show oligopolistic, interdependent, or parallel behavior as part of its prima facie case. That ruling bears on the *Marine Bancorporation* language we discussed in Unit 10, which described the doctrine as applying to markets in which dominant firms engage in interdependent or parallel behavior. To rebut the prima facie showing, defendants had to show that the market was in fact "genuinely competitive." Meta argued that the market was young, that shares were volatile, that the number of dedicated fitness apps had recently doubled, and that

¹ FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 922 (N.D. Cal. 2023) (HHIs of 6,917 by revenue, 6,307 by hours spent, and 3,377 by monthly active users).

entry barriers were low. In other words, Meta argued that the current concentration figures overstated the market's lack of competition. The court was inclined to find the rebuttal insufficient but did not need to decide the question because the FTC failed to establish other elements of the theory (pp. 68-74; Unit 11, slide 10).

2. *Relative uniqueness of the potential entrant.* This element requires comparing the potential entrant's capabilities and incentives with those of other firms positioned to enter. Eliminating one potential entrant matters more when few other firms have comparable capabilities and incentives to enter and compete in the market. Here, that would mean comparing Meta's size, resources, and incentives with those of other firms that might enter the market for VR dedicated fitness apps. The opinion did not separately examine Meta's relative uniqueness, focusing instead on Meta's own means and likelihood of entry (Unit 10, slide 13; Unit 11, slide 9).

3. *Available, feasible means of independent entry.* The plaintiff must show that the potential entrant had an available, feasible means of entering the relevant market other than through the challenged acquisition, either by de novo entry or by a toehold acquisition. The FTC argued that Meta's financial resources and VR engineering capabilities would enable it to develop a dedicated fitness app and that it could obtain the necessary fitness expertise by hiring personnel or partnering with an established fitness company. Its principal proposed route was to reposition Beat Saber as a dedicated fitness product with a fitness content partner, possibly Peloton. The FTC did not advance a toehold acquisition alternative. Defendants responded that Meta lacked fitness expertise and that its preliminary consideration of developing a fitness app had never produced a concrete entry plan.

The court found that Meta had the financial resources and VR engineering personnel to enter de novo but lacked "the capability to create fitness and workout content" and "the necessary studio production capabilities to create and film VR workouts." It acknowledged that Meta could conceivably overcome these deficiencies, but it rejected as speculative the inference that Meta's resources and interest in VR fitness meant that it would obtain the missing capabilities and enter independently. Having the resources to acquire the necessary capabilities was not enough on this record. The court's conclusion that the FTC had not established an available, feasible means of independent entry also rested on its finding, discussed next, that Meta probably would not have pursued the Beat Saber proposal (pp. 74, 77-81, 88-95; Unit 11, slides 11-13).

4. *A reasonable likelihood of entry in the near future.* The plaintiff must establish a reasonable probability that the potential entrant would enter the relevant market in the near future if the challenged acquisition did not occur. The FTC argued that Meta's resources, its incentives to invest in VR fitness, and its consideration of a fitness version of Beat Saber supported that prediction. It maintained that objective evidence could establish probable entry without proof of a subjective intention to enter and that Meta had abandoned the Beat Saber proposal to pursue Within. Defendants urged a more demanding "clear proof" standard. They argued that Meta had no plan to enter independently and would not do so if the acquisition were blocked, and that the Beat Saber proposal had lost momentum before Meta pursued Within (pp. 76-78, 91-93; Unit 11, slides 11-13).

The court rejected the "clear proof" standard, which came from the FTC's own 1984 decision in *B.A.T. Industries*.² Following the Fifth Circuit's decision in *Mercantile Texas*, which we studied

² B.A.T. Indus., Ltd., 104 F.T.C. 852, 926 (1984).

in Unit 10, it instead required a reasonable probability of entry, which it interpreted as a likelihood “noticeably greater than fifty percent.”³ The court accepted that objective evidence alone could establish probable entry, but it would consult subjective evidence if the objective evidence was weak, inconclusive, or conflicting. Subjective evidence could not overcome directly conflicting objective evidence. The court also did not categorically require a formally adopted entry plan or insist that an entry proposal reach a particular stage in the firm’s decision-making process (pp. 76-78, 89; Unit 11, slides 11, 13). Compare this standard with Guideline 4’s sliding scale, under which “the higher the market concentration, the lower the probability of entry that gives rise to concern” (Unit 10, p. 6).

Applying that approach, the court found the objective evidence of Meta’s incentives “inconclusive.” Meta’s interest in expanding VR fitness did not necessarily mean that it would develop its own dedicated fitness app. As a platform operator, Meta could benefit from higher headset sales and usage by supporting independent app developers. Developing its own app offered some additional advantages, including closer integration of hardware and software, but those advantages did not establish reasonably probable independent entry. The court therefore examined the subjective evidence, giving substantially more weight to Meta’s ordinary-course business documents than to its executives’ testimony at the hearing. The documents showed that Meta was interested in having its own fitness app, both for hardware development and for defensive purposes such as protecting access to fitness content, but they did not establish that Meta would pursue *de novo* entry (pp. 81-88; Unit 11, slide 12).

Compare *Steris*, where the court gave significant weight to management testimony. The two decisions are more consistent than they first appear. As we saw in Unit 10, the weight of testimony depends on how well it fits the contemporaneous documents and the commercial circumstances. In *Steris*, the testimony matched the documents showing that the x-ray project failed Synergy’s own financial requirements. In *Meta/Within*, the court found the ordinary-course documents more reliable than the executives’ testimony and relied on the documents (Unit 11, slide 12).

The court also rejected the FTC’s account of the Beat Saber proposal. The proposal’s content and structure remained unclear, internal support was neither uniform nor widespread, and active discussion of the proposal had lapsed by the time Meta began pursuing Within in June 2021. The court therefore did not find that the acquisition had displaced an otherwise probable entry project. Even assuming Meta could find a willing fitness content partner, the court found that repositioning Beat Saber as a dedicated fitness app was not reasonably probable. Consequently, the FTC failed to establish that Meta probably would enter independently if it could not acquire Within (pp. 91-95; Unit 11, slide 13).

5. *A reasonable probability of a substantial procompetitive effect.* The plaintiff must show a reasonable probability that independent entry would substantially deconcentrate the market or produce other significant procompetitive effects. The FTC argued that Meta’s independent entry would introduce a strong new competitor to Supernatural and FitXR, another VR fitness app. Because the FTC failed to establish feasible and reasonably probable independent entry, the court did not reach this element. The decision therefore does not determine whether Meta’s

³ *Meta Platforms*, 654 F. Supp. 3d at 926-27 (adopting the reasonable probability interpretation of *Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 638 F.2d 1255, 1268-69 (5th Cir. Unit A 1981), and rejecting the “clear proof” standard of *B.A.T. Indus.*).

independent entry would have produced the required competitive benefit (pp. 74, 91, 95; Unit 11, slide 13).

In sum, the court accepted actual potential competition as a basis for challenging the acquisition, but the FTC failed to establish a feasible and reasonably probable path for Meta to enter independently. Evidence of a highly concentrated market, Meta's substantial resources, and its interest in VR fitness did not establish that Meta probably would enter if it could not acquire Within. The claim therefore failed on the evidence supporting the predicted entry, leaving unresolved whether that entry would have produced the substantial competitive benefit the doctrine requires (pp. 74-75, 94-95; Unit 11, slides 10-13).

Perceived potential competition. This theory protects a present competitive benefit: incumbents may compete more vigorously because they fear entry by an outside firm. The inquiry therefore concerns the incumbents' perceptions and their competitive responses. What the outside firm privately intends, whether to enter, does not determine whether its presence influences incumbent behavior. The class notes identify five elements: non-competitiveness, uniqueness, perception as a likely potential entrant, incumbent reaction to the threat of entry, and an anticompetitive effect from the acquisition (Unit 10, slides 21-22).

The court stated the theory's requirements in three parts: a concentrated market; that Meta possessed the "characteristics, capabilities, and economic incentive to render it a perceived potential de novo entrant"; and that Meta's "premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market."⁴ Map these onto the five elements. The first corresponds to non-competitiveness, the second to perception as a likely potential entrant, and the third to incumbent reaction and the resulting anticompetitive effect. The court's formulation does not separately address uniqueness (Unit 11, slide 14).

1. *Non-competitiveness.* The relevant market must be one in which the perceived threat of entry can constrain incumbent firms' exercise of market power. The analysis tracks the first element of the actual potential competition theory. The FTC's concentration evidence made a prima facie showing; defendants offered the same rebuttal, and the court again did not resolve it because the FTC failed to establish the other required elements (pp. 68-74; Unit 11, slide 10).

2. *Uniqueness.* Incumbents must perceive the putative potential entrant as relatively unique in its ability and incentive to enter. If they perceive numerous other firms as similarly situated, eliminating one potential entrant may have little effect on their competitive behavior. The FTC emphasized Meta's substantial resources, VR capabilities, ownership of Beat Saber, and strategic advantages as a platform operator. Defendants responded that incumbents monitored potential entry from many firms and that other technology firms, including Apple and Google, had comparable resources and fitness experience.⁵ The court did not separately resolve Meta's relative uniqueness. Its analysis focused on whether incumbents perceived Meta as a likely entrant and whether that perception affected their conduct (Unit 10, slide 21; Unit 11, slide 14).

3. *Perception as a likely potential entrant.* Incumbent firms must perceive the outside firm as a likely potential entrant. Objective evidence of the firm's capabilities and incentives is probative

⁴ *Meta Platforms*, 654 F. Supp. 3d at 938-41.

⁵ Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 3, 21, *FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325-EJD (N.D. Cal. Nov. 14, 2022).

of that perception. The FTC relied on Meta’s capabilities and on Within’s internal expressions of concern that a fitness version of Beat Saber could compete with Supernatural. Defendants disputed that market participants regarded Meta as a likely entrant and challenged the significance of the Within documents. They also pointed to declarations from other app developers stating that they did not consider Meta a likely competitor and that the prospect of its entry had not affected their conduct.⁶

The court found the FTC’s evidence insufficient on both objective and subjective grounds. On the objective evidence, the court carried over its actual potential competition analysis, holding that the objective evidence was insufficient to support a finding that it was “reasonably probable” Meta would enter the relevant market. Notice what this does. *Falstaff*, as we saw in Unit 10, asks whether, given the firm’s capabilities and market conditions, incumbents could reasonably consider it a potential entrant. That is a different question from whether the firm probably would enter. A firm unlikely to enter may still be a credible threat in incumbents’ eyes. Consider whether, by requiring objective evidence of reasonably probable entry, the court imported the actual potential competition standard into the perceived theory. If it did, the perceived theory becomes at least as difficult to establish as the actual theory.

The court then examined the subjective evidence of incumbents’ perceptions. Most of Within’s expressions of concern were old, and several predated Supernatural’s launch. Later contemporaneous evidence indicated that Within’s assessment had changed. The court also gave little weight to an uncorroborated report by a Meta employee that Within remained concerned about Meta’s entry. The evidence did not establish that, at the relevant time, Within continued to perceive Meta as a likely entrant (pp. 95-97; Unit 11, slide 14).

4. *Incumbent reaction to the threat of entry.* Incumbents must respond to the perceived threat by maintaining lower prices, higher quality, or other more favorable competitive terms than they otherwise would. The FTC argued that probabilistic proof of a likely influence on existing competitors was sufficient. It relied on Within’s documents concerning a decision not to reduce staffing before Supernatural’s launch and the need to continue innovating in anticipation of additional competition. Defendants responded that concern about possible entry did not establish an actual competitive effect attributable to Meta and that the FTC had supplied no evidence of such an effect.

The court agreed with defendants on the required showing. The FTC had to show that Meta’s presence actually tempered incumbents’ conduct, not merely that it was likely to do so. Compare Guideline 4, which asks only whether the potential entrant is likely to influence existing competition (Unit 10, p. 8). The FTC could make the required showing through direct or circumstantial evidence; an observed price reduction or an express admission of a response to Meta was not required. But the evidence still had to connect Meta’s perceived entry threat to competitive conduct. The staffing evidence concerned decisions made before Within entered the market, so it did not show a tempering effect on an incumbent’s conduct. The later communication reflected general concern about possible entrants but did not connect that concern to Meta. Consequently, the FTC failed to establish an actual tempering effect even if incumbents had perceived Meta as a potential entrant (pp. 97-99; Unit 11, slide 14).

⁶ *Id.* at 21 (citing declarations from three VR fitness app developers).

5. *Anticompetitive effect*. The acquisition must remove or weaken the competitive constraint created by the perceived threat of entry, producing a reasonable probability of a substantial lessening of competition. The FTC argued that acquiring Within would eliminate Meta’s independent entry threat and the resulting pressure on Within to compete. Defendants disputed that any such constraint existed. Because the court rejected the evidence of perceived entry and incumbent reaction, the FTC had no proof that the acquisition would eliminate a constraint (pp. 99-100; Unit 11, slide 15).

The perceived potential competition claim therefore failed because the evidence showed neither a perceived entry threat nor an actual competitive response to it. In the same order, the court denied defendants’ motion to dismiss because the complaint sufficiently alleged a tempering effect, including the allegation that Within was “concerned about making any moves that would hurt its ability to compete against Meta as a potential entrant.” Allegations sufficient to survive a motion to dismiss, however, did not establish the likelihood of success needed on the evidentiary record for a preliminary injunction (pp. 99-100; Unit 11, slides 14-15).

The denial of preliminary relief rested on the evidence, not on a rejection of either potential competition theory. On February 6, 2023, the FTC announced it would not appeal. Meta closed the acquisition two days later, and the FTC dismissed its administrative complaint on February 24, 2023 (Unit 11, slides 15-16).

Edwards/JenaValve

There is no assigned reading for *Edwards/JenaValve*. This guidance and the class notes (Unit 11, slides 17-18) are your materials for the case, so this section discusses the opinion in some detail.

Before turning to nascent competitive threats, *Edwards/JenaValve* shows why the absence of commercial sales does not necessarily require a challenge under the traditional potential competition doctrines. In *Meta/Within*, the FTC had to establish that Meta would likely enter the relevant market independently or that incumbents’ perception of Meta as a likely entrant had already affected their competitive behavior. In *Edwards/JenaValve*, neither merging firm had an FDA-approved device for commercial sale. Nonetheless, the FTC challenged the acquisition under Section 7 as a merger of existing competitors because the firms were competing in research, development, and clinical trials.

The products. Aortic regurgitation (AR) is a life-threatening disease in which the aortic valve fails to close fully, allowing blood to flow backward into the heart. More than 100,000 Americans suffer from severe symptomatic AR. At the time, the only FDA-approved treatment was surgical aortic valve replacement, which requires open-heart surgery and is a poor option for patients at high surgical risk. Nearly 75 percent of AR patients in the United States went untreated. Transcatheter aortic valve replacement (TAVR) devices already treat a different valve disease, aortic stenosis, but they are generally ill-suited for AR. To meet the need for an AR device, several companies were developing TAVR devices designed specifically for AR (TAVR-AR devices).⁷ When the court ruled, no TAVR-AR device had been approved for commercial

⁷ Transcatheter aortic valve replacement (TAVR) devices for aortic regurgitation are prosthetic heart valves delivered through a thin, flexible tube (a catheter) and implanted within a patient’s malfunctioning aortic valve, without open-heart surgery. Transfemoral devices are inserted through a small incision in the groin and guided through the femoral artery to the heart. Transapical devices are delivered through the apex of the heart, which is reached through an incision in the chest wall, and implanted in the aortic valve.

sale in the United States, and only two were in U.S. clinical trials: JenaValve’s Trilogy and JC Medical’s J-Valve. Trilogy had been approved in Europe since 2021. JenaValve completed enrollment in its U.S. pivotal trial in 2022, and its FDA premarket approval application was pending, although the FDA identified deficiencies that could delay approval. JC Medical had completed enrollment in an early feasibility study of J-Valve, and in May 2024 the FDA authorized it to begin a U.S. pivotal trial (Unit 11, slide 17).⁸

The transactions. Edwards, a leading maker of transcatheter heart valves, had concluded it could not develop its own TAVR-AR device in a reasonable time, so it looked to acquire one. In July 2024, on successive days, it agreed to acquire both JC Medical and JenaValve. On July 22, Edwards agreed to pay \$115 million for JC Medical. The FTC emphasized that this price was just below the Hart-Scott-Rodino reporting threshold then in effect (\$119.5 million). Edwards also committed to invest \$25 million in JC Medical’s parent company, Genesis MedTech. Because Edwards made no HSR filing, no waiting period applied, and Edwards closed the acquisition the same day it was signed. The next day, Edwards agreed to acquire JenaValve for approximately \$945 million, consisting of \$500 million in cash and up to \$445 million in milestone payments. Edwards did not tell JenaValve about the JC Medical acquisition, and JenaValve’s CEO was “totally blindsided” when he learned of it. Another JenaValve employee remarked that Edwards had “just bought the AR market.” After the acquisition, Edwards renamed J-Valve SOJOURN and, in October 2024, began enrolling patients in a U.S. pivotal trial. By the time of the hearing, Edwards had paused the trial twice, and its best-case estimate for FDA approval was 2029. Note that the FTC did not challenge the consummated JC Medical acquisition under Section 7 in this case.⁹ Instead, it challenged the JenaValve acquisition, which was subject to HSR review and could not close while that review was pending. Otherwise, Edwards would have acquired JenaValve and combined the two development programs (Unit 11, slide 17).¹⁰

The FTC’s challenge. On August 6, 2025, the Commission voted 3-0 to issue an administrative complaint and filed suit in the District of Columbia for a preliminary injunction under Section 13(b), pending the administrative trial. Judge Contreras held a six-day evidentiary hearing beginning on November 18, 2025, and granted the injunction on January 9, 2026. The FTC advanced three Section 7 arguments. First, it argued that an acquisition that eliminates the acquirer’s only competitor “tend[s] to create a monopoly.” Second, it argued that the transaction was presumptively unlawful under *Philadelphia National Bank* because it combined the only two firms in the market. Third, it argued that the transaction would eliminate substantial head-to-head competition. The court declined to rely on the first argument, noting that the Supreme Court has

⁸ FTC v. Edwards Lifesciences Corp., No. 25-cv-02569 (RC), 2026 WL 228723, at *1-8 & n.2 (D.D.C. Jan. 9, 2026) (public version filed Jan. 28, 2026).

⁹ In July 2026, the Department of Justice, acting on the FTC’s referral, filed a separate civil penalty action alleging that the \$25 million investment in Genesis was additional consideration for JC Medical, that the combined payments exceeded the reporting threshold, and that Edwards and Genesis structured the transaction to avoid an HSR filing. Without admitting liability, Edwards and Genesis agreed to a proposed final judgment requiring \$12 million in civil penalties (\$10 million from Edwards and \$2 million from Genesis), which the FTC described as the largest ever for failing to make an HSR filing. Complaint ¶¶ 1-2, 23-24, 34, *United States v. Edwards Lifesciences Corp.*, No. 1:26-cv-02450 (D.D.C. July 13, 2026); Press Release, Fed. Trade Comm’n, FTC Secures \$12 Million in Penalties for Pre-Merger Reporting Act Violations (July 13, 2026).

¹⁰ *Edwards Lifesciences*, 2026 WL 228723, at *1, *5, *7-10.

cast doubt on older decisions that treated the nontrivial acquisition of a competitor as unlawful regardless of its effect on competition. It decided the case on the third argument.¹¹

The relevant market. The court defined the relevant market as the research, development, and commercialization of TAVR-AR devices in the United States. Using the *Brown Shoe* practical indicia, it excluded medical management, the off-label use of TAVR devices designed for aortic stenosis, and surgical valve replacement, which differ in effectiveness, invasiveness, or both. It also limited the product market to transfemoral devices, which are inserted through the femoral artery, and excluded transapical devices, which are implanted through an incision in the chest wall and are associated with longer recoveries and worse outcomes. Because quantitative data on pre-commercial products was scarce, the FTC's economist conducted a hypothetical monopolist test based almost entirely on qualitative evidence. The court accepted his conclusion that patients and physicians would not switch to the non-TAVR alternatives in response to a price increase. It did not rely on his analysis for the transfemoral limitation, which he had not tested. The geographic market was the United States. The FDA approval process is a significant barrier to bringing devices developed abroad into the U.S. market, and the FDA approves high-risk devices almost exclusively based on U.S. clinical data.¹²

The more novel question was whether a market can consist of products that have not yet been approved for sale. Defendants argued that no court had ever recognized such a market and that a market for future commercialized devices was too speculative, because it was unclear when, or even whether, any device would be approved. The court acknowledged that it knew of no case recognizing a market for the research, development, and commercialization of a product not yet commercially available. But it reasoned that courts, economists, and the Merger Guidelines recognize that a relevant market can include products still in clinical development. It relied on Section 4.3.D.7 of the 2023 Merger Guidelines, which permits the agencies to define markets around the products that would result from innovation, even if those products do not yet exist. It also relied on the Fifth Circuit's decision in *Illumina*, which accepted a market for the research, development, and commercialization of cancer-detection tests.¹³ Because Trilogy and SOJOURN were close substitutes, Edwards would have less incentive to develop both if it owned both. The FTC, the court said, should not have to wait until one of the devices is commercialized to bring its challenge.¹⁴

The structural presumption. The FTC's economist calculated HHIs based on the number of clinical trial sites and the number of devices implanted. The transaction would raise the HHI from 5,356 to 10,000 on the first measure and from 8,063 to 10,000 on the second. Defendants argued that no court had ever applied the *Philadelphia National Bank* presumption in an "innovation market," where there are no real market shares and the combination of two research programs says little about whether innovation will increase or decrease. The court was skeptical of the presumption in this setting. *Philadelphia National Bank* rested on the premise that commercial markets are most competitive when there are many sellers, and the FTC had not shown that the premise typically holds in innovation markets. The court also noted that the FTC itself had taken inconsistent positions on the question. In *Genzyme/Novazyme*, Chairman Muris

¹¹ *Id.* at *1, *22.

¹² *Id.* at *12-21.

¹³ *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1049-52 (5th Cir. 2023).

¹⁴ *Edwards Lifesciences*, 2026 WL 228723, at *18-19 (citing U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 4.3.D.7 (2023)).

warned that applying the presumption in innovation markets would routinely block mergers likely to accelerate innovation, while Commissioner Thompson saw no reason to exempt innovation mergers from it. In the end, however, the court found it unnecessary to decide whether the FTC was entitled to the presumption, because the FTC's other evidence established the transaction's likely anticompetitive effects (Unit 11, slide 18).¹⁵

Head-to-head competition. The court found that Edwards and JenaValve were the only two competitors in the relevant market and that they competed vigorously on several dimensions. They competed on valve sizes: SOJOURN could treat patients with larger aortic valves than Trilogy could, and JenaValve's board materials called it "imperative" to accelerate a larger Trilogy valve because J-Valve already had one. They competed on patient indications: JenaValve accelerated a second pivotal trial to seek approval for patients at low and intermediate surgical risk, extending its lead over J-Valve. They competed on speed to market, on recruiting clinical trial sites and principal investigators, and on clinical outcomes such as mortality, valve dislodgment, and pacemaker rates. After the FTC sued, Edwards's CEO directed his team to accelerate SOJOURN. In preparing a strategy update in case the FTC prevailed, he considered how to make JC Medical "the first and best" and how to "further slow down" JenaValve.

The court accepted defendants' points that firms in clinical trials do not seek to maximize output or profits and that clinical sites were not scarce. It nevertheless found that competition for sites and investigators had accelerated the trials and benefited patients. It also found modest price competition at the clinical stage. When JenaValve raised Trilogy's price for two of its studies, one hospital withdrew, citing the cost and the availability of J-Valve, which JC Medical offered free for a comparable study. More importantly, the firms would compete on price once their devices were approved. JenaValve planned to raise Trilogy's list price because it would be the only approved device, and it expected J-Valve's entry to erode its market share by 15 to 20 percent. Edwards expected that owning both devices would give it "one shot at setting the bar on commercial price" without having to deal with "low-cost alternatives."¹⁶

Innovation incentives. Edwards argued that it had strong incentives to innovate regardless of competition from JenaValve; as one executive testified, its "biggest competitor" was "the disease." The court did not doubt Edwards's good faith but reframed the question. The issue was not whether Edwards would have strong incentives to develop SOJOURN if JenaValve were out of the picture, but whether Edwards would have the incentive to develop both SOJOURN and Trilogy if it owned both. Because the two devices would compete for many of the same patients, the court found that common ownership would reduce Edwards's incentive to develop both. Edwards pointed to its experience with SAPIEN, its aortic stenosis device, which it continued to improve while SAPIEN was the only approved TAVR device in the United States from 2011 to 2014. The court responded that Edwards faced pipeline competition during that period from Medtronic's CoreValve, which was already in a U.S. pivotal trial. Defendants' economist calculated that, after the merger, Edwards would still have a \$76 million incentive to develop the larger SOJOURN valve sizes. The court found that the analysis missed the point: the question was whether Edwards would develop larger valve sizes for two devices rather than one. The record suggested that it might not. Edwards had not decided whether to continue JenaValve's

¹⁵ *Id.* at *22-23 (citing Statement of Chairman Muris at 23, *In re Genzyme Corp.*, No. 021-0026 (F.T.C. Jan. 13, 2004), and Dissenting Statement of Commissioner Thompson at 3, *In re Genzyme Corp.*, No. 021-0026 (F.T.C. Jan. 13, 2004)).

¹⁶ *Id.* at *24-29.

larger Trilogy valve program, and its planning documents described Trilogy as “Gen 1” and contemplated proceeding with J-Valve as “Gen 2” over JenaValve.¹⁷

The future commercial market. The court also found that the transaction would likely produce unilateral effects once either device was commercialized, because Edwards would hold a monopoly of approved TAVR-AR devices. Defendants responded that this harm was too speculative. Using standard estimates of approval rates at each stage of the FDA process, their economist calculated that the probability that both Trilogy and SOJOURN would be approved was only 49.1 percent. The court rejected the argument. The harm would materialize once either device was approved, and each device was individually more likely than not to be approved: 80.5 percent for Trilogy and 60.9 percent for SOJOURN. Using the same independence assumption implicit in defendants’ calculation, the probability that at least one device would be approved exceeds 90 percent, although the court did not make this calculation. Citing *Meta/Within*, the court concluded that the FTC’s alleged harms were not “ephemeral possibilities.” Compare the probability standards discussed in *Meta/Within* and in the expected value argument below. Here, the prediction concerned the regulatory success of products already in late-stage development, not whether a firm would decide to enter.¹⁸

Defendants’ rebuttal. Defendants made three rebuttal arguments, and the court rejected each. First, defendants argued that TAVR-AR developers abroad could enter the U.S. market and that the threat of their entry already drove Edwards to innovate. Notice that this is a perceived potential competition argument offered in defense. The court rejected it because barriers to entry were high and defendants offered little evidence of imminent entry; presenting research at U.S. medical conferences did not show an intent to enter. Applying a two-to-three-year standard for timely entry, the court found that no other TAVR-AR device was likely to be approved before about 2034, given the average of eight and a half years needed to complete the FDA process. Compare the discussion of entry as rebuttal in Unit 10.

Second, defendants argued that JenaValve’s manufacturing problems, limited staff, and dire finances would prevent it from competing effectively without Edwards. The court found that, despite its small size, JenaValve had brought Trilogy to the brink of FDA approval and that its standalone sales forecasts undercut the claim. In any event, defendants had not shown that JenaValve’s weaknesses could not be resolved by other competitive means. Compare Meta’s argument, discussed below, that Instagram had uncertain prospects without Facebook.

Third, Edwards argued that its resources and expertise would speed Trilogy’s approval, improve its manufacturing, and save thousands of lives. The court did not doubt Edwards’s superior resources but held that they were only the starting point. Defendants had to show specific, verifiable benefits that could not be achieved without the merger. They offered no model supporting their “lives saved” claim. The sales forecast they relied on had been prepared by JenaValve without input from Edwards, and JenaValve had sent the same forecast to Boston Scientific as a potential buyer. Edwards’s claimed ability to improve Trilogy’s poor tissue yields was not merger-specific either. Trilogy uses porcine tissue, and other device makers, not Edwards, have that expertise. The court also held that the verifiability and merger-specificity requirements apply even when merging parties offer procompetitive benefits to rebut the *prima facie* case rather than as an affirmative defense. Finally, the court found that JenaValve had

¹⁷ *Id.* at *29-31.

¹⁸ *Id.* at *31-33 & n.5 (citing *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 927 (N.D. Cal. 2023)).

realistic alternatives to the Edwards transaction. Other strategic buyers had previously shown interest. They would likely view a company with a clinically validated device that was likely to be first to market as an attractive target. JenaValve could seek emergency and additional financing from its investors.¹⁹

The equities and the remedy. The court acknowledged that the transaction promised some public benefits. Edwards was prepared to commit \$100 million to Trilogy in 2026 alone, and without the deal, JenaValve could run out of money in as little as a month unless it found another buyer or emergency funding. But the public interest in effective antitrust enforcement outweighed those benefits. The court also emphasized how difficult it would be to unscramble the eggs. During its investigation, the FTC had asked whether Edwards would divest JC Medical to clear the JenaValve acquisition. Edwards's answer was a "hard no," because it had already integrated its own materials, trade secrets, and intellectual property into the J-Valve program. The same would likely happen with Trilogy if the acquisition closed. Edwards then abandoned the transaction (Unit 11, slide 18).²⁰ JenaValve continued on its own, and on March 17, 2026, the FDA approved Trilogy for patients with symptomatic, severe aortic regurgitation who are at high or greater risk for surgical valve replacement. Consistent with the court's prediction, Trilogy became the first transcatheter device approved in the United States to treat aortic regurgitation.²¹

The significance of the case. The case illustrates why the absence of commercial approval does not necessarily make competition merely potential. Where firms already compete in developing and testing products, Section 7 can protect that existing rivalry before the products reach commercial sale, as well as the commercial competition the rivalry is likely to produce. The court never invoked either traditional potential competition theory or a separate nascent competition doctrine, and it found a likely substantial lessening of competition without relying on the structural presumption. Compare *Medtronic/Covidien* in Unit 10. There, Bard already sold drug-coated balloon catheters in the United States, and the FTC treated Medtronic and Covidien, whose products were still in clinical trials, as potential entrants into that existing market. In *Edwards/JenaValve*, no firm yet sold a TAVR-AR device, and the FTC defined a market for development and commercialization in which the two pipeline programs were already competitors.

This is why the case belongs here in the unit. First, identify any competition already occurring, then consider the additional competitive opportunities that independent development might create. The nascent threat analysis that follows addresses the loss of a possible future challenge to an incumbent's position when the threat's development remains uncertain (Unit 11, slides 17-18, 20-21).

Nascent competitive threats

Concerns about well-entrenched monopolies, especially in high-tech industries, have focused attention on acquisitions of so-called "nascent competitors." By 2020, critics were faulting the enforcement agencies for failing to block such acquisitions by large technology companies. A

¹⁹ *Id.* at *33-44.

²⁰ *Id.* at *44-46; Edwards Lifesciences, Edwards Comments on JenaValve Acquisition (Jan. 9, 2026); Press Release, Fed. Trade Comm'n, [Statement on FTC Victory Halting Anticompetitive Medical Device Deal](#) (Jan. 12, 2026).

²¹ U.S. Food & Drug Admin., Premarket Approval P250024, Trilogy Transcatheter Heart Valve System (Mar. 17, 2026).

nascent competitor is a firm that could develop into a significant threat to a dominant firm's position. The threat may arise from a new technology, a niche product, or a complementary service that does not yet compete directly with the dominant firm's principal offering. The nascent competitor may eventually enter the dominant firm's market itself, be acquired by another firm that enters, license its technology to another firm that enters, or facilitate competition by others without entering itself. The threat may also reside in acquired assets or exclusive development rights, as in *Mallinckrodt/Synacthen*. The competitive concern is that the acquisition eliminates an independent avenue for challenging the dominant firm's position (Unit 11, slide 20).

Challenging acquisitions of nascent competitive threats can be difficult under the traditional actual potential competition doctrine. As *Meta/Within* illustrates, the doctrine requires, among other things, that the potential entrant have available, feasible means of independent entry, that entry be reasonably probable in the near future, and that entry have a reasonable probability of producing a substantial procompetitive effect. A nascent competitor may fall short on each requirement. At the time of the acquisition, it may not be actively considering entry with a product that competes with the dominant firm. It may be uncertain whether the nascent competitor, or a third-party acquirer or licensee, would ever develop such a product. Even if entry is contemplated, it may be more distant than the "near future." And even if entry is near, its technological and commercial success, and therefore its competitive impact, may be highly speculative (Unit 11, slide 21).

These uncertainties do not categorically exclude acquisitions of nascent competitors from Section 7. The absence of a definite entry plan does not, by itself, defeat an actual potential competition claim, since objective evidence of capabilities and incentives may establish a reasonable probability of entry. But the evidence may not show that entry was likely enough, soon enough, or significant enough to satisfy the doctrine (Unit 11, slide 21).

The concern is particularly sharp in a so-called "killer acquisition," in which an incumbent acquires a potentially competing development project and discontinues it to prevent future competition. One empirical study estimated that 5.3 to 7.4 percent of the pharmaceutical acquisitions in its sample were killer acquisitions.²² But eliminating a nascent competitive threat does not require terminating the acquired product. The acquirer may continue developing the product while eliminating the independent ownership that could have made it a competitive threat. Conversely, the acquisition may provide resources or capabilities that accelerate development and improve the product. The analysis must therefore compare the likely competitive consequences of the acquisition with those of the acquired firm or technology remaining independent of the dominant acquirer, including development by another owner or licensee. The Edwards/JenaValve record illustrates the subtler possibility: Edwards had not decided whether to continue developing larger Trilogy valves, and its planning documents contemplated proceeding with J-Valve as its next-generation platform "over JenaValve." Neither continued product development nor evidence of intent to eliminate a threat resolves that comparison on its own (Unit 11, slide 42).

When the traditional doctrine does not fit, the enforcement agencies have also used Section 2 of the Sherman Act to challenge acquisitions of nascent threats to an existing monopoly (Unit 11, slide 22). Monopolization has two elements: (1) the possession of monopoly power in the

²² Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. Pol. Econ. 649 (2021).

relevant market and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development resulting from a superior product, business acumen, or historic accident.²³ Conduct satisfying the second element is called anticompetitive exclusionary conduct. Under a monopoly maintenance theory, the question is whether the acquisition is exclusionary conduct that helps preserve the acquirer's monopoly power. Section 2 also prohibits attempted monopolization, which requires anticompetitive conduct, a specific intent to monopolize, and a dangerous probability of achieving monopoly power.²⁴ Section 2 thus provides a separate basis for liability with its own requirements. A plaintiff that cannot satisfy the actual potential competition doctrine under Section 7 may still have a monopoly maintenance claim under Section 2, but only by proving monopoly power and exclusionary conduct, which Section 7 does not require.

There is no assigned reading for *Microsoft*. This guidance and the class notes (Unit 11, slides 23-24) cover what you need.

Microsoft illustrates how an emerging technology can threaten monopoly power without already competing in the monopolized market.²⁵ Microsoft held monopoly power in operating systems for Intel-compatible personal computers, with a market share of more than 95 percent. That power was protected by what the court called the applications barrier to entry. Consumers wanted an operating system that ran many applications, and developers wanted to write applications for an operating system with many users. A new operating system therefore faced a chicken-and-egg problem that Windows did not.

Two “middleware” technologies threatened that barrier: Netscape Navigator, a web browser, and Sun Microsystems’ Java technologies. Both could expose their own software interfaces to application developers. If developers wrote applications for the middleware rather than directly for Windows, those applications could run on any operating system that supported the middleware, and the applications barrier would erode. Neither Navigator nor Java was itself a substitute for Windows. Microsoft responded with a series of exclusionary practices, including restrictive and exclusive agreements, deception of Java developers, and threats to Intel. The court evaluated each practice separately, sustaining some exclusion claims and rejecting others. *Microsoft* concerned exclusionary conduct rather than an acquisition, but its causation analysis provides the framework used in later acquisition cases (Unit 11, slide 23).

Microsoft argued that the plaintiffs had not shown that its conduct caused the maintenance of its monopoly, because no one could know whether Navigator or Java would ever have developed into viable alternatives to Windows. The D.C. Circuit rejected that argument. In an action seeking injunctive relief, causation could be inferred from exclusionary conduct “reasonably capable of contributing significantly” to the defendant’s continued monopoly power. The court asked two questions: whether, as a general matter, excluding nascent threats is the type of conduct reasonably capable of contributing significantly to continued monopoly power, and whether Navigator and Java reasonably constituted nascent threats when Microsoft engaged in the challenged conduct. The evidence satisfied both. The plaintiffs did not have to prove that the

²³ United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

²⁴ Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

²⁵ United States v. Microsoft Corp., 253 F.3d 34, 51-59 (D.C. Cir. 2001) (en banc) (per curiam).

technologies would actually have developed into viable platform substitutes for Windows (Unit 11, slide 24).²⁶

The court explained why. Suppressing an emerging technology can prevent it from developing far enough to demonstrate its competitive potential. Requiring proof that the technology would have developed without suppression would reward a monopolist for acting early, even when the threat's future remained uncertain. The court reasoned that the Sherman Act should not let monopolists eliminate nascent, if unproven, competitors at will, especially in industries marked by rapid technological change. In effect, the defendant bears the uncertain consequences of its own anticompetitive conduct.

The decision also has limits. The plaintiffs still had to establish monopoly power and anticompetitive exclusionary conduct as separate elements. Intent helps a court understand the likely effects of conduct, but anticompetitive intent alone does not establish liability. The court also distinguished liability from remedy. Structural relief, such as divestiture, may require a clearer causal connection between the exclusionary conduct and the creation or maintenance of monopoly power than is needed to establish liability (Unit 11, slide 24).

The 2023 Merger Guidelines

Read Section 2.6.A of the 2023 Merger Guidelines (pp. 102-04). Section 2.6.A falls under Guideline 6, which addresses mergers that may entrench or extend a dominant position. Outside the assigned excerpt, Guideline 6 directs the agencies to assess dominance based on “direct evidence or market shares showing durable market power” and specifies no numerical market-share threshold.²⁷ Dominance under Guideline 6 thus should not be equated with the monopoly power required for a monopoly maintenance claim under Section 2. Keep the difference in mind when we discuss how dominant an acquiring firm must be (Unit 11, slide 38).

Section 2.6.A explains how acquiring a nascent threat may entrench a dominant position. The target may become a significant rival itself, help other rivals grow, or otherwise weaken the incumbent's power. The concern includes the loss of independent development that could open the market to competition, even if the target would not supply a direct substitute for the incumbent's product (p. 103; Unit 11, slide 25).

Network effects, economies of scale, and switching costs may prevent a new firm from immediately matching an incumbent's full offering. A firm may instead attract a narrow group of customers or offer only some features, and then expand as it gains users and capabilities. A complementary service may also help customers combine products from several suppliers into an alternative to the incumbent's offering. Acquiring such a firm may eliminate both its opportunity to grow and its ability to help others compete. Present product overlap may therefore understate the competition at risk (p. 103).

Technological transitions can temporarily weaken established entry barriers. A new firm may use the new technology to attract users before the incumbent adapts. The agencies are concerned that acquiring such a firm could let the incumbent prevent its independent growth or recreate the barriers protecting the incumbent's position, eliminating an opportunity for the transition to produce a more competitive market (p. 103).

²⁶ *Id.* at 59, 78-80.

²⁷ U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 2.6 (2023).

The Guidelines distinguish two statutory routes. Under Section 7, the agencies examine whether eliminating the threat may substantially lessen competition or tend to create a monopoly by entrenching the dominant position. Under Section 2, they assess whether the acquisition could reasonably contribute significantly to preserving monopoly power. In discussing Section 2, the Guidelines note that a threat may be uncertain and may take years to materialize, and they rely on *Microsoft*. Monopoly power and exclusionary conduct remain necessary. Claimed competitive benefits are evaluated under Section 3 of the Guidelines, including whether they are merger-specific. These statements describe the agencies' enforcement analysis; courts apply the governing statutes and precedents (pp. 103-04; Unit 11, slide 25).

Mallinckrodt/Synacthen

Read the FTC's press release announcing the settlement (pp. 106-08) and Commissioner Ohlhausen's concurring statement (pp. 109-10).

Mallinckrodt/Synacthen illustrates a monopoly maintenance challenge to an acquisition of drug-development rights. The alleged threat was a drug that could become an alternative to the incumbent's product after further development and regulatory approval. Questcor sold Acthar, a natural ACTH drug used to treat infantile spasms and other serious conditions, which the complaint alleged was the only therapeutic ACTH drug sold in the United States. Synacthen Depot, a synthetic ACTH drug sold abroad, lacked FDA approval for therapeutic use in the United States. In June 2013, Questcor acquired the exclusive U.S. rights to Synacthen from Novartis, outbidding other prospective developers and preventing them from acquiring the rights and developing a competing product. Mallinckrodt acquired Questcor in August 2014. The challenged transaction was the earlier rights acquisition, not Mallinckrodt's acquisition of Questcor (Unit 11, slide 26).

The government's theory and evidence. The FTC alleged monopoly maintenance under Section 5 of the FTC Act, and five states alleged a Section 2 violation of the Sherman Act. There was no Section 7 count. Invoking *Microsoft*, the complaint alleged that eliminating the prospect of independent U.S. development of Synacthen was reasonably capable of contributing significantly to the preservation of Questcor's monopoly. Synacthen's prospects for FDA approval remained significantly uncertain. But three alternative purchasers allegedly had relevant expertise, financing, regulatory and business plans, and formal offers. The government thus identified firms that would have pursued development if Questcor had not acquired the rights. It did not allege that FDA approval and successful entry were assured (Unit 11, slide 27).²⁸

The company's response. Mallinckrodt disputed the government's scientific and market premises, emphasized the difficulty and expense of obtaining FDA approval, and pointed to its development of Synacthen for Duchenne muscular dystrophy. The complaint acknowledged Questcor's claim that it acquired Synacthen for indications not covered by Acthar, but alleged that those uses could be developed with Acthar. These competing accounts put both the prospect of independent competition and the claimed development benefits in dispute.²⁹

²⁸ [Complaint](#) ¶¶ 8, 34, 41-47, 50, 53-60, *FTC v. Mallinckrodt ARD Inc.*, No. 17-cv-00120 (D.D.C. Jan. 18, 2017).

²⁹ *Mallinckrodt plc*, [Mallinckrodt and Federal Trade Commission Resolve Questcor Matter](#) (Jan. 18, 2017); *Complaint* ¶ 51, *FTC v. Mallinckrodt ARD Inc.*, No. 17-cv-00120 (D.D.C. Jan. 18, 2017).

The settlement and its significance. The 2017 settlement required a \$100 million payment and a license permitting independent development of Synacthen for infantile spasms and nephrotic syndrome. The order directed the payment to the FTC, which could use the money for equitable relief, including consumer redress, and would deposit any money not so used in the U.S. Treasury as disgorgement. The FTC could also allow the plaintiff states to use \$10 million of the total for equitable relief related to their own claims. Mallinckrodt separately paid the states \$2 million for attorneys' fees and costs.³⁰ Mallinckrodt admitted no wrongdoing, and the court did not adjudicate liability. The case illustrates a challenge to the elimination of an independent development opportunity despite uncertain approval. The licensing remedy sought to restore that opportunity rather than guarantee a competing drug's commercial success (pp. 106-08; Unit 11, slide 27).

Commissioner Ohlhausen supported the substantive theory and the licensing remedy but questioned the use of monetary relief and the decision to proceed in federal court rather than through administrative adjudication. Her concurrence separates agreement on the alleged competitive harm from disagreement over the remedy and forum. The Supreme Court later held in *AMG Capital Management* that Section 13(b) does not authorize equitable monetary relief. The FTC therefore could not obtain a payment like Mallinckrodt's in a litigated Section 13(b) action today (pp. 109-10; Unit 11, slide 27).³¹

Visa/Plaid

There is no assigned reading for *Visa/Plaid*. This guidance and the class notes (Unit 11, slides 28-29) are your materials for the case.

The transaction and the competitive concern. *Visa/Plaid* illustrates how a firm's existing complementary services can provide a foundation for future competition with an incumbent. In January 2020, Visa agreed to acquire Plaid for \$5.3 billion. Plaid's technology connected consumers' bank accounts to financial applications. It had connections to more than 11,000 U.S. financial institutions and over 200 million consumer bank accounts. Plaid did not yet offer a payments service that competed with Visa's debit network. DOJ alleged, however, that Plaid planned to use its bank connections to enable payments directly from consumers' bank accounts, bypassing Visa's debit network and lowering merchants' costs of accepting payments (Unit 11, slide 28).³²

DOJ's theories and evidence. DOJ sued in November 2020 under Section 2 of the Sherman Act and Section 7 of the Clayton Act. It alleged that Visa had monopoly power in U.S. online debit transactions, with a share of approximately 70 percent, and that network effects protected that position: merchants wanted access to consumers, and consumers wanted broad merchant acceptance. A new debit network therefore faced a chicken-and-egg problem like the one that protected Windows in *Microsoft*. Plaid's existing bank connections, technology, and relationships with application developers could help it overcome that barrier. According to the complaint, Plaid planned to launch a money-movement business by the end of 2021. Visa's own documents described the threat. Visa's CEO called the acquisition an "insurance policy" against

³⁰ Stipulated Order for Permanent Injunction and Equitable Monetary Relief § III, *FTC v. Mallinckrodt ARD Inc.*, No. 17-cv-00120 (D.D.C. Jan. 30, 2017).

³¹ *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 70 (2021).

³² [Complaint](#) ¶¶ 1, 7-14, 25-31, 61-78, *United States v. Visa Inc.*, No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020).

a threat to Visa's U.S. debit business, and Visa projected a potential loss of \$300 million to \$500 million by 2024 if a rival acquired Plaid. These documents supported DOJ's account of a significant threat, but Visa's fears did not establish that Plaid would succeed (Unit 11, slides 28-29).

The Section 2 theory alleged that eliminating Plaid as a nascent but significant threat would unlawfully maintain Visa's monopoly. The Section 7 theory alleged that the acquisition would entrench Visa's position and deprive merchants and consumers of a lower-cost alternative and of innovation. Notice that the Section 7 count was framed as entrenchment of an existing monopoly rather than as a traditional actual potential competition claim. Section 7 did not require proof of monopoly power. Under either theory, however, DOJ had to connect Plaid's capabilities and plans to the competition the acquisition threatened to eliminate (Unit 11, slide 28).

The merging parties' response. Visa maintained that Plaid was a complementary data network rather than a payments competitor, that Visa faced substantial competition, and that the acquisition would improve digital services and consumer choice. DOJ's complaint anticipated these arguments. It alleged that Visa would have an incentive to delay or suppress Plaid's competing payments service, that the claimed efficiencies would not offset the harm, and that any benefits could be achieved through less restrictive means (Unit 11, slide 29).³³

The disposition and its significance. The parties terminated the agreement on January 12, 2021, citing the prospect of prolonged litigation. Abandonment prevented the acquisition but produced no decision on liability or on the probability and timing of entry required under either statute.³⁴ The case nonetheless illustrates the importance of looking beyond current product overlap to a target's capacity to become a competitor, and the evidentiary weight the government places on an acquirer's own assessment of the threat (Unit 11, slide 29).

Facebook/Instagram/WhatsApp

Facebook acquired Instagram in 2012 and WhatsApp in 2014. The FTC sued in 2020, alleging that the acquisitions unlawfully maintained Facebook's monopoly in personal social networking services. It pursued the Section 2 theory through Section 5 of the FTC Act and sought injunctive relief, including divestiture, under Section 13(b). It did not plead a Section 7 claim. The case supplies a judicial application of the Section 2 framework to acquisitions and illustrates allegations of both an existing competitive threat and a more uncertain nascent threat (pp. 112-13; Unit 11, slide 30).

Both transactions had undergone HSR review. The Instagram investigation lasted more than four months and included a second request; the WhatsApp review lasted less than a month. The FTC's decisions not to challenge the transactions at those times did not confer immunity or create a presumption of legality in the later case. Read the introductory note and the class notes for this background (pp. 112-13; Unit 11, slide 30). Then read the excerpts from the 2024 summary judgment opinion (pp. 114-32) with the discussion below.

The FTC's account of Instagram focused on the transition from desktop computers to mobile devices. The FTC argued that Instagram's rapidly growing mobile photo-sharing service offered

³³ Visa Inc., [Visa Statement on Planned Acquisition of Plaid](#) (Nov. 5, 2020); Complaint ¶¶ 67, 74-75, United States v. Visa Inc., No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020).

³⁴ Visa Inc., [Visa and Plaid Announce Mutual Termination of Merger Agreement](#) (Jan. 12, 2021).

a strong alternative while Facebook struggled to adapt its own product. The FTC relied on Instagram's growth, its founders' assessments of competition with Facebook, and Facebook's internal documents identifying the threat. Facebook's decision to acquire Instagram rather than rely on its own development efforts, and its later discontinuation of the standalone Facebook Camera application, supported the FTC's claim that the acquisition eliminated independent rivalry (pp. 118-21; Unit 11, slide 30).

The WhatsApp acquisition presented a different theory. The FTC did not allege that WhatsApp already competed in personal social networking. It argued that WhatsApp's large, growing messaging network, its capabilities, and its need for a viable revenue model positioned it to expand into that market. Other messaging services had made that transition abroad. Facebook's documents expressed concern about such a transition, and evidence of Google's interest in acquiring WhatsApp supported an alternative route to competition under another owner. The alleged harm was the loss of those independent possibilities, not the elimination of existing competition in personal social networking (pp. 121-23; Unit 11, slide 30).

Meta's response. Meta disputed the proposed market and its alleged monopoly power. It also disputed each target's competitive importance. Meta argued that Instagram had few employees, fragile infrastructure, and uncertain prospects without Facebook's assistance. Meta also relied on the WhatsApp founders' opposition to advertising and to expansion into personal social networking, and it argued that other messaging services could make that transition. Meta characterized the theory of development under another owner as speculative. It further argued that its investments and integration had improved both products and produced substantial consumer benefits (pp. 113, 121, 123; Unit 11, slide 30).

The 2024 summary judgment decision. Applying *Microsoft*, Judge Boasberg held that a monopolist's acquisition of an actual rival or a nascent threat could establish prima facie anticompetitive conduct without separate proof of higher prices or reduced output. The target had to reasonably constitute a competitive threat when acquired. An informed, reasonable assessment by the acquirer could be highly probative, but objective evidence of the target's capabilities and willingness to compete could support that assessment or show it was exaggerated. The court declined to import the traditional Section 7 actual potential competition standard into this Section 2 case (pp. 114-18; Unit 11, slide 31). Contrast *Meta/Within*, where the actual potential competition doctrine required proof that entry was reasonably probable.

Under that standard, the FTC's evidence was sufficient to permit a reasonable factfinder to conclude that Instagram was already a competitive threat and that WhatsApp presented a nascent threat. Meta's contrary evidence created factual disputes for trial. Remember that this was a decision on summary judgment. The court decided only whether genuine disputes of material fact required a trial, not whether either acquisition was unlawful (pp. 118-23; Unit 11, slide 31).

Procompetitive justifications. The FTC separately sought summary judgment excluding Meta's asserted justifications. Under *Microsoft*, Meta could respond to a prima facie showing of anticompetitive conduct with a procompetitive justification; if that justification remained un rebutted, the FTC would have to show that the anticompetitive harm outweighed the benefit. The court required the claimed benefits to reflect competition on the merits, rest on nonpretextual explanations, and be specific to the acquisitions. Benefits obtainable through a practical, less restrictive alternative could not justify the loss of competition. The court assumed

that Meta bore the burden on this last requirement because the allocation was uncontested; it did not establish a universal rule allocating that burden (pp. 114, 123-26; Unit 11, slide 32).

The parties' dispute concerned both the genuineness of the justifications and whether the acquisitions were needed to achieve the benefits. The FTC relied on Facebook's documents about neutralizing threats and argued that Facebook could instead have invested in its own products. Meta relied on its actual investments, product improvements, and evidence that Instagram's and WhatsApp's features and user networks could not readily be reproduced. The court found factual disputes requiring trial. A mixed motive did not necessarily make a genuine benefit pretextual, and additional spending on Facebook's own products would not necessarily reproduce the acquired products' advantages. The comparison nevertheless had to account for development by the targets or another owner without the acquisitions (pp. 127-31; Unit 11, slide 32).

Two additional rulings define the limits of this analysis. The court permitted evidence of benefits outside the alleged personal social networking market, including WhatsApp messaging benefits, but required a strong showing of relevance and reserved whether to credit them. It rejected Meta's claim that acquiring WhatsApp was justified by a need to prevent Apple or Google from removing Meta's apps from their platforms. That rationale appeared to protect monopoly power, and Meta supplied no evidence that the acquisition was the least restrictive way to obtain the claimed benefit. Most of the disputed justifications survived for trial, but their survival did not establish that they justified the acquisitions (pp. 126-27, 131-32; Unit 11, slide 32).

The 2025 trial judgment and the appeal. Meta won at trial on November 18, 2025, because the FTC failed to establish current monopoly power. The court included TikTok and YouTube in the relevant market and found that TikTok's inclusion alone defeated the FTC's monopoly power showing. This conclusion mattered because Section 13(b), which authorizes the requested permanent injunction, requires an ongoing or imminent violation. Since the pleaded violation was monopoly maintenance, the court required present monopoly power. Past power and continuing effects of past conduct were insufficient. The court therefore did not decide whether the acquisitions constituted anticompetitive exclusionary conduct (pp. 133-34; Unit 11, slide 33). The FTC filed a notice of appeal to the D.C. Circuit on January 20, 2026. The appeal is fully briefed, but as of this writing, the court has not scheduled oral argument.³⁵

The two decisions perform different roles in this unit. The 2024 opinion explains how Section 2 can address an acquisition of a nascent threat and how the court evaluates claimed benefits. The 2025 judgment demonstrates that a legally sufficient theory of exclusionary conduct does not dispense with proof of monopoly power. It did not reject the nascent threat theory on its merits. Nor did it decide how a Section 7 claim, which does not require monopoly power, would have been resolved; no such claim was pleaded (pp. 133-34; Unit 11, slides 31-33).

Comparing the theories and policy proposals

Keeping the theories distinct. The unit brings together five different mechanisms; the class notes summarize the first four. Actual potential competition protects the additional competition that independent entry probably would bring. Perceived potential competition protects an already operating constraint because incumbents perceive a threat of entry; both the perceived threat and its tempering effect must be proved. Existing research and development competition, as in

³⁵ See [Docket, FTC v. Meta Platforms, Inc., No. 26-5028 \(D.C. Cir.\)](#).

Edwards/JenaValve, protects rivalry occurring before commercial sales and the commercial competition that rivalry is likely to produce. Section 2 analysis of nascent threats addresses exclusionary conduct reasonably capable of contributing significantly to maintaining monopoly power, even when the threat's eventual development remains uncertain, but it requires proof of monopoly power. Section 7 can also reach the elimination of a nascent threat as entrenchment of a dominant position, as DOJ alleged in *Visa/Plaid* and as Guideline 6 contemplates, without requiring monopoly power. The mechanisms can overlap in a particular transaction, but evidence sufficient for one does not automatically establish the others. The statutory elements, the counterfactual, and the procedural posture determine what remains to be proved (Unit 11, slide 34).

The policy debate. Proponents of stronger intervention argue that even a relatively small chance of disrupting an entrenched monopoly may be worth preserving when the resulting competitive benefits could be substantial, and that an acquisition may eliminate an opportunity for future competition that cannot readily be recreated. The countervailing concern is that intervention may block beneficial investment or integration involving firms that would never have become meaningful competitive threats, either on their own or in the hands of another acquirer. Proposals for stronger intervention differ materially. Some would prohibit entrenched dominant firms from acquiring nascent competitors, or presume such acquisitions anticompetitive unless the acquiring firm proves a compelling procompetitive justification. Others would apply existing law more aggressively. Some proponents have sought legislation; the 2021 proposal cited in the class notes would presume that acquisitions of nascent potential competitors by dominant firms are anticompetitive. No such legislation has been enacted (Unit 11, slide 35).

The expected value argument. Section 7 prohibits acquisitions whose effect “may be substantially to lessen competition,” and courts have read that language to require a reasonable probability of anticompetitive harm. Defendants argue that uncertain entry by a nascent competitor cannot satisfy that standard. The class notes offer an alternative interpretation: from a consumer welfare perspective, whether a probability of harm is “reasonable” should depend on the expected value of the harm, not on its likelihood alone. A low probability of harm could then satisfy the incipency standard if the harm, should it occur, would be large enough. An expected value analysis would also have to account for any offsetting procompetitive benefits of the acquisition (Unit 11, slide 36).

A purely illustrative example makes the tradeoff explicit. Suppose that preserving a target's independence has a twenty percent chance of producing \$100 million in consumer benefits over a specified period, and that the acquisition would eliminate that opportunity. The expected loss is \$20 million. If the acquisition would generate a certain \$10 million in otherwise unattainable consumer benefits over the same period, the expected loss exceeds the expected gain, even though successful entry is less likely than not. The result depends on the estimates, the acquisition's causal effect, and the availability of alternative ways to achieve either set of benefits. This is an argument for interpreting Section 7's incipency standard in expected value terms. It is not the probability test the *Meta/Within* court applied, nor is it a settled rule of merger law. Guideline 4's sliding scale, noted above, moves in a similar direction: “the higher the market concentration, the lower the probability of entry that gives rise to concern” (Unit 10, p. 6). Compare also *Edwards/JenaValve*, where the court focused on the probability that at least one of two pipeline devices would be approved, not the probability that both would be. That

analysis concerned the likely commercialization of existing development programs; the court did not adopt an expected value test.

Opponents emphasize complementary assets, product improvements, financial support for development, and the role of acquisition opportunities in encouraging investment in new firms. They warn that predictions of disruption can be speculative and that prohibiting beneficial acquisitions can itself reduce innovation. The 2020 commentary reproduced in the class notes presents that position. Its broad statements about the absence of demonstrated harm should be understood as the authors' advocacy at that time, not as an adjudicated or current factual conclusion (Unit 11, slide 37). The empirical estimate of killer acquisitions in the pharmaceutical industry noted above supports that caution, although it concerns a different industry than the technology acquisitions that prompted the debate.

Evidence, defenses, and remedies. The final slides pose the practical questions behind this debate: whether the claim arises under Section 7, Section 2, or a new statute (Unit 11, slides 38-42). First, how dominant must the acquiring firm be? A high market share does not alone establish durable monopoly power. Guideline 6 assesses dominance without a numerical market-share threshold, while a monopoly maintenance claim under Section 2 requires proof of monopoly power. Second, how large, how unique, how likely, and how imminent must the threat be? A target's technical promise does not establish its ability or incentive to commercialize, and other firms may be developing similar or substitute technologies.

Third, what evidence proves the threat? The acquirer's fear may be informed evidence of a threat, but the acquirer may be a "paranoid monopolist" that sees threats where none exist, or it may value the target for its complementary assets. The target's documents may also be shaped by the prospect of a sale, because the target has an incentive to present itself as a competitive threat to raise its value to the acquirer. Documents created before the acquisition prospect arose are therefore most persuasive. Contemporaneous plans, financing, regulatory prospects, other bidders, and the practical availability of substitutes for the target's technology help distinguish these possibilities. Probability, timing, and the magnitude of the competitive opportunity all matter (Unit 11, slides 39-40).

Fourth, what defenses are available, and which party bears the burden of production or persuasion on them? Acquisition can accelerate development, redirect it toward the acquirer's products, or suppress a line of development that threatens the acquirer. Those outcomes have different competitive implications even when all are described as integration. A persuasive justification therefore explains the particular benefit and why a less restrictive alternative would not achieve it. *Edwards/JenaValve* shows how demanding a court can be: the acquirer's superior resources were only the starting point, and the claimed benefits had to be verifiable and specific to the merger. Finally, consider remedies. When an acquiring firm plans to invest in the target's technology but not license it to rivals, should the agencies accept a behavioral decree requiring licensing on reasonable terms? A licensing remedy, as in *Mallinckrodt*, attempts to restore an independent development path, but its effectiveness depends on a capable licensee, adequate rights and resources, and the remaining obstacles to entry (Unit 11, slides 27, 41-42).

The common task throughout the unit is to connect a specific competitive mechanism to evidence about what the firms would do with and without the transaction. By the end of the assignment, you should be able to explain why the FTC lost both potential competition claims in *Meta/Within*; distinguish existing competition in development, as in *Edwards/JenaValve*, from

potential competition; explain how *Microsoft*'s causation analysis allows Section 2 to reach acquisitions of nascent threats and what Section 2 still requires; compare the statutory theories in *Mallinckrodt/Synacthen*, *Visa/Plaid*, and *Facebook/Instagram/WhatsApp*; and evaluate the arguments for and against more aggressive treatment of acquisitions of nascent competitors.

This completes Unit 11. Enjoy the reading! Email me if you have any questions.