ARTICLE

FACING REALITY: LITIGATING THE FIX WHEN PRE-MERGER NEGOTIATIONS FAIL

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"Litigating the fix" refers to the practice of defendants litigating divestitures or behavioral commitments ("the fix") designed to resolve anti-competitive concerns, following rejection by the reviewing antitrust agency during the pre-complaint merger investigation. There have been relatively few cases with this posture, until recently. The vast majority of HSR-reportable mergers that were subject to remediation formerly were "fixed" via a settlement with the DOJ Antitrust Division or FTC, avoiding the need for litigation. But the antitrust agencies' recent enforcement posture has caused them to be more circumspect about divestitures or other conditions, opting more often to challenge deals outright in litigation. This article examines the litigated decisions addressing this issue, the legal principles they rely on, and the legislative history behind the HSR Act and identifies the proper legal standards by which courts should resolve a government merger challenge in which the defendants have proposed a fix to address any identified competitive problems. The author concludes that the relevant inquiry for a reviewing court is whether the "fixed" transaction may substantially lessen competition, not (as the government argues) whether the proffered divestiture fully restores competition that may be—but for the fix—lost from the originally filed transaction.

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I. INTRODUCTION

The practice commonly referred to as "litigating the fix"[1] is not a new defense strategy for merging parties—it was first attempted in response to a government merger challenge twenty-three years ago in *United States v. Franklin Electric Co., Inc.*[2] But in the long history of cases under Section 7 of the Clayton Act[3], there were relatively few with this posture,

[1] "Litigating the fix" relates to the practice of litigating divestitures or behavioral commitments ("the fix") that purport to resolve anti-competitive concerns but were rejected by the antitrust agencies during the course of consent decree negotiations. See David Gelfand and Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST 10 (2016), for a general overview of the concept and its development.

[2] United States v. Franklin Electric Co., Inc., 130 F.Supp.2d 1025 (W.D. Wis. 2000).

[3] 15 U.S.C. § 18 (forbidding a "person [to] acquire . . . the whole or any part of the assets of one or more persons engaged in commerce or in any

until recently. The reason is that the vast majority of mergers that were subject to remediation got "fixed" via a settlement with the DOJ Antitrust Division or FTC during the course of a Hart-Scott-Rodino Act ("HSR Act")[4] investigation of a prospective merger, avoiding the need for litigation.[5] But the antitrust agencies' recent, more aggressive enforcement posture has caused them to be more circumspect about divestitures or other conditions and opt instead to challenge deals outright in litigation.[6] Merging parties, for their part undeterred, are more often proffering a proposed fix to the reviewing court in an effort to persuade the court to accept it, deny the government's request for injunction, and allow the transaction to close.[7] The *United States v. UnitedHealth Grp. Inc.* case is one

activity affecting commerce, where . . . the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly").

[4] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[5] *See* David Hatch, *'Litigate the Fix' Gains Traction with Dealmakers*, THE DEAL (Oct. 27, 2023), https://pipeline.thedeal.com/article/0000018b-6dbe-db88-a5bb-6fff2f340. . ./deal-news/regulation/litigate-the-fix-gains-traction-with-dealmakers [on file with the Columbia Business Law Review] ("There is a trend that has emerged fairly strongly since the new appointees arrived in 2021. Deals that had been acceptable in the past no longer were viewed as suitable.") (quoting Bill Kovacic, former FTC chair); *see also* Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Just., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers [https://perma.cc/DV2M-H267]. (noting that "[o]ver the last few months, the [Antitrust] division has taken important steps to reject risky settlements and challenge illegal mergers in court").

[6] *See* Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Just., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers [https://perma.cc/DV2M-H267] (stating that "[the Antitrust Division is] more committed than ever to litigating when we believe a violation has taken place").

[7] *See* Hatch, supra note 5.

recent example of the merging firms "litigating the fix" that led to a successful outcome for the defendants.[8]

As relatively few courts have had to wrestle with whether, when, and how to assess the legality of a fix proffered by defendants, no black-letter law for doing so has emerged.[9] But a careful reading of the litigated decisions addressing this issue, the legal principles they rely on, and the legislative history behind the HSR Act provide some guiding principles. This article will summarize the proper legal standards by which courts should resolve a government merger challenge in which the defendants have come forward with a fix to address any identified competitive problems. This article will limit the discussion to how the courts should analyze divestitures raised at a federal district court trial on the merits, but many of the same principles can apply (and have been applied) to other forms of commitments and preliminary injunction trials.

First, the Article explains the legal basis for why—contrary to recent arguments advanced by DOJ—a revised transaction is not a "remedy" on which the defendant bears the burden of proof or persuasion, nor should the merging parties be required to make a new HSR filing for their proffered divestiture transaction.

Next, the Article advocates for application of the *Baker Hughes* framework to a court's consideration of divestitures proffered by merging defendants—specifically, that the government should show in Step 1 that the defendants' proposed transaction *inclusive of* any proffered fix is, on its face, likely to substantially lessen competition. The burden would then properly shift to defendants in Step 2 to rebut the government's prima facie case. [10]

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[8] United States v. UnitedHealth Group Inc., 630 F. Supp. 3d 118 (D.D.C. 2022).

[9] This was the state of the law as of the Taft Lecture event on November 29, 2023. Weeks later, on December 15, the Fifth Circuit issued an opinion directly on point in *Illumina, Incorporated v. FTC*. The Fifth Circuit's opinion generally endorses the approach advocated in this article. A postscript has been added to the end of the article examining the Fifth Circuit's approach in *Illumina*.

[10] See discussion *infra* Part III.

Finally, the Article will explain why the relevant inquiry for a reviewing court is whether the "fixed" transaction—in total—may substantially lessen competition, not (as the government argues) whether the proffered divestiture fully restores competition that would be—but, given the procedural framework established by the HSR Act, has not yet been—lost from the originally filed transaction. Indeed, this is the only logical interpretation of the statutes and case law precedents that interrelate to provide guidance on this issue.

II. A REVISED TRANSACTION IS NOT A "REMEDY" TO A SECTION 7 VIOLATION

The fundamental question of whether the subject transaction in a litigated merger challenge should incorporate a proffered fix by defendants or instead should be thought of as an equitable remedy turns on the existence and application of the HSR Act. Notably, reflecting on a bit of history, the HSR Act's enactment did not substantively change Section 7 of the Clayton Act or the case law that interpreted it.[11] In all merger challenges (for deals HSR-reportable and not) under Section 7, the government must prove that the effect of the transaction "may be substantially to lessen competition, or tend to create a monopoly" in a relevant market.[12] However, because the HSR Act affords the DOJ or FTC the opportunity to review mergers prior to consummation, the government can identify competitive issues with prospective mergers *before they arise*, and engage with the merging parties about ways to resolve them. Accordingly, for a prospective, HSR-reportable transaction where the merging parties attempt to fix the issue with a divestiture or behavioral commitment, the revised, actual—not the originally filed—transaction should be the one subject to Section 7 scrutiny. In other words, the court reviewing a

[11] 10 EARL KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, PART II: THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, at 7 (1978) ("The Act does not change the substantive standards for determining the legality of the merger, nor is the burden of proof for obtaining a preliminary injunction delaying consummation of the merger altered.").

[12] 15 U.S.C. § 18.

government merger challenge in such a case must consider the parties' proposed divestiture or other commitments holistically in its review of the allegations pursuant to the Clayton Act's Section 7 standard.

Since the passage of the HSR Act's premerger notification program, the vast majority of deals raising competitive issues have been identified and fixed through a bilateral negotiation with the government that resolves the competitive problem short of litigation.[13] Once the antitrust agency identifies the competitive issue, the merging parties may revise the transaction, which often leads to a negotiated settlement embodied in a consent decree or consent judgment.[14] A revised transaction pursuant to a settlement agreement with the DOJ or FTC does not require a new HSR filing because there is an HSR exemption to allow for that.[15] If the government rejects a proposed fix as insufficient, it should not be able to just ignore the proposal—rather, it falls on the government to show that the revised transaction would substantially lessen competition in violation of Section 7. That is what the statute requires.[16]

In recent Section 7 litigations, the government has argued that it is free to choose the transaction to challenge. Even if the defendants revise their transaction to address the competitive concerns raised by the government, the government contends it can ignore this at trial and limit the challenge to the original transaction absent any proposed fixes in establishing its prima facie case. Under this argument, the government says the merging parties have two options for presenting the revised transaction. The first option would require merging parties to file a new HSR for the revised transaction, observe a new waiting period, and potentially be subject to another second request and litigation. The second option would require the merging parties to wait until a court first determines

[13] *See* FTC PREMERGER NOTIFICATION OFFICE, INTRODUCTORY GUIDE I: WHAT IS THE PREMERGER NOTIFICATION PROGRAM 1 (Revised Mar. 2009).

[14] 16 C.F.R. § 2.34; *See also*, David Gelfand & Elaine Ewing, *"Be Careful What You Wish For": U.S. Government Enforcement of Merger Consent Decrees*, 58 ANTITRUST BULL. 225, 226 (2013).

[15] 16 C.F.R. § 802.70.

[16] 15 U.S.C. § 18.

the original transaction is unlawful, and then, only in a remedies phase, show that the proposed divestitures or other commitments would fully restore competition to pre-merger levels.

This second option relies on a legal framework that predates the HSR Act that required the defendant to show restoration of competition lost from an already consummated merger that had been found unlawful.[17] But in the context of a prospective merger, such a proposal would impermissibly shift the burden of proof to the merging parties rather than requiring the government to show how the revised (and not yet consummated) transaction may substantially lessen competition. Furthermore, the government's proposal to treat the divestiture as a "remedy" to harms caused by a fictional antitrust violation is not as Congress intended or how the courts—or the antitrust agencies themselves through longstanding practice – have previously addressed merging parties' proposals to prospectively fix competitive issues contingent on a transaction closing.

A. The HSR Act Ensures Proper Notice of Proposed Transactions and Imposes Restraints on the Government's Authority

The premerger notification program proposed by Congress had a simple objective: allow the antitrust agencies an opportunity to learn of and receive enough information about a proposed merger that they may effectively challenge unlawful transactions *before* consummation.[18] Prior to the HSR Act, the antitrust agencies were routinely stuck in protracted litigation, first to show that a consummated transaction may substantially lessen competition and then to show whether the

[17] *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

[18] *See* H.R. Rep. No. 94-1373, at 11 (1976) (stating that the HSR Act was intended to "help prevent the consummation of so-called 'midnight' mergers, which are designed to deny the government any opportunity to secure preliminary injunctions").

proposed relief restored competition lost from it. During the pre-HSR Act period, the Supreme Court decided forty-nine antitrust cases requiring divestiture, including twenty-six Section 7 cases.[19] Representative Rodino justified the premerger notification program as a procedural, not substantive, solution to avoid "a costly exercise in futility—untangling the merged assets and management of the two firms," which he likened to "trying to unscramble an omelet."[20] *United States v. El Paso Natural Gas*[21] was the poster child for this legislation because it took the government seventeen years of litigation before El Paso was required to finally unwind the problematic merger. During the lengthy litigation, the merged entity allegedly reaped $24,000 a day in illegal profits that it was not required to pay back.[22]

Although Congress wanted to address the post-consummation divestiture problem, it also sought to place strict limits on the premerger notification program to address concerns from various members that the program would lead to lengthy delays of mergers and chill merger activity. Representative Rodino assured the members that the bill was meant to "reach only about the largest 150 mergers a year—for those are the ones that are the most difficult to 'unscramble.'"[23] One member expressed grave concerns that any expansion beyond notice would "alter the normal flow of capital."[24] Indeed, Representative Rodino explained that the HSR Act "makes no changes in the substantive law of mergers,"[25] consistent with the House Report explanation that the Act does not "ease in any way the traditional burden of proof that must be borne by the government when it seeks equitable relief."[26]

[19] E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565, 568 & appendix (2002).

[20] 122 Cong. Rec. 25020, 25051 (1976) (statement of Rep. Rodino).

[21] United States v. El Paso Natural Gas Co., 465 F.Supp. 249 (D. Colo. 1978).

[22] 122 Cong. Rec. 25020, 25051 (1976) (statement of Rep. Rodino).

[23] 122 Cong. Rec. 25020, 25052 (1976) (statement of Rep. Rodino).

[24] 122 Cong. Rec. 25020, 25053 (1976) (statement of Rep. Hutchinson).

[25] 122 Cong. Rec. 25020, 25052 (1976) (statement of Rep. Rodino).

[26] H.R. Rep. No. 94-1373, at 8 (1976).

Congress debated, but rejected, an "automatic stay" provision that would have mandated that the courts stay a merger at the government's request. Proposals to shift the burden of proof to the defendant on a motion for preliminary injunction were likewise rejected. Members expressed concerns that such provisions would give the antitrust agencies arbitrary powers. A statement from the then-FTC chairman also rejected the provisions, reasoning that "[i]f we can get the information that we need to make the determination as to whether a particular merger should be opposed, we think the burden should be on us to make the challenge."[27] Congress instead adopted a standard of "substantial compliance," which was intended to require parties to provide reasonably available information, but was not to be used by the government as a means to delay and extend the review.[28]

Over several months, Congress debated and ultimately resolved the post-merger divestiture problem by passing the HSR Act. As Congress intended, the premerger notification program inserts a procedural framework into Section 7 that gives the antitrust agencies an opportunity to review the most significant mergers prior to consummation. For the limited set of mergers that pose potential competitive problems, the agencies can address the competitive issues before a violation occurs. As this history makes clear, the government's new position that a divestiture of assets must be subject to a new HSR filing misinterprets the Congressional intent of the premerger notification program. Congress never intended that all transactions be notified, nor did it intend that the procedural framework be used to kill mergers.[29]

[27] 122 Cong. Rec. 16911, 16929 (1976) (statement of Rep Buckley, quoting FTC Chairman Engman).

[28] 122 Cong. Rec. 29277, 29341 (1976) (statement of Sen. Hart); 122 Cong. Rec. 30761, 30877 (1976) (statement of Rep. Rodino) (explaining that substantial compliance should not be interpreted as something that would allow an antitrust agency to subject mergers to protracted delays because the effect would be a reversal of clear congressional intent).

[29] 122 Cong. Rec. 30761, 30877 (1976) (statement of Rep. Rodino) ("It was, after all, the prospect of protracted delays of many months – which might effectively 'kill' most mergers – which led to the deletion, by the

Put simply: precisely *because of* the HSR Act's procedural framework, in the relatively uncommon scenario where the DOJ or FTC determines that a merger presents risk of anticompetitive effects, parties may seek to resolve those concerns *before* there is any actual loss of competition. The yet-to-be-consummated transaction may be altered in a targeted fashion in an effort to address the government's specific concerns. As the FTC explained in its summary accompanying the revised HSR exemption for acquisitions subject to order, when the government receives information about a divestiture during the HSR process, requiring a merging party to re-file HSR would not typically be in the public interest.[30] The government's recent argument that a potential ancillary divestiture transaction requires a separate notification and review process therefore rings hollow if the merging parties produce information about the revised transaction during the investigation or discovery in the Section 7 litigation. The relevance of any inquiry into the ancillary transaction is simply to determine whether it is sufficient to resolve concerns with the notified merger; those competition concerns were developed upon a record of evidence already received by the government in the context of its pre-complaint investigation.

Of course, the government can choose not to accept a divestiture or can choose not to engage in a settlement process altogether. But in either scenario, a federal district court is capable of ordering the discovery necessary to assess the merits of the revised transaction, while avoiding unnecessary delays and costs. And, in such a case, the government must be

Senate and the House Monopolies Subcommittee, of the 'automatic stay' provisions originally contained in both bills").

[30] Premerger Notification; Reporting and Waiting Period Requirements, 63 Fed. Reg. 34592 (June 25, 1998) (codified at 16 C.F.R. § 802.70) (amending Section 802.70 to exempt proposed divestitures pursuant to negotiated consent agreements because they "are adequately reviewed for potential antitrust concerns during the approval process under the consent agreement, in which the antitrust agencies determine that the divestiture to that party does not raise antitrust concerns . . . . Whatever delay and cost result from the HSR reporting requirements are contrary to the public interest where the antitrust agencies already have notice of the transaction and have completed their review.").

held to its proof in demonstrating that the revised transaction, inclusive of the proffered fix, may substantially lessen competition.

B. Case Law Weighs Heavily in Favor of Considering the Revised Transaction to Determine Whether a Merger is Legal

No court reviewing a litigated Section 7 challenge has denied the merging parties the opportunity to produce evidence about proposed divestitures or other commitments aimed at resolving competitive concerns.[31] This is well-settled practice based on the real-world effect of a proposed merger with roots in the Supreme Court's *United States v. General Dynamics* decision. In that case, the Court rejected the government's argument that the district court should only look at the evidence of competitive effects from the time of, not after, the acquisition.[32] It explained that "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger."[33] It also added that the court was allowed to rely on "evidence [that] went directly to the question of whether future lessening of competition was probable."[34]

The *General Dynamics* precedent applies directly to the assessment of a divestiture proposed prior to consummation. For example, in *FTC v. Libbey*, the court explained:

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[31] *See* United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025 (W.D. Wisc. 2000); FTC v. Libbey, Inc., 211 F. Supp. 2d 34 (D.D.C. 2002); FTC v. Arch Coal, 329 F. Supp. 2d 109 (D.D.C. 2004); FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015); United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017); United States v. AT&T, 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020); United States v. UnitedHealth Group Inc., 630 F. Supp. 3d 118 (D.D.C. 2022); FTC v. Microsoft Corp., No. 23-cv-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

[32] 415 U.S. 486 (1974).

[33] *General Dynamics*, 415 U.S. at 498 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 322 & n.38 (1962)).

[34] *Id.* at 506.

> [P]arties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns. And when they do so under circumstances as occurred in this case, it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.[35]

In *United States v. AT&T*, on appeal, the D.C. Circuit explained that the district court could consider whether the parties' post-merger agreements would have a "real-world effect[]" on the competitive effects of the merger in determining whether the government met its prima facie burden.[36] And the court in *United States v. UnitedHealth Group* allowed the proposed divestiture to be presented during the liability phase and characterized the original transaction, absent the proposed divestiture of Change Healthcare's claims editing software business, as a "fictional transaction" and the government's reliance on the market shares in its prima facie case as "fictional market shares."[37] Courts consistently allow the parties' proposed divestiture or other commitments to be presented in the liability phase because this is the common-sense approach.

The government's recent reliance on *United States v. E.I. du Pont de Nemours & Co.*[38] to require a court to first find liability from an originally proposed, but not yet consummated, transaction before assessing a divestiture as an equitable remedy is inapposite. That decision reviewed a merger *after* it was consummated.[39] In *du Pont*, the Supreme Court was tasked with reviewing the adequacy of a remedy imposed on a transaction that had already been found to violate Section 7.[40] Because the original transaction had, in fact, taken place and there was evidence of that transaction's anti-

[35] *FTC v. Libbey, Inc.*, 211 F. Supp. 2d at 46.

[36] 916 F.3d at 405–06.

[37] United States v. UnitedHealth Group Inc., 630 F. Supp. 3d 118, 134 & n.5.

[38] 366 U.S. 316 (1961).

[39] *Id.* at 336–37.

[40] *Id.* at 353–54.

competitive effects, the Court determined that the real-world transaction had "lessen[ed] competition."[41] It was therefore incumbent on the Court to address the real-world harm by seeking relief to "restore competition" lost during the decade since the merger was consummated.[42]

With the enactment of the HSR Act, an antitrust agency now has the opportunity to review and challenge mergers before the parties close, removing the need for a court to fashion a remedy *after* finding a violation. Because of HSR premerger notification, with limited exceptions, the government can challenge a merger prior to its consummation. And when courts have been faced with a pre-consummation case, all courts have analyzed the revised transaction along with a determination of liability.[43] Requiring the parties to wait until a violation is found would frustrate the Congressional intent that the HSR Act not change the substance of Section 7.[44] Although some district courts have required that the revised transaction restore competition likely to be lost from the originally proposed transaction, that line of cases originated when the merging parties agreed to that standard, not because a court was following settled law.[45] Moreover, a careful reading of the most recent of those cases shows that "restoring competition" was thought of as a relative measure that did not lessen the government's ultimate burden to show a likely substantial lessening of competition. Because there is no competition lost from that prospective transaction that must be restored, and no binding precedent, courts should adhere to the substance

41 *Id.* at 369.

42 *Id.* at 326.

43 *See infra* Part III.

44 *See supra* note 25 and accompanying text.

45 FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015) ("Here, both sides cite to the 2004 U.S. Department of Justice's 'Policy Guide to Merger Remedies,' which provides the following guidance: 'Restoring competition requires replacing the *competitive intensity* lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels.'" (quoting ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 5 (Oct. 2004))).

of Section 7 and ask whether the real-world effects from the revised transaction may substantially lessen competition.

III. *BAKER HUGHES* SUPPLIES THE FRAMEWORK TO ASSESS THE MERITS OF A REVISED TRANSACTION

As with other antitrust merger litigations under the HSR Act, a court is tasked with predicting the future: deciding whether a merger that has not yet happened may substantially lessen competition if it is consummated. For this reason, the "allocation of the burdens of proof assumes particular importance" because of the "uncertain task" that a court must undertake.[46] In its 1991 *United States v. Baker Hughes* decision, a D.C. Circuit panel that included future Supreme Court Justices Clarence Thomas and Ruth Bader Ginsburg, crafted the following three-step burden-shifting framework to guide Section 7 inquiries[47]:

- *First*, the plaintiff bears the initial burden of showing that the merger would lead to "undue concentration in the market for a particular product in a particular geographic area."[48] Such a showing establishes a "presumption" that the merger "will substantially lessen competition."[49]

[46] United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990).

[47] *See, e.g.*, Fjord v. AMR Corp. (*In re* AMR Corp.), No. 22-901, 2023 U.S. App. LEXIS 6504, at *4–7 (2d Cir. Mar. 20, 2023) (applying *Baker Hughes* and collecting cases in which other Circuits have adopted similar burden-shifting frameworks).

[48] *Baker Hughes*, 908 F.2d at 982; *see also* FTC v. H.J. Heinz Co., 246 F.3d 708, 715 ("[T]he government must show that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market.'" (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963))).

[49] *Baker Hughes*, 908 F.2d at 982. The *Baker Hughes* framework originated in the context of a horizontal merger, where a plaintiff can establish a prima facie case by showing the merger results in undue concentration. *Baker Hughes* applies to vertical mergers as well, but in a vertical merger the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market

- *Second*, if the plaintiff establishes the prima facie case, defendants must present evidence that rebuts the presumption by "affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor."[50]
- *Third*, if defendants can make a showing that rebuts the presumption, "the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times."[51]

Courts have relied on the *Baker Hughes* framework to assess the merits of the revised transaction so long as defendants provide sufficient information about the divestiture by the close of fact discovery.[52] But courts diverge on how to assign the burden of proving whether the divestiture fixes the competitive issue. Where the divestiture is highly likely to occur, several courts, including the D.C. Circuit Court, have imposed the burden on plaintiffs at Step 1 of the *Baker Hughes* framework to account for the revised transaction in its prima

concentration, because vertical mergers produce no immediate change in the relevant market share. Instead, the government must make a "fact-specific" showing that the proposed merger is "likely to be anticompetitive." United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019).

[50] *Baker Hughes*, 908 F.2d at 991; *see also Heinz*, 246 F.3d at 715 (". . . defendants must produce evidence that 'show[s] that the market share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market" (quoting United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975))).

[51] *Baker Hughes*, 908 F.2d at 983; *see also* Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1340 & n.12 (7th Cir. 1981); FTC v. Arch Coal, 329 F. Supp. 2d 109, 116 (D.C. Cir. 2004) ("[P]laintiffs have the burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined.").

[52] *See, e.g.,* United States v. Aetna, 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("[T]he divestiture need not be iron clad for a court to consider it. Rather, once the divestiture is sufficiently non-speculative . . . to evaluate its effects on future competition, then further evidence about the likelihood of the divestiture goes to the weight of the evidence regarding the divestiture's effects").

facie case.[53] This is the correct approach because—as one court put it—to do otherwise would be "tantamount to turning a blind eye to the elephant in the room" during the government's case-in-chief.[54] Other courts have waited for the defendants to raise the divestiture and evaluated it at Steps 2 and 3.[55] But critically, in all such cases the courts ultimately required proof by a preponderance of the evidence that the revised transaction, inclusive of any proffered divestiture, would be likely to "substantially lessen" competition.[56]

A. The Government Should Address Divestitures in its Prima Facie Case

Plaintiffs are "masters of their complaints," and therefore, the government can target its complaint to challenge the transaction(s) it chooses.[57] Frequently, the government brings complaints that target the transaction initially described in the HSR filing, even when the merging parties have proposed

[53] *See, e.g.*, FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 46 (D.D.C. 2002) ("[T]he Court concludes that parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns. And when they do so under circumstances as occurred in this case, it becomes the new agreement that the court must evaluate in deciding whether an injunction should be issued."); *Arch Coal*, 329 F. Supp. 2d at 116; United States v. AT&T, 310 F. Supp. 3d 161, 191-92 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019); FTC v. Microsoft, No. 23-cv-02880-JSC, 2023 WL 4443412, at *11–12 (N.D. Cal. July 10, 2023).

[54] FTC v. Arch Coal, Inc., No. 04-0534 (JDB), slip op. at 7–8 (D.D.C. July 7, 2004).

[55] *See* United States v. Franklin Elec. Co., Inc., 130 F. Supp. 2d 1025, 1033 (W.D. Wisc. 2000); *Aetna*, 240 F. Supp. 3d at 60; FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 290 (D.D.C. 2020).

[56] 15 U.S.C. § 18; *See also* United States v. Anthem, 236 F. Supp. 3d 171, 178 (D.D.C. 2017) (holding that the government bears the "burden to demonstrate that the proposed combination is likely to have a substantial effect on competition").

[57] U.S. Supplemental Pretrial Brief at 5, United States v. Assa Abloy AB, No. 22-2791-ACR (D.D.C. Mar. 27, 2023) (citing Standard Fire Ins. Co. v. Knowles, 568 U.S. 588, 595 (2013)).

a divestiture during the government investigation.[58] This may be, in part, a consequence of when the merging parties finalize their revised transaction. Although the merging parties may, and frequently do, offer proposed fixes over the course of an investigation, they often do not finalize the details of the divestiture, including identification of the proposed divestiture buyer, until after the complaint is filed. Even when the government's complaint is silent as to a proffered fix by defendants, courts have consistently admitted and considered evidence about the proposed divestiture in determining Section 7 liability.[59]

Courts wield the authority to ensure that plaintiffs have adequate discovery of the revised transaction to prepare their case for trial. Where a divestiture has been offered, courts typically stipulate production deadlines in the Case Management Order that obligate the defendants to provide rolling updates on developments as they occur in the execution of a revised transaction.[60] Courts set deadlines by which the defendants must execute the revised transaction or face day-for-day extensions of the trial schedule.[61] The government may also seek to exclude evidence under Federal Rule of Evidence 403 if defendants fail to timely submit and the delay is prejudicial.[62]

[58] *See, e.g.*, United States v. UnitedHealth Group Inc., 630 F. Supp. 3d 118, 128 (D.D.C. 2022); Complaint, U.S. v. Assa Abloy AB, No. 1:22-cv-02791-ABJ (D.D.C. Nov. 3, 2022).

[59] FED. R. EVID. 402; *See* FTC v. Arch Coal, Inc., No. 04-0534 (JDB), slip op. at 7 (D.D.C. July 7, 2004) ("Section 7 of the Clayton Act requires the Court to review the entire transaction in question . . . . [T]he Court is unwilling to simply ignore the fact of the divestiture.") (emphasis in original); Transcript of Trial Proceedings at 26, United States v. Assa Abloy AB, No. 22-2791-ACR (D.D.C. Apr. 17, 2023) ("My basis for the ruling of allowing the Vietnam lease to come in is that that evidence goes to the merits of the case. And I don't feel like I should be ruling on a divestiture agreement that doesn't in fact exist because there are changes to it that everyone agrees are out there, because I've excluded that evidence. To me, that undermines what we are supposed to try to do here, which is get to the right outcome as to whether or not there will be a lessening of competition.").

[60] *See, e.g.,* Scheduling and Case Management Order at 21, U.S. v. Assa Abloy AB, No. 1:22-cv-02791 (ABJ) (D.D.C. Nov. 18, 2022).

[61] *See id.*

[62] FED. R. EVID. 403.

But the defendants are motivated by external factors as well, because a delay could push the merger decision date beyond the outside date in their original merger agreement, which could jeopardize the transaction altogether.

How the government presents its case will determine the defendants' rebuttal burden because "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."[63] With courts ensuring adequate discovery, the government's prima facie case is expected to account for the transaction's probable future based on the record evidence.[64] Stated another way, if the government chooses to bring a less-compelling prima facie case than is possible based on the record evidence—for example, by ignoring the impact of a likely divestiture—the defendants will accordingly require a less robust production to rebut it.[65]

When the government ignores the divestiture at the prima facie stage, it implicitly argues that either the defendant has not produced enough evidence to evaluate the divestiture or that it is unlikely, in fact, to occur.[66] A divestiture is nearly certain to occur where a party enters into a divestiture

[63] United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990).

[64] See FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116–17 (D.C. Cir. 2004) ("[A]ntitrust theory and speculation cannot trump facts, and . . . cases must be resolved on the basis of the record evidence relating to the market and its probable future."); Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market —its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger").

[65] *See* Illumina, Inc. v. FTC, 88 F.4th 1036, 1058 (5th Cir. 2023) ("Because Complaint Counsel preemptively addressed the Open Offer as part of its case-in-chief, Illumina's burden on rebuttal was 'heightened.'").

[66] *See, e.g.,* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("[T]he divestiture need not be iron clad for a court to consider it. Rather, once the divestiture is sufficiently non-speculative for the court to evaluate its effects on future competition, then further evidence about the likelihood of the divestiture goes to the weight of the evidence regarding the divestiture's effects.").

agreement with a divestiture buyer and satisfies all conditions of the agreement except those to be satisfied upon the resolution of the merger litigation.[67] A divestiture is even more certain to occur when the defendants ask the judge to order it, which courts may do to exempt the divestiture from HSR filing requirements under the HSR Act's implementing regulations.[68]

In circumstances where there is significant doubt over whether the divestiture will occur, the government may seek to establish its prima facie case based solely on the original transaction. For example, in *Aetna*, the CEO of the divestiture buyer testified that the divestiture was "not a done deal," and the DOJ identified several substantial hurdles to the divestiture, such as the need for Centers for Medicare & Medicaid Services' ("CMS") approval of the divestiture's asset transfer.[69] The court in *Aetna* allowed the government to meet its prima facie burden without accounting for the proposed divestiture.[70]

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[67] S*ee* United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 135 (D.D.C. 2022) ("The evidence established, and the Court finds, that UHG's divestiture of ClaimsXten to TPG is a virtual certainty. UHG and TPG have already entered a definitive purchase agreement, and all conditions of that agreement have been satisfied, except for those to be satisfied at closing or by the resolution of this lawsuit.").

[68] *See, e.g.,* Defendants' Pretrial Brief at 6, United States v. Assa Abloy AB, No. 1:22-cv-02791-ABJ (D.D.C. Jan. 13, 2023) ("ASSA ABLOY has entered a binding divestiture agreement with Fortune Brands (ECF No. 50) and asks the Court to *order* the divestiture." (emphasis in original)); *UnitedHealth*, 630 F. Supp. 3d at 140 n.8. Congress invoked the equity jurisdiction of the federal courts in the Clayton Act. 15 U.S.C. § 25. These equitable powers are broad, and a court need not find liability to issue an injunction ordering the divestiture. *Cf.* United States v. Coca-Cola Bottling Co., 575 F.2d 222, 227–31 (9th Cir. 1978) (issuing preliminary injunction to sellers despite holding that sellers are not violators of § 7 of the Clayton Act).

[69] *Aetna*, 240 F. Supp. 3d at 63; *cf.*, United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025, 1032-33 (W.D. Wis. 2000) (allowing the government to satisfy its prima facie burden without consideration of a licensure fix in a case where the court found the defendant had minimal incentive to adhere to the fix in the long-term).

[70] *Aetna*, 240 F. Supp. 3d at 63–64.

However, where the divestiture is likely to occur, the government is better off not ignoring it. First, the government weakens its prima facie case and makes it easier for the defendants to rebut the government's case by offering proof that "the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition in the relevant market."[71] Defendants' rebuttal in such a case would be analogous to the Supreme Court's holding in *General Dynamics*, which requires the plaintiff to factor in the "probable future ability to compete" by taking into account the real-world effects.[72] Second, courts may find that ignoring the divestiture so undermines the government's prima facie case that the government cannot meet its burden without accounting for the divestiture;[73] or the court may also consider it a waste of the

[71] FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Circ. 2001) (quoting United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975)) (internal quotation marks omitted).

[72] *See generally* United States v. Gen. Dynamics Corp., 415 U.S. 486, 503–04 (1973). In *General Dynamics*, the government relied on past production statistics to show that the challenged acquisition materially enlarged the coal market share of the acquiring company. The Supreme Court affirmed the lower court judgment that the acquisition did not violate Section 7, holding that the lower court was correct to rely on evidence relating to changes in the structure of the coal industry as to long-term contract purchases by electric utility companies, and to changes in the amount of uncommitted coal reserves held by the acquired company, since such evidence necessarily implies that the acquired company would be unable to compete effectively for future contracts. While the government's statistical showing might have been sufficient to show a likely substantial lessening of competition in the absence of these other considerations, the fact that virtually all of the acquired company's supply of coal reserves were either depleted or already committed by long-term contracts with large customers meant that its past performance was not an accurate indicator of its probable ability future to compete. Just as long-term contracts tying up supply of coal rebutted the government's prima facie case in *General Dynamics*, contracts permanently severing divested assets from a party ought to rebut a prima facie case relying entirely on evidence of the party's past performance using those assets.

[73] *See* FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 46 (D.D.C. 2002) ("[T]he Court concludes that parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns. And when they do so under

court's time to rule on the competitive effects of a merger without the divestiture.[74] Finally, defendants seeking to force the issue could raise a mootness challenge since the original transaction can no longer be reasonably expected to occur and has been mooted by the adoption of the divestiture.[75]

circumstances as occurred in this case, it becomes the new agreement that the Court must evaluate . . . ."); FTC v. Arch Coal, Inc., No. 04-0534 (JDB), slip op. at 7 (D.D.C. July 7, 2004) ("Even under Section 13(b), this Court's task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the <u>entire</u> transaction in question. Given this Court's conclusion, based on all circumstances including the evidence presented at the preliminary injunction hearing, that the Arch-Kiewit transaction will in fact occur as agreed if the Arch-Triton merger goes forward, the Court is unwilling to simply ignore the fact of the divestiture of Buckskin to Kiewit.") (emphasis in original); United States v. AT&T, Inc., 916 F.3d 1029, 1037, 1041 (D.C. Cir. 2019) (affirming the district court's judgment that the government failed to meet its prima facie burden for reasons including that the government did not account for the efficacy of the defendants' "irrevocable" fix agreement with distributors).

[74] *See* United States v. UnitedHealth Grp., Inc., 630 F. Supp. 3d 118, 134 n. 5 (D.D.C. 2022) ("[T]he relevant transaction here is the proposed acquisition agreement *including* the proposed divestiture. As discussed above, treating the acquisition and the divestiture as separate transactions that must be analyzed in separate steps allows the government to meet its prima facie burden based on a fictional transaction and fictional market shares." (emphasis in original)); Transcript of Status Conference at 38, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. Oct. 28, 2022) ("I'm willing to do anything on earth in this building that's important, but I don't like to spend five minutes deciding something I don't have to decide."); Transcript of Status Conference at 7, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. Dec. 5, 2022) ("I'm not sure [the defendants] actually dispute the pre-divestiture market share statistics or the fact that something would be necessary, and they're telling you this [divestiture] is the thing that we're going to do . . . I have a serious question about how much time and effort has to be spent on that piece at all.").

[75] FTC v. H. J. Heinz, Co., 164 F. Supp. 2d 659, 660 (D.D.C. 2001) (citing Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 188–89 (2000)); *see generally* United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 857 (6th Cir. 2005) ("The party asserting mootness bears a heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to stand up again . . . . Thus, it is DFA's burden to show that the government's claim with respect to the original agreement is moot[.]" (internal quotation marks omitted)).

Accordingly, the government has, until recently, accounted for the revised transaction in its prima facie case when divestitures or other commitments are highly likely to occur.[76] This practice goes back at least as far as *Arch Coal*.[77] In *Arch Coal* the FTC initially filed a pre-trial motion to exclude evidence of the divestiture from consideration at trial, arguing that the divestiture was not sufficiently likely to occur and that it was a "remedy" that should not be considered in a liability phase of a Section 7 case.[78] The court denied the FTC's motion, holding that the divestiture was highly likely to occur and, therefore, Section 7 required the court to consider it in evaluating liability.[79] With the court having established that the divestiture was highly likely to occur, the FTC proceeded to include the divestiture in its prima facie case based on market concentration.[80]

B. A Defendant's Rebuttal Need Only Produce Evidence Showing Competition is Not Likely to Substantially Lessen Post-Divestiture

Under *Baker Hughes*, if plaintiffs establish a prima facie case, defendants must present evidence to rebut the

[76] *See* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 53 (D.D.C. 2015) ("As his last step, Dr. Israel adjusted his market shares to account for the divestiture to PFG.").

[77] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 114–15 (D.D.C. 2004); David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST, 10, 11 (Fall 2016) ("Since *Arch Coal*, the agencies generally have not disputed that courts have authority to consider fixes.").

[78] FTC v. Arch Coal, Inc., No. 04-0534 (JDB), slip op. at 2-3 (D.D.C. July 7, 2004).

[79] *Id.* at 7 ("Even under Section 13(b), this Court's task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the entire transaction in question. Given this Court's conclusion, based on all circumstances including the evidence presented at the preliminary injunction hearing, that the Arch-Kiewit transaction will in fact occur as agreed if the Arch-Triton merger goes forward, the Court is unwilling to simply ignore the fact of the divestiture of Buckskin to Kiewit." (emphasis in original)).

[80] *Arch Coal,* 329 F. Supp. 2d at 124–25.

presumption of anti-competitive effect by "affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." [81] In the case of a revised transaction that includes a divestiture, defendants' rebuttal might include evidence pertaining to "the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture[;] the independence of the divestiture buyer from the merging seller[;] and the purchase price."[82]

The DOJ has recently argued that defendants "must show that their divestiture remedy would 'replace competitive intensity lost as a result of the [challenged] merger.'"[83] This mischaracterizes the defendants' burden in two key respects. First, it imposes a burden of proof on *defendants*, whereas the law is clear that defendants' actual burden is only of production, not proof.[84] Second, the concept of "replacing competitive intensity" has a shallow basis in the law and should not be given undue emphasis or understood to remove from the plaintiff—at any stage—the burden to persuade the court that the revised transaction (including the divestiture) is likely to substantially lessen competition.

In the context of unwinding a consummated merger already deemed to have violated Section 7, the Supreme Court has held that "relief in an antitrust case must be 'effective to redress the violations' and to 'restore competition.'"[85] In 2015, the D.C. District Court in *Federal Trade Commission v. Sysco Corporation* noted that "there is a lack of a clear precedent

[81] United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990).

[82] FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020).

[83] Pretrial Brief for United States at 10, United States v. Assa Abloy AB, No. 22-2791-ABJ (D.D.C. Jan. 13, 2023) (quoting United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017)).

[84] *See Aetna*, 240 F. Supp. 3d at 60 ("In rebuttal, a defendant may *introduce evidence* that a proposed divestiture would 'restore [the] competition' lost by the merger counteracting the anticompetitive effects of the merger.") (alteration in original) (emphasis added) (citing Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015)).

[85] Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) (quoting United States v. Du Pont & Co., 366 U.S. 316, 326 (1961)).

providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger."[86] The *Sysco* court subsequently turned to the 2004 and 2011 Antitrust Division Policy Guides to Merger Remedies for principles by which to evaluate a divestiture rebuttal.[87] Noting that both sides had cited the 2004 Guide, the court quoted from it that "[r]estoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels."[88] The court then analyzed the effect of the proposed divestiture "with these principles in mind."[89]

Two years later, the D.C. District Court in *Aetna* cited *Sysco* for the proposition that the "divestiture must 'replac[e] the competitive intensity lost as a result of the merger.'"[90] Three years after that, the D.C. District Court in *FTC v. RAG-Stiftung* cited *Aetna* for the same proposition.[91] The extent of the legal basis for "replacing competitive intensity" is thus (1) the non-binding 2004 Policy Guide, the latest version of which was withdrawn by the DOJ in 2022,[92] and (2) the D.C. District Court's reference to the 2004 Policy Guide in *Sysco* and subsequent district court citations stemming from *Sysco*.

The government would be mistaken to interpret the language from the 2004 Policy Guide quoted by the D.C. District Court—in response to citations from both parties—as imposing a new burden on defendants. Furthermore, *Sysco*, *Aetna* and *RAG-Stiftung* evaluated only whether the divestiture

[86] *Sysco*, 113 F. Supp. 3d at 72.

[87] *Id.* at 72-73.

[88] *Id.* at 72 (quoting ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 5 (Oct. 2004)).

[89] *Id.* at 73.

[90] United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (quoting *Sysco*, 113 F. Supp. 3d at 72).

[91] FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) ("Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity.").

[92] ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL (Sept. 2020) (withdrawn Apr. 2022), https://www.justice.gov/atr/page/file/1312416/download [https://perma.cc/LC8X-CY2E].

replaced competition to the degree that, post divestiture, there was not likely to be a "substantial lessening of competition."[93] The court in those cases did not place a heightened burden on the defendants to provide evidence, let alone prove, that the divestiture restored competition beyond the point at which competition would have otherwise been substantially lessened:

- In *Sysco*, the court ruled in favor of the government's prima facie case, which had established that the transaction *including the divestiture* was likely to substantially lessen competition.[94]
- In *Aetna*, the court found the divestiture buyer so ill-suited to run the divested business that, far from preventing a substantial lessening of competition, its efforts were likely to completely fail, even if the divestiture overcame several barriers that made its likelihood of even occurring doubtful.[95]
- In *RAG-Stiftung*, the court also did not impose on the defendants a burden of proving that the divestiture would completely replicate pre-merger competition, but rather found that the merging firms' divestiture "threw a wrench in the FTC's argument that their merger will substantially lessen competition."[96] The FTC itself in that case interpreted "replac[ing] competitive intensity" to be relative to its ultimate burden of showing a likelihood of substantial lessening of competition.[97]

Put plainly, it would be a perverse interpretation of Section 7 to allow the government to meet its prima facie burden on

[93] 15 U.S.C. § 18.

[94] *Sysco*, 113 F. Supp. 3d at 53–54, 88 ("As his last step, Dr. Israel adjusted his market shares to account for the divestiture to PFG."); *See also id.* at 73–74 (stating that defendants do not have to show that a divestiture "replicate[s] pre-merger HHI levels.").

[95] *Aetna*, 240 F. Supp. 3d at 73–74.

[96] *Rag-Stiftung*, 436 F. Supp. 3d at 304.

[97] *Id.* ("[T]he FTC's expert, Dr. Rothman, concluded that if PeroxyChem sells its Prince George plant to a new competitor that replaces PeroxyChem's competitive intensity in the Pacific Northwest, *competition will not be substantially lessened* in that geographic market." (emphasis added)).

the original transaction but require the defendants to prove that the revised transaction—which is, in fact, the proposed real-world transaction—would completely restore competition hypothetically lost from the fictional original transaction that will not occur. It would be inconsistent with the text of Section 7 because "[b]y requiring that [the defendant] prove that the divestiture would preserve exactly the same level of competition that existed before the merger, the Government's proposed standard would effectively erase the word 'substantially' from Section 7."[98] Furthermore, the D.C. Circuit Court explained in *Baker Hughes* that raising a substantial burden on the defendant following the plaintiff's low bar to establish a prima facie case would improperly require the defendant to "essentially persuade the trier of fact on the ultimate issue in the case."[99]

Indeed, the D.C. Circuit's holding in *Baker Hughes* regarding entry rebuttals is analogous to the treatment of a proposed divestiture. In *Baker Hughes*, the government argued that to rebut the government's prima facie case, the defendants were required to make "a clear showing that entry into the market by competitors would be quick and effective."[100] The Circuit Court rejected the government's proposed standard including its claim that defendants are required to make a "clear showing" to rebut the prima facie case.[101] The court explained that

[98] United States v. UnitedHealth Grp., Inc., 630 F. Supp. 3d 118, 133 (D.D.C. 2022).

[99] United States v. Baker Hughes Inc., 908 F.2d 981, 991-92 (D.C. Cir. 1990) ("Imposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7.").

[100] *Id*. at 983.

[101] *Baker Hughes*, 908 F.2d at 991. As an initial matter, the Circuit Court noted that entry was not the only possible rebuttal, and the District Court had correctly considered the defendants' other rebuttals, including evidence of "the flawed underpinnings of the government's prima facie case." *Id.* at 986. S*ee, e.g., United States v. Marine Bancorporation*, 418 U.S.

the burden of production on the defendant in rebuttal could not be too onerous, such that it erased the distinction between that burden and the ultimate burden of persuasion held at all times by the plaintiff:

> By focusing on the future, section 7 gives a court the uncertain task of assessing probabilities. In this setting, allocation of the burdens of proof assumes particular importance. By shifting the burden of producing evidence, present law allows both sides to make competing predictions about a transaction's effects. If the burden of production imposed on a defendant is unduly onerous, the distinction between that burden and the ultimate burden of persuasion—always an elusive distinction in practice—disintegrates completely. A defendant required to produce evidence "clearly" disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case—whether a transaction is likely to substantially lessen competition. Absent express instructions to the contrary, we are loath to depart from settled principles and impose such a heavy burden. Imposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories. Requiring a "clear showing" in this setting would

602, 631 (1974) (holding that, after the government established its prima facie case, "the burden was then upon appellees to *show* that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the [relevant] market" (citation omitted) (emphasis added)); *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120 (1975) (holding that, after the government established its prima facie case, "[i]t was… incumbent upon [the defendant] to *show* that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition" (emphasis added)).

> move far toward forcing a defendant to rebut a probability with a certainty.[102]

The holding applies for litigating the fix. To impose a burden of production on the defendants that requires them to prove *absolutely no lessening* of competition would impermissibly allow the government to rest its case by presenting market concentration statistics that will never come to pass and effectively to shift the burden of persuasion to the defendants to prove the case.

A noteworthy area of dispute between the government and the defense bar in recent litigate-the-fix cases has been the adequacy of private equity divestiture buyers. For example, in *UnitedHealth* the government argued that, as a private equity firm, the divestiture buyer in the case, TPG Capital, might have weaker incentives to innovate than strategic buyers. The court held the argument was "misplaced" because the evidence at trial established that the private equity buyer had incentives to maintain or improve upon the divested business's competitive edge and was well-positioned to do so.[103] The court also noted that its finding was consistent with the now-revoked DOJ Merger Remedies Manual, which recognized that, in some cases, a private equity buyer might be preferred to a strategic buyer because a private equity firm is more "flexibility in investment strategy, [i]s committed to the divestiture, and [i]s willing to invest more when necessary."[104]

C. Policy Considerations Affirm the Government's Burden of Persuasion

Section 7 of the Clayton Act protects consumers by prohibiting transactions likely to create a "substantial lessening of competition." Transactions unlikely to substantially lessen competition are not only lawful, but a regular feature of the modern economy that frequently serve to make business more productive. To block a transaction that is unlikely to

[102] *Baker Hughes*, 908 F.2d at 991 (internal citations omitted).

[103] *UnitedHealth*, 630 F.Supp. 3d at 136.

[104] *Id.* at 137 (quoting ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL 24–25 (Sept. 2020) (withdrawn Apr. 2022)).

substantially lessen competition merely because the transaction was revised will not serve consumers. Instead, it would prioritize process over real-world outcomes. And the process would not be beneficial to consumers either.

Negotiated settlements between businesses and the agencies have traditionally resolved a substantial portion of merger challenges without the high cost of litigation. Penalizing businesses for attempting to address the concerns of the agencies will not foster negotiated settlements between businesses and the agencies. Unlike the agencies, businesses do not have the power to subpoena third parties to investigate market structure. The predictions of businesses about which transactions will be legal are necessarily imperfect. Businesses and the government benefit from good faith engagement and settlement where necessary. To the extent that businesses and the government cannot come to an agreement, the courts stand ready and able to resolve disputes.

IV. POST-SCRIPT: THE FIFTH CIRCUIT AFFIRMED THIS APPROACH IN *ILLUMINA*

This Article until now has captured the state of the law as it existed at the time of the Taft Lecture event on November 29, 2023. Weeks later, on December 15, the Fifth Circuit issued an opinion directly on point in *Illumina, Inc. v. FTC*.[105] The Fifth Circuit's opinion broadly endorses the approach advocated in this article and is now the most notable authority on the issue of litigating the fix.

In *Illumina*, the FTC alleged that Illumina, Inc., the dominant provider of a DNA sequencing tool, had illegally acquired Grail, Inc., the manufacturer of the first commercially available multi-cancer early detection ("MCED") test in the United States. The FTC asserted that Illumina's DNA sequencing tool was an essential input to MCED tests and that the acquisition would substantially lessen competition for the research, development, and commercialization of MCED tests by incentivizing Illumina to foreclose or disadvantage Grail's MCED-test rivals. As a remedy for the alleged violation, the

[105] Illumina, Inc. v. Fed. Trade Comm'n, 88 F.4th 1036 (5th Cir. 2023).

FTC sought an order requiring Illumina to divest the Grail business and assets it had acquired.[106]

On the same day that the FTC issued its complaint, Illumina published an offer of binding, irrevocable contractual commitments to all of its U.S. DNA sequencing customers intended to address the foreclosure concerns raised by the FTC (the "Open Offer"). In essence, the Open Offer was a standardized supply contract requiring Illumina to provide its DNA sequencing tools at the same price and with the same access to services and products that is provided to Grail.[107]

The FTC complaint counsel argued that the Open Offer was a "flawed behavioral remedy" that must be assessed only after a determination of liability and under the remedies standard by which Illumina would bear the burden of proving its proffered remedy would "restore the competitive intensity" lost from the acquisition.[108] Illumina took the contrary position, consistent with this article, that the real-world effects of the Open Offer must be accounted for at the prima facie stage of the liability determination.[109]

The FTC's Chief Administrative Law Judge ("ALJ") ruled in favor of Illumina, concluding that the FTC failed to prove its prima facie case, in part because the Open Offer constrained Illumina from acting on the asserted incentives to harm Grail's rivals, and held that case law supports applying the real-world effects of contractual commitments to the liability determination.[110] The ALJ rejected the government's

[106] *Id.* at 1045–46. Although Illumina consummated the transaction with Grail, Illumina committed to holding Grail as a separate company during the regulatory review underway by the European Commission. Grail remained held separate throughout the course of the U.S. proceedings. Therefore, the posture of the case from a liability standpoint was similar to that of a pre-merger challenge of an HSR reportable transaction, rather than a typical post-consummation challenge in which the alleged harms of the acquisition would have already manifested.

[107] *Id.* at 1044–45.

[108] Initial Decision, In the Matter of Illumina, Inc., Dkt No. 9401 at 182 (FTC Sep. 9, 2022).

[109] Petitioners' Brief at 55–58, *Illumina*, 88 F.4th 1036, ECF No. 96.

[110] Initial Decision, In the Matter of Illumina, Inc., Dkt No. 9401 at 178–81 (FTC Sept. 9, 2022).

argument that the Open Offer should only be evaluated at the remedy stage after a liability determination based on a world without the Open Offer, critiquing that "[h]olding the Open Offer to the standard of a remedy for a violation puts the proverbial cart before the horse."[111]

Upon appeal of the ALJ's initial decision to the FTC, the FTC reversed.[112] The FTC rejected the ALJ's holding regarding the Open Offer. In dictum, the FTC stated that it was "evident on its face" that the Open Offer was a proposed remedy.[113] Nevertheless, stating that it would mirror the approach taken by the courts in *Aetna* and *Sysco* because the outcome was unaffected in doing so, the FTC assessed the Open Offer as a rebuttal at Step 2 of the *Baker Hughes* framework.[114] Crucially, the FTC held that whether assessed at the remedy stage or as a rebuttal at Step 2 of the *Baker Hughes* framework, the "ultimate analysis" did not change, and in either case Illumina must bear the burden of showing that the Open Offer would restore the pre-transaction level of competition.[115] The FTC did not wrestle with or address the apparent inconsistency, commented upon by the D.C. District Court in *UnitedHealth*, between a standard requiring the defendant to show *no* lessening of competition and the Section 7 statutory requirement that the government establish *substantial* lessening of competition.[116]

Upon appeal to the U.S. Court of Appeals for the Fifth Circuit, the Court narrowed in on that inconsistency, vacating

[111] *Id.* at 182.

[112] Opinion of the Commission, In the Matter of Illumina, Inc., Docket No. 9401 at 2 (FTC Mar. 31, 2023).

[113] *Id.* at 62–64.

[114] *Id.* at 64–65.

[115] *Id.*

[116] United States v. UnitedHealth Group Inc., 630 F. Supp. 3d 118, 133 (D.D.C. 2022) ("By requiring that [the defendant] prove that the divestiture would preserve exactly the same level of competition that existed before the merger, the Government's proposed standard would effectively erase the word 'substantially' from Section 7.").

the FTC's order and remanding the case for reconsideration of the effect of the Open Offer.[117] The Fifth Circuit held:

> To rebut [the FTC's] prima facie case, Illumina was only required to show that the Open Offer sufficiently *mitigated* the merger's effect such that it was no longer likely to *substantially* lessen competition. Illumina was not required to show that the Open Offer would negate the anticompetitive effects of the merger entirely.[118]

While the Fifth Circuit's holding fundamentally affirms the position in this Article, two key points distinguish *Illumina* from the classic litigate-the-fix scenario of a divestiture to address horizontal overlaps, which this Article has primarily addressed. First, *Illumina* involved a vertical merger. As vertical mergers do not affect market shares and cannot give rise to the market concentration-based prima facie presumption of harm, less emphasis arguably needs to be placed on whether a litigated fix in a vertical merger trial is addressed at Step 1 or 2 of *Baker Hughes*.[119] The Fifth Circuit acknowledged this point in holding that the FTC was not in error to evaluate the Open Offer at Step 2.[120] In trials involving a divestiture, courts may be more likely to hold that the presumption of harm at Step 1 will not arise without consideration of the fix.

The second key distinction between *Illumina* and the classic divestiture fix scenario is that *Illumina* involved a behavioral commitment. There is a possibility that a future ruling

[117] Illumina, Inc. v. FTC, 88 F.4th 1036, 1062 (5th Cir. 2023).

[118] *Id.* at 1059.

[119] In a vertical merger, "unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share. Instead, the government must make a 'fact-specific' showing that the proposed merger is 'likely to be anticompetitive.'" United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019) (citations omitted).

[120] *Illumina*, 88 F.4th at1057 ("As we and our sister circuits have recognized, the burden-shifting framework is 'somewhat artificial.' . . . This is particularly true in vertical merger cases." (internal quotations omitted)).

under the *Illumina* precedent could hold divestitures to be remedies, distinguishing divestitures contingent upon closing from behavioral commitments like the Open Offer, which was made prior to any judgment in the case, and which will remain in effect notwithstanding Illumina's decision to divest Grail following its review of the Fifth Circuit's opinion. Indeed, the Fifth Circuit commented in dictum on the difference between the Open Offer and the divestitures in *Aetna* and *Sysco*, where, by contract, the divestitures at issue were conditional upon the court's liability determination.[121] Nonetheless, for the reasons described above, statutory intent, case law, and public policy support extension of the Fifth Circuit's treatment of the Open Offer to divestiture fixes.

V. CONCLUSION

In sum, proffered divestitures and behavioral commitments have real-world effects that must be considered in the determination of a transaction's potential for anticompetitive harm. Regardless of exactly how or at what step of *Baker Hughes* the court evaluates the divestiture or commitment, the "burden of persuasion 'never shifts' away from plaintiff."[122] The government has, in fact, previously conceded this logical interpretation of Section 7 at trial.[123] "[P]laintiffs 'have the burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined.'"[124] This approach is consistent with the Congressional intent of the HSR Act, according to which Congress flatly rejected shifting the burden to the merging parties and instead designed the premerger notification program as a limited procedural fix to allow the agencies to

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121 *Id.* at 1056.

122 United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990).

123 United States v. UnitedHealth Grp. Inc., No. 1:22-cv-0481 (CJN) at 18 (D.D.C. Sept. 21, 2022) ("We have to persuade Your Honor at the end of the day, after they've come in with their divestiture evidence, that Your Honor believes that there's a substantial lessening of competition.").

124 United States v. Anthem, 236 F. Supp. 3d 171, 192 (D.D.C. 2017) (quoting FTC v. Arch Coal, 329 F. Supp. 2d 109, 116 (D.D.C. 2004)).

review and challenge unlawful mergers prior to consummation under the same substantive liability standard; nothing more.