**MERGER ANTITRUST LAW**

LAW 1469
Georgetown University Law Center
Fall 2026

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

## Class 24 (November 17): *AT&T/Time Warner* and Vertical Remedies and "Fixes" (Unit 12)

In Class 24, we will finish the *AT&T/Time Warner* opinion and then turn to remedies in vertical mergers. The last two parts of the opinion reject the government's remaining theories of harm: that the merged firm would slow the growth of virtual MVPDs, acting alone or in coordination with Comcast/NBCUniversal, and that it would restrict rival distributors' use of HBO as a promotional tool. We then examine how the agencies and the courts have treated conduct relief. For decades, the agencies resolved most vertical concerns through consent orders that regulated the merged firm's conduct rather than requiring a divestiture. *GE/Avio* is an example. When the agencies became unwilling to accept such settlements, merging parties began offering their own commitments in litigation as evidence that the merger would not harm competition. *AT&T/Time Warner* was the first modern instance, and *Tempur Sealy/Mattress Firm* is the most recent. We will ask three questions about such commitments: whether a commitment shows that the merged firm lacks the incentive to foreclose, whether it would prevent a substantial lessening of competition if the merged firm performed as promised, and whether anyone could enforce it.

*The virtual MVPD theory.* Virtual MVPDs, such as Sling, distribute packages of live channels over the internet. The complaint alleged that the merged firm would use Turner's programming to impede these emerging distributors, which threatened the traditional pay-TV bundle on which AT&T's video profits depended. At trial, the government presented the theory in two versions: AT&T could slow the growth of virtual MVPDs acting on its own (the "unilateral theory") or in coordination with Comcast/NBCUniversal (the "coordination theory") (p. 302). Read Part IV of the opinion (pp. 301-15).

The court rejected the unilateral version largely on the government's own evidence. Professor Shapiro testified that, acting unilaterally, AT&T would still want to license Turner's content to virtual MVPDs, and he offered no opinion that the merged firm would withhold it. The court also found that Turner's business depended on wide distribution and that AT&T's wireless business benefited when customers watched video on any service. Executives' expressions of displeasure with virtual MVPDs, it concluded, said little about the merged firm's incentives (pp. 303-07). Contrast the increased-leverage theory we studied in Class 23. There, the government did not need to predict that Turner would actually withhold its programming, because a more credible threat of withholding could raise affiliate fees. The unilateral virtual MVPD theory required a prediction that the merged firm would act against these distributors, and the government's own expert disclaimed the incentive to do so.

The coordination version applies the vertical coordinated effects theory introduced in Class 21: vertical integration that makes the two largest traditional distributors more alike can align their incentives and facilitate tacit coordination against disruptive entrants. The government did not need to prove an agreement, but it did need to show that coordination was reasonably probable. "Section 7 involves probabilities, not certainties or possibilities," the court observed, quoting

*Baker Hughes* (p. 310). Shapiro had not attempted to quantify the risk of coordination. The court also found that each firm would lose affiliate fees and advertising revenue by withholding programming, that NBCUniversal had licensed its programming to virtual MVPDs, that AT&T's large wireless business gave it different incentives from Comcast's, and that long-term affiliate agreements meant one firm would have to act first without any assurance that the other would follow (pp. 308-15).

Compare the horizontal coordinated effects analysis in *H&R Block*. There, the structural presumption supplied an inference that the merger would increase the risk of coordination. A vertical merger produces no change in concentration that could support the same inference, so the government had to prove the coordination mechanism directly. As you read, ask what evidence might have persuaded the court: a history of parallel conduct by the two firms toward online distributors, documents showing that each expected the other to follow its lead, or an analysis showing that coordinated withholding would be profitable for both.

*HBO as a promotional tool.* The government's third theory was that the merged firm would restrict rival distributors' use of HBO in promotions to attract and retain subscribers. Shapiro disavowed any claim that AT&T would withhold HBO or raise its price (p. 316 n.57), leaving a narrow theory that the court called "a gossamer thin claim" (p. 317). HBO's business depends on subscription volume, which distributors' promotions help generate, so the merged firm would have little incentive to restrict them. Nor did the government show harm: distributors use many promotional tools, and HBO competes with other premium content, including Netflix. Read Part V of the opinion (pp. 316-20).

*The conclusion and the appeal.* The opinion's conclusion begins: "The Court has now spoken and the defendants have won" (p. 321). The court then urged the government not to seek a stay pending appeal, which it said "would be a manifestly unjust outcome in this case" because the merger agreement's June 21, 2018, termination date was days away and AT&T would owe Time Warner a $500 million breakup fee if the deal failed. Read the conclusion (pp. 321-23).

The government did not seek a stay, and the merger closed on June 14, 2018, two days after the decision.[1] AT&T committed by letter to the Antitrust Division to manage the Turner networks separately from its distribution business while any appeal was pending.[2] The government appealed, challenging only the rejection of its increased-leverage theory. It argued that the district court had discarded the economics of bargaining, failed to apply the principle of corporate-wide profit maximization, used internally inconsistent logic in evaluating the industry evidence, and erred in rejecting Shapiro's model. The D.C. Circuit acknowledged that "[u]ndoubtedly the district court made some problematic statements," but it reviewed the findings for clear error and affirmed in February 2019. It read the district court as having "accepted the Nash bargaining theory as an economic principle generally but rejected its specific

[1] The integration proved short-lived. In April 2022, AT&T spun off WarnerMedia, which combined with Discovery to form Warner Bros. Discovery.

[2] AT&T committed to (1) manage the Turner networks as part of a business unit separate from AT&T Communications; (2) give AT&T Communications no role in setting Turner's prices or other terms for unaffiliated distributors; (3) leave largely unchanged the number of Turner employees and their target compensation and benefits; and (4) maintain an information firewall between Turner and AT&T Communications, in each case until the earlier of February 28, 2019, or the conclusion of the case or any appeal. *See* Letter from AT&T Inc. to U.S. Dep't of Just. (June 14, 2018) (attached as an exhibit to the Joint Motion to Modify Case Management Order, United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C. June 14, 2018)).

prediction," and it expressly declined to "opine on the proper legal standards for evaluating vertical mergers."[3] Like the district court, it relied on Turner's arbitration offer. We return to that reliance below.

**Vertical Remedies and "Fixes"**

*The structural baseline.* The Supreme Court's merger remedy decisions treat divestiture as the presumptive remedy for an unlawful acquisition, including a vertical one. In *Du Pont*, the Court called divestiture "the most important of antitrust remedies," explaining that "[i]t is simple, relatively easy to administer, and sure."[4] Courts of that era did not rely on divestiture alone, however. Recall that the *Ford/Autolite* decree required Ford to divest the Autolite plant and trade name, barred Ford from manufacturing spark plugs for ten years, and required it to buy half of its spark plug requirements from the divested plant for five years. Supply obligations of that kind became the core of later conduct remedies.

*Negotiated conduct decrees.* Beginning in the 1990s, the agencies resolved most vertical concerns through consent orders that left the vertically related businesses under common ownership while regulating the merged firm's conduct. Typical provisions included nondiscriminatory access obligations, commitments to maintain open systems, firewalls protecting rivals' competitively sensitive information, and arbitration of disputes. The FTC's orders in *Time Warner/Turner* (1997), *Merck/Medco* (1999), and *AOL/Time Warner* (2001) took this form, as did its 2010 orders in PepsiCo's and Coca-Cola's acquisitions of their bottlers.[5] In 2011, DOJ's remedies guide described conduct remedies as "a valuable tool" that "can preserve a merger's potential efficiencies,"[6] and DOJ's *Comcast/NBCUniversal* and *Google/ITA* decrees imposed continuing access and licensing obligations, backed in *Comcast* by commercial arbitration.[7]

*GE/Avio.* This 2013 FTC consent order illustrates conduct relief in a vertical merger. GE agreed to acquire the aviation business of Avio S.p.A., an Italian supplier of aircraft engine components, for about $4.3 billion (pp. 72-75). Avio was designing the accessory gearbox for Pratt & Whitney's PW1100G engine, one of only two engines offered for the Airbus A320neo. The other engine, the LEAP-1A, was made by CFM International, GE's joint venture with Safran. Avio had sole design responsibility for the gearbox, and the FTC alleged that replacing it would take several years. According to the complaint, the acquisition would give GE the ability and incentive to disrupt the gearbox's design and certification, enabling it to raise prices, reduce quality, or delay delivery to Pratt & Whitney and so win A320neo engine sales for the LEAP-1A (pp. 76, 79-82). This is input foreclosure and raising rivals' costs. The input's importance came from lock-in: other firms could make gearboxes, but not in time for an engine already in

---

[3] United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019).

[4] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 330-31 (1961).

[5] Time Warner Inc., 123 F.T.C. 171 (1997); Merck & Co., 127 F.T.C. 156 (1999); America Online, Inc., 131 F.T.C. 829 (2001); PepsiCo, Inc., 150 F.T.C. 231 (2010); Coca-Cola Co., 150 F.T.C. 520 (2010).

[6] U.S. DEP'T OF JUST., ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 6 (2011) (withdrawn 2018).

[7] United States v. Comcast Corp., 808 F. Supp. 2d 145 (D.D.C. 2011); Final Judgment, United States v. Google Inc., No. 1:11-cv-00688 (D.D.C. Oct. 5, 2011).

development. Read the GE press release (pp. 72-75), the FTC news release and complaint (pp. 76-82), and the FTC's analysis of the consent order (pp. 83-85).

The consent order did not require a divestiture. It incorporated provisions of the agreements among GE, Avio, and Pratt & Whitney, so that a breach of those provisions would also violate the order. It barred GE from interfering with Avio's staffing of the gearbox work, allowed Pratt & Whitney to station representatives on site, required GE to provide transition services if Pratt & Whitney terminated its relationship with Avio, walled off Pratt & Whitney's proprietary information from GE, and authorized the appointment of a monitor (pp. 76-77, 85). The firewall addressed the information-conduit concern you saw in *Coca-Cola/Coca-Cola Enterprises*. Several features made conduct relief workable here. The concern was limited to a single input during a defined period of design, certification, and initial production; the protected rival was a sophisticated party able to detect interference; and because the order incorporated Pratt & Whitney's contract rights, a breach could expose GE both to civil penalties for violating an FTC order and to contract claims by Pratt & Whitney.[8] As you read, match each provision to the mechanism of harm it addresses.

*The enforcement problem.* Behavioral decrees proved hard to enforce. Consent decrees are enforced through civil contempt, which requires clear and convincing evidence that the defendant violated a clear and unambiguous provision of the decree, and courts read a decree within its four corners rather than in light of its purposes.[9] Obligations to deal on nondiscriminatory or comparable terms, or not to retaliate, often leave room for reasonable dispute about whether particular conduct violated them. A merged firm can therefore frustrate a decree's purpose without clearly violating its terms. The *Live Nation/Ticketmaster* decree illustrates the problem. After DOJ concluded that Live Nation had repeatedly violated the 2010 decree's anti-retaliation provisions, it did not seek a contempt finding. Instead, the parties agreed to an amended judgment that clarified those provisions, extended the decree by five and a half years, and added an independent monitoring trustee.[10]

*The retreat from conduct relief.* In November 2017, Assistant Attorney General Makan Delrahim announced a return to "the preferred focus on structural relief," describing a behavioral remedy as "the wolf of regulation dressed in the sheep's clothing of a behavioral decree."[11] Four days later, DOJ sued to block *AT&T/Time Warner* after rejecting a settlement modeled on the *Comcast/NBCUniversal* decree. DOJ's 2020 Merger Remedies Manual codified the new approach: stand-alone conduct relief would be appropriate only if the parties proved that the transaction generated significant efficiencies that could not be achieved without the merger, that a structural remedy was not possible, that the conduct remedy would completely cure the harm, and that it could be enforced effectively.[12] The FTC continued to accept some vertical conduct

---

[8] The final order is reported at General Elec. Co., 156 F.T.C. 255 (2013).

[9] *See* Armstrong v. Exec. Off. of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993); United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

[10] *See* Amended Final Judgment, United States v. Ticketmaster Ent., Inc., No. 1:10-cv-00139 (D.D.C. Jan. 28, 2020); Press Release, U.S. Dep't of Just., Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster (Dec. 19, 2019).

[11] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Keynote Address at the American Bar Association's Antitrust Fall Forum (Nov. 16, 2017).

[12] U.S. DEP'T OF JUST., ANTITRUST DIV., MERGER REMEDIES MANUAL 16 (2020) (later withdrawn).

orders, such as the supply and firewall provisions in its 2018 order in Northrop Grumman's acquisition of Orbital ATK.[13]

From 2021 through 2024, leadership at both agencies preferred litigating to settling. Assistant Attorney General Jonathan Kanter said that "in most situations we should seek a simple injunction to block the transaction."[14] DOJ withdrew the 2020 Manual, and the FTC accepted few merger consents. The 2023 Merger Guidelines state that the agencies "are unlikely to credit claims or commitments to protect or otherwise avoid weakening the merged firm's rivals that do not align with the firm's incentives."[15] In 2025, the FTC's new leadership signaled renewed willingness to settle while remaining skeptical of behavioral relief. Chairman Andrew Ferguson wrote that behavioral remedies "should be treated with substantial caution" and "are therefore disfavored." Still, a month later he described the FTC's order in Omnicom's acquisition of Interpublic as "a rare instance where the imposition of a behavioral remedy is appropriate."[16]

*Commitments as rebuttal evidence.* An agency's refusal to settle moves the remedy question into the courtroom. If the agency will not accept a commitment as a settlement, the merging parties can make it unilaterally and ask the court to consider it in deciding whether the government has shown a likely violation. *AT&T/Time Warner* was the first modern example. About a week after DOJ filed suit, Turner sent letters to roughly 1,000 distributors irrevocably offering baseball-style arbitration of carriage disputes for seven years, with a guarantee that no blackout could occur once arbitration was invoked.[17] The offer carried over the arbitration and no-blackout terms of the settlement DOJ had rejected. The district court treated the offer as one reason to credit Carlton's comparison with *Comcast/NBCUniversal*, and it called the offer "extra icing on a cake already frosted" (pp. 300-01 n.51). The D.C. Circuit went further. It relied on AT&T's representation at oral argument that the no-blackout commitment was "legally enforceable" and that AT&T "will honor" the arbitration offers, and it reasoned that, "[c]onsequently, the government's challenges to the district court's treatment of its economic theories becomes largely irrelevant, at least during the seven-year period."[18] Neither court, however, entered an order requiring AT&T to keep the commitment.[19] Notice where the offer entered the analysis.

---

[13] Northrop Grumman Corp., 165 F.T.C. 1236 (2018).

[14] Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022).

[15] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 2.5 (2023).

[16] Statement of Chairman Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador, Synopsys, Inc., Matter No. 2410059 (F.T.C. May 28, 2025); Statement of Chairman Andrew N. Ferguson, Omnicom Grp., Matter No. 2510049 (F.T.C. June 23, 2025).

[17] United States v. AT&T Inc., 310 F. Supp. 3d 161, 184 (D.D.C. 2018).

[18] United States v. AT&T, Inc., 916 F.3d 1029, 1041 (D.C. Cir. 2019).

[19] Could the district court have entered an order enforcing Turner's commitments? Having held that the acquisition did not violate Section 7, it had no violation to enjoin. Two possible sources of authority are the court's inherent authority and the All Writs Act, 28 U.S.C. § 1651(a) ("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). Jurisdiction would not have been the obstacle. The court would have had jurisdiction when it entered the order, and it would have retained continuing jurisdiction to enforce the order after the case ended. The question is whether an order requiring a prevailing party to honor a commitment on which the court relied would be "necessary or appropriate in aid of" that jurisdiction and "agreeable to the usages and principles of law." Does the Act authorize relief that Section 15 of the Clayton Act, which empowers the courts "to prevent and restrain violations," would not? *Cf.* Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985) ("Where a statute

The district court found that Shapiro's model failed to account for the offer and held that the government had not made out its prima facie case, so the commitment did its work within the court's assessment of the government's own prediction rather than in a separate rebuttal case.[20]

Three later vertical cases also involved litigated commitments.

- In *Illumina/GRAIL*, Illumina offered Grail's rivals a standardized supply contract, which it called the Open Offer, promising parity with Grail in price and in access to products and services. The Fifth Circuit described the offer as "somewhere in between a fact and a remedy" and held that it should be considered as part of the defendants' rebuttal at the liability stage, not as part of the government's prima facie case. The defendants had to show that the offer "sufficiently mitigated the merger's effect such that it was no longer likely to substantially lessen competition"; they did not have to show that it restored premerger competition. The government retained the burden of persuasion throughout.[21]
- In *UnitedHealth/Change*, the court credited UnitedHealth's longstanding firewall policies and its letters to customers in rejecting DOJ's theory that the merged firm would misuse rivals' competitively sensitive information, and it ordered the defendants to complete a divestiture that resolved a horizontal overlap.[22]
- In *Microsoft/Activision*, the district court considered Microsoft's offer to provide Call of Duty to Sony on parity terms for ten years, together with signed agreements with Nintendo and cloud-streaming providers, and rejected the FTC's argument that these were proposed remedies that could not be considered at the liability stage. The Ninth Circuit affirmed without reaching that question.[23]

We will study *UnitedHealth/Change* in Unit 13 and *Microsoft/Activision* in Unit 14.

*Three questions about a commitment.* These cases show that a commitment offered to defeat a vertical merger challenge raises three distinct questions:

1. *Evidence of incentive.* Does the merged firm's willingness to make the commitment show that it lacks the incentive to foreclose?
2. *Adequacy.* If the merged firm performs as promised, will the commitment prevent a substantial lessening of competition?

---

specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling."). The *UnitedHealth* court ordered the prevailing defendants to complete their proposed divestiture, but as far as I know, no court has analyzed the source of its authority to enter such an order. In *Tempur Sealy*, the defendants suggested that the court could order compliance with their slot commitment under either authority, and the court did not take up the suggestion (pp. 386, 401). Any such order would also have to satisfy Rule 65(d)'s requirement that an injunction "state its terms specifically."

[20] *See AT&T*, 310 F. Supp. 3d at 217-18 & n.30, 240-41 & n.51.

[21] Illumina, Inc. v. FTC, 88 F.4th 1036, 1044-45, 1055-59 (5th Cir. 2023). Illumina later divested Grail, and the Commission dismissed its complaint. *See* Order Dismissing Complaint, Illumina, Inc., No. 9401 (F.T.C. Aug. 15, 2024).

[22] United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 128, 135-41, 144-49, 155 (D.D.C. 2022).

[23] FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1082, 1093, 1099 (N.D. Cal. 2023), *aff'd*, 136 F.4th 954, 969-70 (9th Cir. 2025).

3. *Enforceability.* Does anyone—the government, an injured rival, or the court—have a legal right to compel performance, and is the obligation defined clearly enough that a violation could be proved?

The questions are distinct. A promise may be credible yet fail to protect the relevant competition, and an apparently adequate promise may be ineffective if compliance cannot be secured. A negotiated consent decree answers the first part of the enforceability question by design: it gives the government a right to enforce the decree in court. As *Live Nation* shows, it does not guarantee the second.

A commitment offered in litigation separates the three questions, and how far it does so depends on whom the commitment runs to. Commitments fall along a spectrum: a consent decree enforceable by the government; a contract with the rivals the commitment protects, which those rivals can enforce; a representation made only to the court; and a promise backed only by the firm's reputation. In *AT&T*, Turner's offers ran to the distributors whose bargaining position was at issue, and each distributor could accept the offer and invoke arbitration. *Illumina*'s Open Offer was a supply contract available to Grail's rivals, and Microsoft's commitments were signed agreements with, or open offers to, the platforms concerned. Courts have generally been willing to answer the first two questions while leaving the third unresolved. Yet the answer to the third affects the first two: a commitment that the firm can abandon once the litigation ends is weaker evidence that it lacks an incentive to foreclose, and a weaker constraint for the same reason.

*Tempur Sealy/Mattress Firm.* The *Tempur Sealy* materials show all three questions arising in a single case. Tempur Sealy, the world's largest mattress manufacturer and supplier, agreed in May 2023 to acquire Mattress Firm, the largest U.S. mattress retailer, for about $4 billion. The companies had a history. In 2017, after contract negotiations broke down, Mattress Firm removed Tempur Sealy's mattresses from all its stores and invited them back in 2019 (p. 398). In July 2024, the Commission voted 5-0 to issue an administrative complaint and to seek a preliminary injunction in federal court. The FTC alleged that the combined firm could limit rival suppliers' access to Mattress Firm's floor, pay sales associates higher commissions on Tempur Sealy products, or otherwise steer customers away from rivals' mattresses, and it relied heavily on Tempur Sealy's own deal documents (pp. 344-46). This was a theory of output foreclosure: the rival manufacturers needed access to Mattress Firm's stores to reach customers, not an input from Tempur Sealy. In her statement accompanying the Commission's vote, Commissioner Holyoak emphasized that vertical mergers are more likely than horizontal mergers to generate efficiencies, including the elimination of double marginalization, but voted for the complaint because of the evidence developed in the investigation, especially the parties' ordinary-course documents (p. 347).

*The original commitments.* A slot is a horizontal display position on the store floor; the average Mattress Firm store had about 38 (pp. 351, 398). Even before the FTC sued, the defendants offered three commitments: a divestiture of 104 Sleep Outfitters stores, 74 Mattress Firm stores, and seven distribution centers to Mattress Warehouse; post-closing supply agreements with seven suppliers; and a commitment to reserve at least 20 percent of Mattress Firm's slots for third-party brands, 75 percent of them for mattresses priced at $1,500 or more. The FTC rejected them as insufficient to resolve its concerns (pp. 349-50). At closing argument, after a seven-day evidentiary hearing, the court asked why Tempur Sealy would not commit to maintaining a floor balance closer to the status quo, and it suggested that Tempur Sealy "could also unilaterally commit to me as part of the deal" (pp. 353-54, 400).

*The revised commitment.* Eleven days after closing argument, and after the record had closed, the defendants filed a notice of a revised slot commitment (pp. 348-56). The notice argued that no commitment was needed and that, under *Illumina*, a commitment had to prevent only a substantial lessening of competition, not restore premerger competition, but that the revised commitment would still preserve the existing share of premium slots held by third parties (pp. 349, 352-53). Read Exhibit A, the commitment itself, closely (p. 363). For five years after closing, Mattress Firm would provide for third-party mattresses at least 43 percent of its horizontal slots for mattresses priced at $1,500 or more, measured as an average across all open stores. Tempur Sealy would determine compliance annually under procedures it would establish with a nationally recognized independent accounting firm. The commitment was subject to the availability of third-party mattresses meeting "Minimum Performance Criteria," and it would end if Tempur Sealy ceased to control Mattress Firm. You may skim the Dament declaration (pp. 364-65).

The notice also explained three design choices you should evaluate. The commitment guaranteed floor space, not any supplier's share of sales, which "is up to customers" (p. 354). It also did not guarantee slots to any particular supplier. It used a $1,500 threshold rather than the $2,000 boundary of the FTC's proposed market, which the defendants said captured more third-party slots and suppliers such as Purple (pp. 354-55). The 43 percent applied only to slots in that price range, not to all slots. And the commitment measured compliance by the average across more than 2,300 stores rather than store by store (pp. 355-56).

*The court's December 29 order.* Judge Eskridge responded with an email order (pp. 366-69). He agreed to consider the notice as "factual and supplementary," but he noted that "legal points remain at issue, including the extent of the commitment's binding and enforceable nature." He directed the FTC to address "whether, how, and where the submitted commitment could later be judicially or administratively considered upon any assertion of a violation" and "the sufficiency of the stated duration of the commitment." He also ordered the FTC to identify the decisionmakers with authority to maintain or withdraw the challenge and to state whether it wished to continue (pp. 366-67).

*The FTC's response.* The FTC's response makes three kinds of arguments (pp. 370-79). First, the commitment was unenforceable. It was "neither a binding contract with any supplier, nor a binding settlement that can be enforced by the FTC or any court" (p. 371). The FTC distinguished *AT&T* and *Microsoft*, where the offers ran to the rivals the government sought to protect, and *UnitedHealth*, where the firewall policies memorialized longstanding practice (pp. 371-72). It added that an enforceable settlement of a pending administrative case must proceed through withdrawal from adjudication and a consent order approved by the Commission after public comment (pp. 373-75). Second, the commitment was substantively deficient in two respects. Several terms made the commitment easy to escape or hard to monitor: the "Minimum Performance Criteria" let Tempur Sealy escape it, Tempur Sealy would judge its own compliance, company-wide averaging prevented outsiders from monitoring compliance, and five years was short compared with typical consent orders. Other objections went to adequacy: the merged firm could still "tilt the floor" through placement, commissions, and promotions, and because no particular supplier was guaranteed slots, Tempur Sealy could exclude its closest rivals while flooring suppliers that posed "less of a threat" (pp. 375-77). Third, accepting a commitment offered after the close of evidence "would be highly prejudicial to the FTC and

could encourage future merging parties to delay remedy proposals until after the close of evidence" (p. 378).

*The defendants' reply.* The reply characterized the commitment as "one fact among many" showing that the defendants had no plan or incentive to foreclose, and it argued that commitments take many forms, including open offers, internal policies, and representations to courts (pp. 383-84). The defendants argued that firms keep their commitments because breaking them carries reputational, financial, and legal consequences. They stated that compliance would be overseen by Tempur Sealy's board audit committee, assessed by an independent consulting firm, and reported in the company's annual Form 10-K, subject to the securities laws, and that the FTC could challenge noncompliance under Section 7 or under Section 5 of the FTC Act. They added that the court, although it was unnecessary, could order compliance under its inherent authority or the All Writs Act, as the *UnitedHealth* court had ordered completion of the divestiture there (pp. 384-86).[24] Read the rest of the reply as well, including its responses to the FTC's procedural and substantive objections (pp. 386-88). Remember that the reply is advocacy.

*The FTC's January 10 statement.* This short statement explains a structural feature of FTC merger litigation (pp. 393-95). The five Commissioners who would approve any settlement also sit as adjudicators in the administrative case, so the separation-of-functions rules bar FTC staff from discussing a settlement with them unless the case is first withdrawn from adjudication. Any party may move to withdraw the case, but the defendants had not done so, and the merger agreement's February 9, 2025 outside date was approaching.

*The decision.* The court denied the FTC's Section 13(b) motion for a preliminary injunction against the closing. It rested its decision on three independent grounds: (1) the FTC failed to prove its proposed market of premium mattresses priced at $2,000 and above; (2) even in that market, the merger was not likely to substantially lessen competition; and (3) the defendants' commitments resolved any remaining concern (pp. 398, 402). Following *Illumina*, the court treated the commitments as rebuttal evidence and asked whether they "sufficiently mitigated the merger's effect such that it was no longer likely to substantially lessen competition," not whether they restored the premerger status quo (p. 399). It evaluated the divestiture under the five factors from *UnitedHealth* (pp. 399-400). It found that the revised slot commitment "indicates remarkable good faith," rejected the FTC's prejudice objection, and declined to decide whether the commitment was enforceable. The defendants "would choose to ignore such representations at their own peril," the court wrote, and "nothing prevents the FTC or any other aggrieved rival from returning to this Court to test the binding nature of such commitments in a non-advisory posture, if necessary and desired" (p. 401). The court thus did not adopt the reply's account of how the commitment could be enforced, and it entered no order requiring compliance. The FTC did not seek emergency relief, the acquisition closed on February 5, 2025, and the Commission dismissed its administrative complaint in April 2025. The combined company, now Somnigroup International, reports that it complied with the slot commitment as assessed at the end of 2025. Read the opinion excerpt and the notes that follow it (pp. 398-404).

*Applying the three questions.* Use the three questions to evaluate the court's treatment of the slot commitment:

[24] *See supra* note 19 (discussing the All Writs Act).

1. *Evidence of incentive.* Tempur Sealy offered the revised commitment at the court's invitation, after the court had signaled its concern. Does the offer show that Tempur Sealy lacked an incentive to foreclose, or only that it wanted the deal to close? Compare the court's finding of "remarkable good faith" with the 2023 Guidelines' skepticism of commitments that do not align with the firm's incentives.
2. *Adequacy.* Would reserving 43 percent of slots for mattresses priced at $1,500 or more, averaged across stores, prevent a substantial lessening of competition in a market defined at $2,000 and above? The court's answer depended in part on its finding that the possible foreclosure was small to begin with (p. 400). Which of the FTC's objections, such as tilting the floor or choosing less threatening rivals, does a slot percentage fail to address?
3. *Enforceability.* No supplier had a contract right to the reserved slots, and the court entered no order. Who, then, could enforce the commitment? Consider the indirect mechanisms the defendants identified—a new challenge to the consummated merger and securities-law exposure for a false compliance statement—and ask whom each protects. Could judicial estoppel hold the defendants to their representation? Compare the *GE/Avio* order, which made a breach of Pratt & Whitney's contract terms a violation of an FTC order, and *AT&T*, where the D.C. Circuit relied on counsel's representation that the arbitration commitment was "legally enforceable."

Three broader questions remain. First, should courts consider commitments offered after the close of evidence at all? The concern outlasted the case: in May 2026, the FTC held a workshop on "eleventh-hour" remedy proposals and litigating the fix (pp. 402-03). Second, which party should bear the burden of accounting for a commitment? In *AT&T*, the court faulted the government's model for ignoring the arbitration offer; under *Illumina* and *Tempur Sealy*, the defendants must come forward with evidence that a commitment sufficiently mitigates the predicted harm. Third, when a court relies on a commitment to deny an injunction, should it order the defendants to comply with it, as the *UnitedHealth* court did with the divestiture there? The *Tempur Sealy* defendants invited such an order, and the court declined to enter one.

*Looking ahead.* This class completes Unit 12. Class 25 (November 19) begins Unit 13 with *UnitedHealth/Change*, where you will examine the firewall commitments and divestiture discussed above in detail. Unit 14 then turns to *Microsoft/Activision* and its Call of Duty commitments.

Enjoy the reading. As always, if you have any questions, please send me an email.