DIGITAL MARKETS GUIDE

THIRD EDITION

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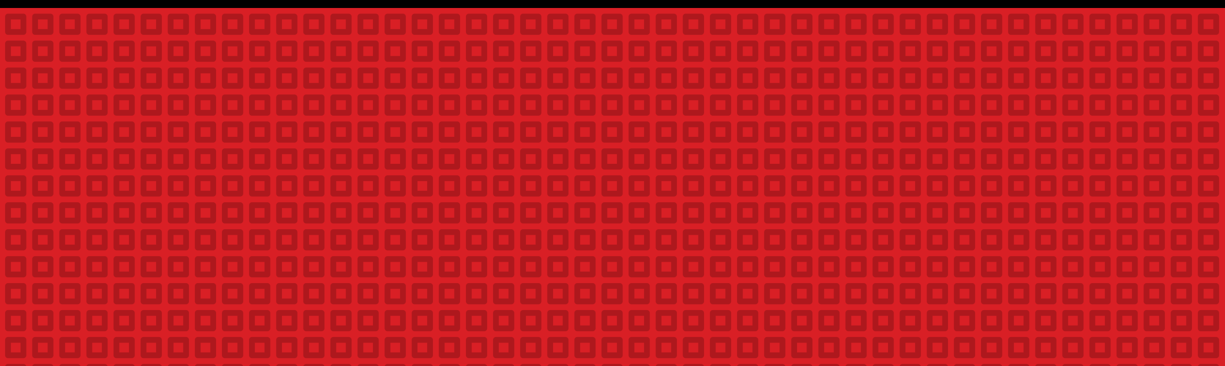

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Publisher's Note

The digital economy is transforming day-to-day lives, and we are seeing a rise in connectivity not only between people but also between vehicles, sensors, meters and other aspects of the internet of things. Yet, as noted by Claire Jeffs and Nele Dhondt in their introduction, even as the Fourth Industrial Revolution accelerates, traditional concerns are keeping pace, and the digital economy has also been a powerful force, increasing competition across a broad sweep of products and services. Regulation is a growing concern, with the European Commission's review of transactions – including the much-discussed *Illumina/GRAIL* case – illustrating the impact the EU Merger Regulation is having in Europe and beyond. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is thus critical.

The third edition of the *Digital Markets Guide* – edited by Claire Jeffs of Slaughter and May, Daniel Sokol of White & Case and Susan Ning of King & Wood Mallessons – provides just such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The guide draws on the wisdom and expertise of distinguished practitioners globally and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as how pricing algorithms intersect with competition law and antitrust enforcement in certain tech mergers – for all competition professionals.

CHAPTER 8

United States: How Antitrust Agencies are Increasing Merger Control in Big Data

Daniel S Bitton, Leslie C Overton, Michael O'Mara and Heather Zuckert[1]

Introduction

Three years into the Biden administration, mergers and acquisitions in digital markets – especially large digital platforms – continue to be a key focal point of the US antitrust agencies. This emphasis is illustrated by the July 2021 Executive Order issued by President Biden on competition policy, which, among other things, raised concerns over consolidation in the technology sector and encouraged agency action, setting out:

> *the policy of [his] Administration to meet the challenges posed by new industries and technologies, including the risk of dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.*[2]

The Biden administration's policy focus has also been reflected in the public statements of the leaders of the Federal Trade Commission (FTC) and Department of Justice, Antitrust Division (DOJ). For instance, DOJ Assistant Attorney General

1 Daniel S Bitton and Leslie C Overton are partners, Michael O'Mara is counsel and Heather Zuckert is an associate at Axinn, Veltrop & Harkrider LLP.

2 See Executive Order No. 14036, 56 Fed. Reg. 36987, 36988 (9 July 2021).

Jonathan Kanter cited the Executive Order as providing a 'definitive mandate to revisit and revitalize antitrust enforcement and competition policy across the entire US government', which the DOJ is continuing to act upon through increased merger enforcement.[3] Kanter went on to discuss the ability of platforms to use strategic acquisitions to build market power or further entrench a dominant position and the need for antitrust scrutiny of platform mergers across different dimensions of competition.

Importantly, however, this policy focus is increasingly translating into practice as the agencies become more aggressive with challenges to technology mergers – including those consummated years ago. These actions show that the agencies are beginning to hit their stride in ramping up enforcement and are willing to expend resources litigating newer theories around entrenchment and dominance reflected in the Biden Executive Order, and include challenges to combinations between digital platforms like UnitedHeath/Change Healthcare, vertical acquisitions by platforms like Microsoft/Activision and platform acquisitions of potential competitors like Meta/Within. The agencies have also sought to revisit and unwind long-ago acquisitions by major technology companies in the context of monopolisation cases, including Facebook's acquisitions of WhatsApp and Instagram[4] and Google's acquisitions of two advertising technology companies.[5] Those acquisitions, which occurred nearly or more than a decade ago, were thoroughly investigated by the agencies at the time and were not challenged. Nevertheless, the agencies are now alleging that these long-closed acquisitions have hampered competition. While, to date, the agencies' track record in court is mixed, they do appear to be devoting more time, attention and resources to scrutinising and challenging technology mergers.

Given this changing landscape and increased scrutiny, understanding the US antitrust agencies' approach to tech mergers, including past merger enforcement matters covering digital markets and big data issues, is more important than ever. This chapter first discusses a number of pertinent policy and process changes made by the US agencies – including rhetoric and guidance out of the DOJ and FTC – that provide valuable insights into where the agencies will likely focus

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3 J Kanter, 'Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy' (2 March 2023): https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone.

4 Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590, at ¶ 1 (D.D.C. 9 December 2020).

5 Press Release, DOJ, 'Justice Department Sues Google for Monopolizing Digital Advertising Technologies' (24 January 2023): https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

their attention and resources, and process changes implemented by the agencies that will continue to increase the cost of navigating merger control in the United States. And, because the agencies are still required to challenge mergers through litigation pursuant to the US antitrust laws (in federal court or in the FTC's specialised administrative court), the rest of this chapter summarises takeaways from recent agency challenges to combinations involving digital markets, big data and e-commerce, including how the agencies and US courts analysed key issues of market definition, horizontal and non-horizontal theories of harm, and remedies.

Digital markets merger focus amid agencies' push for more robust enforcement

Driven by a general sentiment that various segments of the economy have become too concentrated, the greater focus on mergers involving digital markets comes amid increased antitrust scrutiny of mergers and acquisitions more broadly. Both have led US agencies to propose regulatory policy and process changes that affect all transactions, including those involving technology companies. In particular, the agencies have proposed an overhaul of the agencies' merger guidelines and significant changes to the Hart-Scott-Rodino notification form (HSR Form), simultaneously signalling their enforcement priorities and scepticism regarding the societal value of merger activity.

In July 2023, the FTC and DOJ jointly released their new Draft Merger Guidelines. The guidance is intended to replace the 2020 Vertical Merger Guidelines, which the FTC previously withdrew, and the 2010 Horizontal Merger Guidelines, which were widely accepted by courts and practitioners, and includes significant substantive changes from both. The Draft Guidelines expand the scope of mergers potentially subject to scrutiny by adjusting thresholds at which a merger is presumptively anticompetitive, including (1) a lower threshold for what will be considered a 'highly concentrated' market under the Herfindahl-Hirschman Index, (2) a structural presumption against horizontal mergers that would result in a combined share greater than 30 per cent and (3) a presumption against vertical mergers where access to over 50 per cent of the market could be foreclosed. While the Draft Guidelines do not carry the force of law, they do reflect the agencies' point of view as to the applicable law and signal their enforcement priorities when deciding whether to challenge a merger in court.

The Draft Guidelines also address several issues that are particularly relevant to mergers in digital markets, reflecting the Biden Executive Order's directive to prioritise antitrust enforcement relating to 'dominant internet platforms', including 'the acquisition of nascent competitors, the aggregation of data . . . and the presence of network effects'.[6]

Among the Draft Guidelines, Guideline 10 specifically addresses multi-sided platforms, in which the agencies describe the common attributes of multi-sided platforms and note that they 'will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants—i.e., around one side of the platform'.[7] The Guideline attempts to distinguish the 'limited scenario' addressed in *Ohio v. Am. Express* (*Amex*) (discussed below),[8] in which the relevant market for two-sided 'transaction' platforms encompasses both sides of the platform. The Guideline further explains that the agencies will consider competition (1) between platforms (e.g., acquisitions involving direct competitors, platform participants or firms that provide services or inputs to the platform operator, such as data that helps facilitate matching, sorting or prediction services); (2) on a platform (e.g., if the merger would create conflicts of interest between the platform operator and participants that would harm competition); and (3) to displace the platform (e.g., from new technologies or services that could displace or decrease dependency on the platform).

The agencies' concern with protecting nascent competitors is further reflected in the discussion on entrenchment by dominant firms in Guideline 7. Among the five examples provided of mechanisms through which a merger may entrench the dominant position of a firm, the Guideline includes 'eliminating a nascent competitive threat' (i.e., a firm 'that could grow into a significant rival, facilitate other rivals' growth, or otherwise lead to a reduction in dominance').[9] The agencies particularly note their interest with preserving nascent competition in the

6 See Executive Order No. 14036, 56 Fed. Reg. 36987, 36988 (9 July 2021).

7 FTC and DOJ, 'Guideline 10. When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform,' 2023 Draft Merger Guidelines: https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

8 138 S. Ct. 2274, 2280 (2018).

9 FTC and DOJ, 'Guideline 7. Mergers Should Not Entrench or Extend a Dominant Position,' 2023 Draft Merger Guidelines: https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

context of technological transitions and new technologies where a 'dominant firm might seek to acquire firms that might otherwise gain sufficient customers to overcome entry barriers'.[10]

The Draft Guidelines also outline new principles around entrenchment and strategic acquisitions, including allowing the agency to examine the cumulative impact of serial acquisitions even if no single acquisition would violate antitrust laws.[11] Guideline 9 notes that these acquisitions may be evaluated as part of an industry trend towards concentration or as part of a strategy by the acquiring firm to foreclose competitors or extend a dominant position. Notably, the agencies may examine historical evidence of acquisitions – 'consummated or not' – 'both in the markets at issue and in other markets' to assess a firm's overall strategic approach to serial acquisitions.[12]

In June 2023, the FTC and the DOJ also released proposed changes to the HSR Form that would bring about significant changes to the merger review process for reportable transactions.[13] The changes include an expanded scope of business documents to be submitted and a requirement for narrative submissions on competitive overlaps, including horizontal and non-horizontal relationships, as well as transaction rationale and anticipated timing. In a prepared statement to the House Judiciary Committee, the FTC explained that the new proposed HSR filings will give agencies a 'more complete picture of the proposed transaction's competitive impact' and are 'necessary so that the agencies can harness their limited resources to focus on those deals that are most likely to unlawfully lessen competition or tend to create a monopoly'.[14] Some of the proposed updates require information that is already collected by other antitrust authorities, such as the European Commission. Critics of the proposed changes anticipate that they

10 id.

11 FTC and DOJ, 'Guideline 9. When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series', 2023 Draft Merger Guidelines: https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

12 id.

13 Press Release, FTC, 'FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review' (27 June 2023).

14 FTC, 'Prepared Statement of the Federal Trade Commission,' Hearing on Oversight of the Federal Trade Commission before the Committee on the Judiciary, United States House of Representatives (13 July 2023): https://www.ftc.gov/system/files/ftc_gov/pdf/p210100housejudiciarytestimony07132023.pdf.

will dramatically increase the burdens on filing parties, with HSR filings requiring greater time and expense to complete – the FTC itself estimates that the average time to complete the HSR Form will rise from 37 hours to 144 hours.[15]

Another major change at the FTC came with its October 2021 announcement that it would start requiring 'prior approval' commitments in consent orders, a practice that had been discontinued in 1995.[16] To settle FTC merger concerns by consent decree under this new policy, parties will have to agree to obtain the FTC's advance approval of all future acquisitions in the relevant market or related markets for 10 years, regardless of the size of the target company or transaction value.

The FTC's prior approval provision lacks the timing and due process protections of the HSR Act. In its press release, the FTC cited a desire to encourage anticompetitive deals to 'die[] in the boardroom', rather than forcing the FTC to expend time and resources analysing those deals.[17] Companies contemplating transactions that might require divestitures or other remedies implemented via consent decree will now need to weigh the risk that reaching a settlement with the FTC would require submitting all future transactions in that market, and potentially related markets, for FTC review on an unspecified timetable.

Market definition

Two-sided markets

The recent Draft Merger Guidelines in part build on, and react to, prior enforcement challenges the agencies have pursued. For example, the agencies' commentary in Guideline 10 around multi-sided platforms is informed by recent merger challenges involving two-sided markets.

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15 Premerger Notification; Reporting and Waiting Period Requirements, 84 Fed. Reg. 42208 (6/29/2023) (Notice of Proposed Rulemaking to amend 16 CFR 801, 803).

16 Press Release, FTC, 'FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers' (25 October 2021): www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.

17 id.

In its decision in *Amex*,[18] the Supreme Court held that 'courts must include both sides of the platform' in the analysis of market definition and competitive effects in two-sided markets characterised by strong indirect network effects[19] because in such markets a platform 'cannot raise prices on one side without risking a feedback loop of declining demand'.[20]

In 2020, this concept was applied in a merger case for the first time in *United States v. Sabre Corp*.[21] In that case, the district court rejected the DOJ's challenge to the acquisition by Sabre, a global distribution system (GDS) connecting travel agencies and airlines for bookings and other purposes, of Farelogix Inc, whose technology allegedly threatened to disintermediate Sabre. The *Sabre* court interpreted *Amex* to mean that '[o]nly other two-sided platforms can compete with a two-sided platform for transactions' as a matter of law. The fact that Sabre was a two-sided platform and Farelogix was not was, in the court's view, a 'dispositive flaw' in the DOJ's challenge.[22] The court found that even if Farelogix could, as a matter of law, be considered a competitor to Sabre in the relevant market on one side of the platform (the airline side), it would need to show that the anticompetitive effects in that side of the market were so substantial as to 'reverberate throughout the Sabre GDS' and affect both sides of the market.[23] The court found that the DOJ did not make this showing.

The DOJ appealed the decision. Despite the victory at the district court, the parties ultimately abandoned their deal because the UK's Competition and Markets Authority (CMA) prohibited the transaction.[24] Afterwards, the DOJ asked the Third Circuit Court of Appeals to vacate the lower court's decision. The court granted the motion, although it noted that its decision was not to be construed as commentary on the merits:

> *We also express no opinion on the merits of the parties' dispute before the District Court . . . As such, this Order should not be construed as detracting from the persuasive force of the District Court's decision, should courts and litigants find its reasoning persuasive.*[25]

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18 138 S.Ct. 2274, 2287 (2018).

19 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018).

20 id. (internal citations omitted).

21 452 F.Supp.3d 97 (D. Del. 2020), vacated, 2020 WL 4915824 (3rd Cir. 20 July 2020).

22 id. at 136–138.

23 id. at 72–73.

24 Press Release, Sabre Corp., 'Sabre Corporation Issues Statement on its Merger Agreement with Farelogix' (1 May 2020): https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix.

25 *United States v. Sabre Corp.*, 2020 WL 4915824, at *1.

The DOJ's November 2020 complaint challenging the *Visa/Plaid* acquisition took care to discuss harms on both sides of the relevant two-sided market. In *Visa/Plaid*, Visa, Inc sought to acquire Plaid Inc, a company that provides financial data aggregation technology used by financial technology companies like Venmo to plug into consumers' financial accounts to perform functions like looking up account balances. Although the parties did not compete directly, Plaid was planning to enter the market for online debit transactions, whereby consumers purchase goods with money debited from their bank accounts.[26]

The DOJ alleged that Visa controlled 70 per cent of the existing online debit transactions market, with the only other material competitor being Mastercard with a 25 per cent share.[27] The DOJ's complaint stated that Visa was acquiring a potential competitor, and the agency was particularly concerned about Plaid's plan to begin offering pay-by-bank services.[28] Pay-by-bank is a type of online debit 'that uses a consumer's online bank account credentials . . . rather than debit card credentials . . . to . . . facilitate payments to merchants directly from the consumer's bank account'.[29]

The online debit transaction platforms at issue in the merger are two-sided transaction platforms that serve as intermediaries between merchants on one side and consumers on the other.[30] The DOJ alleged that the merger of Visa and Plaid would hurt both merchants and consumers. For example, the complaint alleges that the pay-by-bank services that Plaid planned to offer would have much lower merchant fees than Visa's traditional debit service and therefore that the merger would eliminate this lower-cost option for merchants.[31]

On the other side of the market, the DOJ alleged that consumers would be harmed because Plaid's entry would mean that merchant savings would likely be passed on to consumers, and merchants might even offer rewards or other incentives to induce them to use Plaid's pay-by-bank debit service.[32] The parties ultimately abandoned the deal in January 2021.[33]

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26 Complaint, *US v. Visa, Inc. and Plaid Inc.*, No. 4:20-cv-07810, at 3 (N.D. Cal. 5 November 2020).

27 id. at 3.

28 id. at 10 and 12–13.

29 id. at 10.

30 id. at 15–16.

31 id. at 17.

32 id. at 18.

33 Press Release, DOJ, 'Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block' (12 January 2021): www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

The pitfalls of pleading narrow digital markets

Defining the product market in mergers involving digital markets has also presented other types of challenges, especially where services to consumers are free of charge and the services offered are delineated in a way that makes them difficult to distinguish from other online services. A key case to watch in this regard is the FTC's suit against Meta Platforms (Meta) in relation to its acquisitions of Instagram and WhatsApp.

In June 2021, the district court dismissed the FTC's original December 2020 complaint for failure 'to plead enough facts to plausibly establish' monopoly power, a necessary element of the agency's claims under Section 2 theories[34] that typically requires a dominant share of a properly defined relevant product market.[35]

The FTC had alleged a relevant product market for 'personal social networking (PSN) services', defined as 'online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space'.[36] The agency alleged that PSN services have three distinguishing characteristics – a social graph of personal connections, features to interact and share personal experiences with personal connections, and features for finding and connecting with other users – and argued, in turn, that mobile messaging services (e.g., WhatsApp), specialised social networking services (e.g., LinkedIn and dating apps) and 'online services that focus on the broadcast or discovery of content based on users' interests rather than personal connections' (e.g., Twitter, Reddit and Pinterest), and 'online services focused on video or audio consumption' (e.g., YouTube and TikTok) were not reasonably interchangeable.

While the district court found the PSN market's contours 'plausible', it also suggested that the dearth of factual allegations supporting the market definition meant that the agency's market share allegations would need to carry more weight. The primary failing of the complaint was that the FTC had alleged only that 'Facebook has "maintained a dominant share of the U.S. personal social

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34 The FTC brings its enforcement actions under the FTC Act, but the Supreme Court has interpreted that statute's ban on unfair methods of competition as prohibiting all conduct that would violate the Sherman Act. The FTC has typically pleaded its cases based on the prevailing standards under the Sherman Act, the Clayton Act and other antitrust laws, and courts typically apply precedent concerning these laws in presiding over FTC competition cases. See FTC Guide to Antitrust Laws: www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

35 Memorandum Opinion, *FTC v. Facebook, Inc.*, Civil Action No. 20-3590, at 2, 19 (D.D.C. 28 June 2021).

36 Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590, at ¶ 52 (D.D.C. 9 December 2020).

networking market (in excess of 60%)" since 2011 . . . and that "no other social network of comparable scale exists in the United States"'.[37] The court found this insufficient and suggested that the FTC's burden on market share allegations was 'more robust' because its product market was 'somewhat "idiosyncratically drawn" to begin with' and the complaint was 'undoubtedly light on specific factual allegations regarding consumer-switching preferences'.[38]

At several points in the opinion, the court implied that the nature of Meta's products and the fact that this was 'no ordinary or intuitive market' heightened the FTC's pleading burden. For example, the court indicated that the FTC's 'naked' assertions 'might (barely) suffice' for a 'more traditional good market, in which the Court could reasonably infer that market share was measured by revenue, units sold, or some other typical metric'.[39] But PSN services are 'free to use, and the exact metes and bounds of what even constitutes a PSN service – i.e., which features of a company's mobile app or website are included in that definition and which are excluded – are hardly crystal clear'. This 'unusual context' made its vague market share assertions 'too speculative and conclusory to go forward'.

Elsewhere in the opinion, the court again contrasted PSN services with 'familiar consumer goods like tobacco or office supplies', noting that 'there is no obvious or universally agreed-upon definition of just what a personal social networking service is'.[40]

The FTC subsequently filed an amended complaint, and Meta's motion to dismiss that complaint was denied. This time, the district court said the 'FTC [had] done its homework', including by citing market share data from the media analytics firm ComScore. That data indicated at least a 60 per cent market share using measurements of daily average users, monthly average users and time users spent online, and the court concluded that these were 'common sense' indicators of social media competitiveness. The court further noted the FTC allegation that Meta and its competitors use precisely those metrics when analysing their own performance.

The *Meta Platforms* case, which will now proceed towards trial, illustrates the challenges of defining a relevant product market in the digital age. Market definition can become more complicated when there are many providers competing for consumer attention with differentiated free-of-charge online services monetised

37 *FTC v. Facebook*, Memorandum Op., at 27.
38 id.
39 id. at 2.
40 id. at 21.

through advertising, especially when consumers use a broad array of such online services at any given time. But the opinion gives a sense of the different tools courts (and agencies) might use to analyse market power in the 'attention economy'.

The *Meta Platforms* case is not the only time the FTC has recently alleged narrow markets for tech products. In July 2022, the FTC sued to prevent Meta from acquiring Within Unlimited, Inc, a virtual reality (VR) studio.[41] Meta previously acquired the leading VR headset, formerly known as Oculus and rebranded as the Meta Quest, and operates a leading VR app platform. In *Meta/Within*, the FTC proposed a narrow product market for 'VR dedicated fitness apps' whose primary purpose is physical fitness, such as Within's game Supernatural, and a broader market for 'VR fitness apps', also including apps with incidental fitness or exercise benefits, such as sports apps and Meta's Beat Saber dance app. Meta competes only in the latter market, but the FTC alleged that the threat of Meta entering the narrower dedicated fitness market spurred innovation and competition by current market participants. In January 2023, a California federal judge denied the FTC's request for an injunction.[42] The judge 'recognized VR dedicated fitness apps as an economically distinct submarket', but concluded that Meta did not have 'available feasible means' of independently entering the narrower market absent the Within acquisition, as is required under the 'actual potential competition' doctrine.[43] However, the judge did endorse the 'actual potential competition' doctrine as a valid antitrust theory. The FTC dropped its challenge shortly after the decision, and the transaction closed in February 2023.[44]

Horizontal theories of harm

Unilateral effects theories

Antitrust analysis of tech mergers is a dynamic area with some investigations involving novel or less common theories of harm; however, a number of merger investigations involving digital markets during the current and prior administrations have involved traditional horizontal theories, such as unilateral effects theories.

41 Complaint, *Meta Platforms, Inc. et al.*, FTC Docket No. 1 (27 July 2022): www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf.

42 Order Denying Plaintiff's Mot. For Prelim. Injunction, *FTC v. Meta Platforms Inc., et al.*, ECF 549 , 5:22-cv-04325-EJD (N.D. Cal. Feb. 2, 2023).

43 id.

44 Order Withdrawing Matter from Adjudication Pursuant to Rule 3.26(c) of the Commission Rules of Practice, *Meta Platforms, Inc. et al.*, FTC Docket No. 9411 (Feb. 10 2023): https://www.ftc.gov/system/files/ftc_gov/pdf/d09411-order-withdrawing-adjudication.pdf.

For example, in 2023, the FTC sued in federal court to block Intercontinental Exchange, Inc (ICE) from acquiring Black Knight, Inc, a rival mortgage loan technology provider.[45] The complaint alleged that ICE's product is the dominant loan origination system (LOS) software in the United States and Black Knight's software is the second largest, and the companies closely competed to provide their respective LOS software to mortgage lender customers as well as competed on various ancillary services necessary to process, underwrite, fund and close a loan. Accordingly, the complaint alleged that reduced competition post-acquisition would lead to increased prices for consumers, as well as harm third-party ancillary service providers. The FTC reached a settlement with the parties shortly after, in which Black Knight agreed to divest its LOS software and its Optimal Blue business, which provided ancillary services in the form of product pricing and eligibility software.[46]

During the prior administration, Taboola's planned 2019 merger with Outbrain received regulatory attention in both the United States, in the form of a Second Request,[47] and the United Kingdom.[48] Taboola and Outbrain both provided advertisement-based content recommendations. In announcing the merger, Taboola's CEO claimed that it would allow for the creation of a more robust competitor to Meta and Google for advertising.[49]

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45 Complaint, *FTC v. Intercontinental Exchange, Inc. and Black Knight, Inc.*, ECF 1, 3:23-cv-01710 (N.D. Cal. Apr. 10, 2023).

46 Press Release, FTC, 'FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal' (31 August 2023).

47 Press Release, Davis Polk & Wardwell LLP, 'Taboola secures DOJ approval of merger with Outbrain' (1 September 2020): www.davispolk.com/experience/taboola-secures-doj-approval-merger-outbrain.

48 The Israel Competition Authority also investigated the merger. The Authority even launched a criminal investigation against Taboola for failure to submit complete information during the course of the investigation. Taboola ultimately agreed to pay a fine of 5 million shekels. See Press Release, Israel Competition Authority, 'The Competition Authority reaches an agreed consent decree with Ynet' (22 August 2021): www.gov.il/en/Departments/news/consentdecree-ynet.

49 'Taboola and Outbrain to Merge to Create Meaningful Advertising Competitor to Facebook and Google', *Business Wire* (19 October 2019): www.businesswire.com/news/home/20191003005479/en/Taboola-and-Outbrain-to-Merge-to-Create-Meaningful-Advertising-Competitor-to-Facebook-and-Google; see also Ingrid Lunden, 'Taboola and Outbrain call off their $850M merger', *Tech Crunch* (8 September 2020): https://techcrunch.com/2020/09/08/taboola-and-outbrain-call-off-their-850m-merger.

In the United States, the DOJ ultimately approved the deal,[50] and in the United Kingdom, the CMA continued to investigate to see whether the merger would create a substantial loss of competition in the market for the 'supply of content recommendation platform services to publishers in the UK'.[51] In particular, the CMA was interested in whether the merger would reduce competition through unilateral effects.[52] The parties ultimately abandoned the deal in September 2020. A few reasons were given for why the deal was abandoned, including changing conditions from the covid-19 pandemic;[53] however, the ongoing antitrust investigations in the United Kingdom and Israel could have played a part as well.

In 2017, the FTC sued to block the merger of DraftKings and FanDuel, the two leading online platforms for daily fantasy sports, on the basis that the merger would have resulted in a 'near monopoly'.[54] According to the complaint, the parties competed on commission rates, discounts, contest prizes and non-price factors such as contest size, product features and contest offerings.[55] While the industry was unique and relatively new, the FTC pursued a familiar unilateral effects case based on closeness of competition.[56] The parties abandoned the deal a month after the FTC's complaint.[57]

In 2015, after an extensive investigation, the FTC unconditionally cleared Zillow's US$3.5 billion acquisition of Trulia. The parties were the first and second largest consumer-facing online portals for home buying.[58] Internal documents suggested that they competed head-to-head to offer users home sales information

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50 'DOJ Won't Challenge Taboola & Outbrain Merger', Competition Policy International (22 July 2020): www.competitionpolicyinternational.com/doj-wont-challenge-taboola-outbrain-merger.

51 Issues Statement, 'Anticipated Acquisition by Taboola.com td of Outbrain inc.', Competition and Markets Authority (4 August 2020): https://assets.publishing.service.gov.uk/media/5f27e1d7e90e0732d865d713/Issues_Statement_-_Taboola_Outbrain.pdf.

52 id. at 6.

53 Lunden, see footnote 56.

54 Complaint, *DraftKings, Inc and FanDuel Limited*, FTC Docket No. 161-0174, at ¶ 1 (19 June 2017).

55 id. at ¶¶ 17 and 60–75.

56 id. at ¶¶ 49–57.

57 Chris Kirkham and Ezequiel Minaya, 'DraftKings, FanDuel Call Off Merger', *The Wall Street Journal* (13 July 2017): www.wsj.com/articles/draftkings-fanduel-call-off-merger-1499976072.

58 'Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia, Inc.', FTC File No. 141-0214 (19 February 2015): www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

and sell advertising to real estate agents.[59] The FTC nevertheless cleared the transaction without remedies based on data showing that the platforms represented 'only a small portion of agents' overall spend on advertising' and that their portals did not generate a higher return on investment for agents than other forms of advertising used by the agents.[60] This finding meant that the parties could not realistically increase advertising prices post-merger without losing too much agent spend to other forms of advertising. The FTC also found that the companies competed with a number of other portals to offer home buyers relevant information.

The *Zillow/Trulia* acquisition is a good reminder to always look closely at the parties' data, because it may prove to be an important reality check on documents that paint an unhelpful but inaccurate or incomplete picture. *Zillow/Trulia* also illustrates an important point to remember in mergers between online advertising businesses: even if the merging parties attract consumers with similar online content, they often compete with a much broader array of (online) companies in selling advertising, given that the same consumers can typically be targeted through many different advertising media.

This point is reinforced by the DOJ's 2018 clearance of WeddingWire's acquisition of XO Group. Both WeddingWire and XO Group connected engaged couples to wedding service vendors that paid a fee to advertise on the platform.[61] Despite the apparent close competition between the companies, the deal never received a Second Request.[62]

The DOJ's successful 2014 challenge of Bazaarvoice's consummated acquisition of PowerReviews shows that a merger defence that online markets are dynamic goes only so far, and that unhelpful documents still can kill deals.[63] Bazaarvoice's documents showed that its intent behind the acquisition was to eliminate its closest and only competitor in the sale of 'product ratings and reviews platforms' used in e-commerce.[64] Following trial, the district court ruled for the DOJ, pointing to 'the overwhelming market share Bazaarvoice acquired when

59 id. at 2.

60 id.

61 Scott Sher, Michelle Yost Hale and Robin Crauthers, 'United States: Digital Platforms', Americas Antitrust Review 2020 (30 September 2019): https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2020/article/united-states-digital-platforms.

62 id.

63 Memorandum Opinion at 140–41, *United States v. Bazaarvoice, Inc.*, No. 13-cv-133, Doc. No. 244 (N.D. Cal. 18 January 2014).

64 Complaint at ¶¶ 1–9, 18, *United States v. Bazaarvoice, Inc.*, No. 13-cv-133 (N.D. Cal. 10 January 2013).

it purchased PowerReviews, the stark premerger evidence of anticompetitive intent and the merger's likely effects, [and] the actual lack of impact competitors have made since the merger', which had closed in June 2012.[65] Bazaarvoice was ordered to divest the PowerReviews business in a way that would re-establish PowerReviews as an independent competitor as strong as if it had never been acquired (taking into account how it would have developed on its own but for the acquisition).[66]

Nascent competition and maverick theories

As reflected previously, the antitrust agencies have recently shown an increased interest in pursuing theories of harm in digital markets around the concept of nascent competition, at times in conjunction with 'maverick' theories, to investigate or challenge acquisitions of recent entrants or small players by incumbent firms with large alleged market shares.

Some have noted that protecting nascent competition is not always easy in practice. For example, in 2018, then FTC chair Joe Simons stated that acquisitions of nascent competitors in the high-tech space are 'particularly difficult for antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor' and 'the likely level of competition with the acquiring firm is frequently, maybe more than frequently, not apparent'.[67]

A prominent example of a nascent competitor case is the FTC's challenge of Meta's acquisition of WhatsApp and Instagram. The FTC had initially declined to challenge these mergers back in 2012 for Instagram and in 2014 for WhatsApp.[68] In its 9 December 2020 complaint against Meta, however, the FTC alleged that Meta violated Section 2 of the Sherman Act, and claimed that these

65 *United States v. Bazaarvoice, Inc.*, Memorandum Op. at 10.

66 Third Amended Final Judgment, *United States v. Bazaarvoice, Inc.*, 13-cv-133, Doc. No. 286, § IV.A (N.D. Cal. 2 December 2014).

67 Leah Nylen, 'FTC to focus on "non-partisan", "aggressive" enforcement, Simons says', *MLex* (25 September 2018): www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1025909&siteid=191&rdir=1; see also 'Prepared Remarks of Chairman Joseph Simons', Georgetown Law Global Antitrust Enforcement Symposium, 5 (25 September 2018): www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

68 See Press Release, FTC, 'FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program' (22 August 2012): www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition; Alexei Oreskovic, 'Facebook says WhatsApp deal cleared by FTC', *Reuters* (10 April 2014): www.reuters.com/article/us-facebook-whatsapp/facebook-says-whatsapp-deal-cleared-by-ftc-idUSBREA391VA20140410.

acquisitions were designed to eliminate nascent competitors that could grow to challenge Meta, especially if they were acquired by someone else.[69] For example, the FTC alleged that CEO Mark Zuckerberg 'recognized that by acquiring and controlling Instagram, Meta would not only squelch the direct threat Instagram posed, but also significantly hinder another firm from using photo-sharing on mobile phones to gain popularity as a provider of personal social networking'.[70] The complaint further alleged that employees internally celebrated the acquisition of WhatsApp, which they viewed as 'probably the only company which could have grown into the next FB purely on mobile'.[71] The FTC complaint also quoted an analyst report wherein the analyst wrote that 'WhatsApp and Facebook were likely to more closely resemble each other over time, potentially creating noteworthy competition, which can now be avoided.'[72]

The FTC's challenge relies on a course of conduct theory: the idea that a series of individually lawful acts, transactions or practices can combine to form an antitrust violation in the aggregate.[73] This approach has been questioned by some commentators. For example, Judge Douglas Ginsburg and Koren Wong-Ervin have suggested that this theory is akin to other 'monopoly broth' theories[74] because this sort of approach could act as an end run around established conduct-specific tests.[75] Judge Ginsburg and Wong-Ervin also point out that the agencies should not need to have to rely on a Section 2 course of conduct theory to challenge serial acquisitions, because they could just seek to block or undo 'the last merger in the series that tipped the market into undue monopoly power'.[76]

In seeking to dismiss the amended complaint, Meta argued that it was too speculative to assert that Instagram and WhatsApp would have generated improved product quality had they remained independent from Meta.

69 *FTC v. Facebook*, Compl. at *5.

70 id.

71 id. at 7.

72 id.

73 Amended Complaint at 26, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590 (D.D.C. 19 August 2021).

74 Douglas H Ginsburg and Koren Wong-Ervin, 'Challenging Consummated Mergers Under Section 2', *Competition Policy International*, 8–9 (21 May 2020) (Challenging Consummated Mergers): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590703; see also Timothy Snyder and James Moore, 'Another Way to Skin the Cat? Perspectives on Using Section 2 to Challenge the Acquisition of Nascent Competitors', *The Threshold*, Vol. XXI, No. 1 (Fall 2020): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668026&download=yes.

75 id.

76 Ginsburg and Wong-Ervin at 9, see footnote 84.

In rejecting the second motion to dismiss, the district court acknowledged that the FTC would eventually need to prove that the acquisitions harmed competition in the relevant market and that 'expert testimony or statistical analysis' would likely be necessary to meet that burden, but that the FTC's allegations – including that Meta historically saw Instagram and WhatsApp as threats, that Meta has been able to provide lesser data privacy and security than in a competitive market and that Meta shut down projects after acquiring Instagram and WhatsApp – was sufficient for the court to conclude that the complaint was not too speculative to proceed to discovery.

A Trump administration era merger case based on nascent competition theories was the FTC's challenge of Illumina's planned 2019 acquisition of Pacific Biosciences of California, Inc. (PacBio).[77] Illumina was described by the FTC as the dominant provider of short-read DNA sequencers and PacBio as the dominant provider of a nascent technology: long-read gene sequencers.[78] Long-read DNA sequencers can read longer individual DNA sequences but have lower throughput overall and are more expensive.[79]

The FTC was concerned that because advances in long-read gene sequencers could put pricing pressure on Illumina's short-read product, the two markets could converge, making PacBio a nascent competitor. In addition, there was already significant overlap in the two companies' customer base.[80] The FTC initiated administrative proceedings before the Commission to block the merger in December 2019. A few weeks later, the companies abandoned the transaction.[81]

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77 Illumina's recent acquisition of GRAIL also involves an acquisition of a nascent competitor. GRAIL did not earn any revenue at the time that the FTC issued an administrative complaint but instead had just raised private funding. This acquisition is discussed along with other vertical mergers later in this chapter. See Complaint at 8, *Ilumina, Inc. and GRAIL, Inc.*, FTC Docket No. 9401 (30 March 2021): www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf.

78 Administrative Complaint, *Illumina, Inc. and Pacific Biosciences of California, Inc.*, FTC Docket No. 9387 (17 December 2019): www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

79 id.

80 id.

81 Joint Motion to Dismiss Complaint, *Illumina, Inc. and Pacific Biosciences of California, Inc.*, FTC Docket No. 9387 (3 January 2020): www.ftc.gov/system/files/documents/cases/d09387_jt_mtn_to_dismisspublic.pdf.

Prior to that, in 2018, the FTC challenged CDK's acquisition of Auto/Mate, based on a maverick theory that the target company, while small, put disruptive competitive pressure on the acquirer and other incumbent players in the market.[82] CDK was the largest provider of dealer management systems (DMS).[83] DMSs are software platforms that are used to run various aspects of auto dealerships' businesses, including accounting, payroll and vehicle inventory.[84] CDK, along with the second largest provider, Reynolds and Reynolds, had about 70 per cent of the market. Auto/Mate, by contrast, was the fifth largest provider, with less than one-third of 30 per cent of the market.[85]

Despite Auto/Mate's small share, the FTC filed a complaint, citing the fact that the combination resulted in a presumption of illegality under the Herfindahl-Hirschman Index thresholds laid out in the Merger Guidelines and because Auto/Mate appeared to be a maverick, disrupting the DMS market with its improved DMS functionality and low prices.[86] Ultimately, the parties abandoned the deal.[87]

Several DOJ actions from the Trump administration also involved challenges to acquisitions of nascent competitors. In its complaint challenging the proposed *Visa/Plaid* merger, the DOJ alleged that the transaction would result in the elimination of a nascent competitor that was uniquely positioned to disrupt the market and erode Visa's 70 per cent market share.[88] Quoting *United States v. Microsoft Corp*,[89] the complaint alleges the following: 'Monopolists cannot have "free reign to squash nascent, albeit unproven competitors at will." Acquiring Plaid would eliminate the nascent but significant competitive threat Plaid poses, further entrenching Visa's monopoly in online debit.'[90]

The DOJ's challenge of the *Sabre/Farelogix* merger was also based on a nascent competition theory. Sabre is a GDS that assists airlines in marketing and distributing their fares to travel agents, including online travel agencies that market to

82 Administrative Complaint, *CDK Global and Auto/Mate*, FTC Matter No. 171 0156, Docket No. 9382 (20 March 2018): www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter.

83 Sher et al., see footnote 68.

84 id.

85 id.

86 id.

87 See Commission Order Dismissing Complaint, *CDK Global and Auto/Mate*, FTC Matter No. 171 0156, Docket No. 9382 (26 March 2018).

88 Complaint at 5, *US v. Visa Inc. and Plaid Inc.*, No. 4:20-cv-07810 (N.D. Cal. 5 November 2020).

89 253 F.3d 34, 79 (D.C. Cir. 2001).

90 id.

consumers. There were three legacy GDSs, including Sabre.[91] Farelogix was not a GDS but had developed a 'direct connect' application programming interface solution that enabled airlines to sell tickets directly to travel agents and travellers, removing GDSs as intermediaries for many bookings.[92] The DOJ alleged that the merger would eliminate a competitor whose presence airlines used as a bargaining chip to negotiate for lower prices with the GDSs.[93] The DOJ argued that Farelogix was 'poised to grow significantly' as the industry shifted towards a newer standard that it had pioneered.[94]

Finally, in its 2020 challenge of Credit Karma's acquisition of Intuit, the DOJ seems to have combined a theory of nascent competition with a maverick theory of disruption (as well as a unilateral effects theory). This acquisition raised concerns in the same product market – digital-do-it-yourself (DDIY) tax preparation – defined in *United States v. H&R Block*. In that 2011 case, the DOJ blocked a merger between the number two and number three DDIY competitors, H&R Block and TaxAct, based on a loss of direct competition and increased potential for coordination with Intuit, which owns the leading DDIY product, TurboTax. That successful challenge by the DOJ involved a more traditional maverick theory of harm.

In 2017, Credit Karma launched its own DDIY tax preparation product.[95] Credit Karma's offering had a very small share compared with Intuit, with only around 3 per cent of the market compared with Intuit's 66 per cent;[96] however, Credit Karma was unique in the market because its offerings are completely free, even for more complex filings, whereas Intuit and all other DDIY tax preparation providers charge fees for anything beyond the most basic filings.[97]

In a complaint accompanying a consent decree, the DOJ alleged that 'Credit Karma has constrained Intuit's pricing, and has also limited Intuit's ability to degrade the quality and reduce the scope of the free version of TurboTax . . . If the proposed transaction proceeds . . . consumers are likely to pay higher prices,

91 Complaint at 6, *US v. Sabre Corp.*, No. 1:19-cv-01548-UNA (20 August 2019).

92 id. at 9.

93 id. at 10 ('For over a decade, Farelogix's airline customers have successfully used the threat of switching to Farelogix's booking services solutions to negotiate better rates and terms with Sabre and the other GDSs for bookings through both traditional and online travel agencies.').

94 id. at 13.

95 Complaint at 2, *US v. Intuit Inc. and Credit Karma, Inc.*, No. 1:20-cv-03441 (D.D.C. 25 November 2020).

96 id. at 2–3.

97 id. at 3.

receive lower quality products and services, and have less choice.' [98] The consent decree required the parties to divest Credit Karma's tax business to Square, Inc, including all the relevant software and intellectual property.[99]

Non-price theories: privacy

US agency officials have acknowledged that privacy conceptually could be one quality parameter on which companies compete.[100] Traditionally, however, the agencies seemed disinclined to use antitrust merger review to protect user privacy, instead dealing with user privacy protections as part of the FTC's consumer protection enforcement efforts.[101]

FTC Chair Khan's recent announcements and the FTC's suit against Meta suggest that this could be changing, however, as the FTC framed data privacy as an element of consumer choice that could be harmed by loss of competition.

When the FTC first investigated and then declined to challenge Meta's acquisition of WhatsApp, for example, the FTC's Bureau of Consumer Protection (separate from the Bureau of Competition) sent Meta a letter reminding it to abide by WhatsApp's privacy commitments to users.[102] In contrast, in its 2021 amended antitrust complaint against Meta, the FTC alleged that the harm to competition, in part from the acquisition of WhatsApp and Instagram, results in loss of consumer choice, which includes:

98 id. at 3–4.

99 Press Release, DOJ, 'Justice Department Requires Divestiture of Credit Karma Tax for Intuit to Proceed with Acquisition of Credit Karma' (25 November 2020): www.justice.gov/opa/pr/justice-department-requires-divestiture-credit-karma-tax-intuit-proceed-acquisition-credit.

100 DOJ, 'Assistant Attorney General Makan Delrahim Delivers Keynote Address at the University of Chicago's Antitrust and Competition Conference' (19 April 2018): www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos.

101 'Statement of FEDERAL TRADE COMMISSION Concerning Google/DoubleClick', FTC File No. 071-0170, at 2 (stating the Commission 'lack[s] legal authority to require conditions to this merger that do not relate to antitrust,' like privacy concerns): www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

102 Press Release, FTC, 'FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition' (10 April 2014): www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed.

> *enabling users to select a personal social networking provider that more closely suits their preferences, including, but not limited to, preferences regarding the amount and nature of advertising, as well as the availability, quality, and variety of data protection privacy options for users, including but not limited to, options regarding data gathering and data usage practices.*[103]

Non-horizontal theories of harm

Vertical foreclosure

With the FTC's withdrawal from the Vertical Merger Guidelines, and new Draft Merger Guidelines that apply to both horizontal and vertical mergers, increased scrutiny of challenges to vertical mergers is likely. Indeed, Guideline 6 in the proposed Guidelines addresses vertical mergers and sets forth a presumption that a foreclosure share above 50 per cent is sufficient to conclude that the merger may substantially lessen competition.

This continues a trend of increased vertical enforcement that began before the Vertical Merger Guidelines were published in 2020. For example, during the Trump administration, the DOJ challenged AT&T's acquisition of Time Warner based on vertical foreclosure concerns. While that acquisition was not entirely in the digital markets sphere, the rationale for the transaction and states' bases for challenging it involved online video and digital advertising. AT&T claimed that it pursued the transaction to gain a stream of data and content that would enable it to compete better for advertising dollars against online companies such as Google and Meta. The DOJ alleged that once Time Warner became part of AT&T it would have the incentive and ability to extract higher rents for its marquee programming (e.g., CNN and Turner Sports programming such as March Madness, NBA and MLB games) from rivals of AT&T's DirecTV video distribution business, weakening its ability to compete effectively with AT&T. The DOJ lost its challenge at both the district court and the appellate court levels, allowing the merger to proceed,[104] but, in April 2022, AT&T spun off most of the Time Warner assets in a transaction with Discovery Inc.

Under the current administration, the FTC and the DOJ continue to pursue challenges based on vertical theories of harm. For example, the FTC continues to litigate its vertical challenge to Illumina's acquisition of GRAIL, which is currently

103 Amended Complaint at 73, *FTC v. Facebook*.

104 See Memorandum Opinion, *United States v. AT&T Inc.*, 1:17-cv-2511, Doc. No. 18-5214 (D.C. Cir. 26 February 2019): www.lit-antitrust.shearman.com/siteFiles/27063/USCA%20DCA%2018-5214%20-%20USA%20v%20AT&T%20-%20Opinion.pdf.

in proceedings before the Fifth Circuit Court of Appeals. Illumina is the largest provider of next-generation sequencing (NGS) in the United States and globally. NGS platforms allow for DNA sequences to be read and analysed.[105] GRAIL is a pre-commercial diagnostics company that makes NGS cancer tests. This includes multi-cancer early detection (MCED) tests, which use NGS to broadly screen for multiple types of cancer before patients even exhibit systems.[106]

The FTC's concern about this transaction is fundamentally vertical in nature: it is concerned that Illumina could reduce competition in the US MCED market by raising the costs for GRAIL competitors and by otherwise hindering their ability to sell competing tests.[107] For example, the FTC is concerned that Illumina could raise the price of its NGS systems or of necessary chemical reagents that it provides to competitors of GRAIL.[108]

Despite the ongoing FTC investigation, the parties closed the deal on 18 August 2021, and the administrative trial began on 24 August 2021.[109] Illumina had made an open offer to sign 12-year contracts with anyone interested in securing its supply of its DNA sequencing products, but the FTC contested the adequacy of this offer as a remedy to competitive harm.[110] The administrative trial ended in June 2022, with the FTC complaint counsel arguing that Illumina should have to divest itself of GRAIL until it retained just the 12 per cent it owned prior to the challenged acquisition. Illumina, on the other hand, stood by its offer to sign long-term supply contracts and argued that sequencing is its most profitable business, making allegations that it would limit the sale of its sequencing products untenable. The administrative law judge sided with Illumina and dismissed the FTC's complaint in September 2022. The FTC complaint counsel then appealed

105 Complaint at 2-3, *Ilumina, Inc. and GRAIL, Inc.*

106 id. at 2 and 8.

107 id. at 16–24.

108 id.

109 Mike Scarcella, 'Illumina-Grail deal heads to FTC trial, as EU weighs penalty', *Reuters* (23 August 2021): www.reuters.com/legal/litigation/illumina-grail-deal-heads-ftc-trial-eu-weighs-penalty-2021-08-23; Jonathan Wosen, 'FTC trial kicks off, with fate of Illumina's acquisition of Grail hanging in the balance', *The San Diego Union-Tribune* (27 August 2021): www.sandiegouniontribune.com/business/story/2021-08-27/ftc-trial-kicks-off-with-fate-of-illuminas-acquisition-of-grail-hanging-in-the-balance.

110 Bryan Koenig, 'Illumina "Wasting Court Time" With Deal Overtures, FTC Says', *Law360* (21 July 2021): www.law360.com/articles/1405296/illumina-wasting-court-time-with-deal-overtures-ftc-says.

to the FTC commissioners, who reversed the initial decision in April 2023 and ordered Illumina to divest.[111] As noted, Illumina is appealing the order to the Fifth Circuit Court of Appeals.

In December 2022, the FTC filed an administrative complaint to prevent Xbox maker Microsoft's acquisition of Activision Blizzard, a video game creator. According to the FTC, Microsoft, with Playstation maker Sony, is one of only two manufacturers of high-performance video game consoles, and Activision develops and publishes video games for video game consoles, including iconic video games such as Call of Duty, Diablo and Overwatch. The FTC alleged that Activision's content is extremely important for competition and drives adoption of video game consoles, and that, post-acquisition, Microsoft could deny access to Activision's content to Sony and thereby disadvantage its primary rival. The complaint also alleges that Microsoft could withhold or degrade Activision content through various means, such as manipulating pricing or degrading game quality for competitors.

After initially filing an administrative complaint seeking to block the acquisition, the FTC filed a complaint in federal district court in June 2023. The district court denied the agency's request for a preliminary injunction, finding that Microsoft would have no incentive to withhold Activision's content from Sony, but, rather, Microsoft had financial incentives to sell Activision's games as widely as possible and that implementing exclusivity to Xbox would damage its reputation. The FTC is currently appealing the decision to the Ninth Circuit; however, the FTC's case has been further weakened by Microsoft's agreement with Sony, signed shortly after the initial preliminary injunction decision, in which it committed to keep Call of Duty on PlayStation for 10 years. The agreement follows several others Microsoft has entered into with other gaming console rivals such as Nintendo and NVIDIA to continue to make Activision content available post-acquisition. In addition to litigating its appeal, the FTC returned its administrative complaint to adjudication in September 2023, after initially withdrawing the matter from adjudication in July, stating its determination that 'the public interest warrants that this matter be resolved fully and expeditiously'.[112]

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111 Press Release, FTC, 'FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market' (3 Apr. 2023): https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving.

112 FTC, Order Returning Matter to Adjudication, In the Matter of Microsoft Corp. and Activision Blizzard, Inc. (27 September 2023): https://www.ftc.gov/system/files/ftc_gov/pdf/608644.2023.09.25_d09412_-_order_returning_matter_to_adjudication.pdf.

The FTC also cited concerns over vertical foreclosure in its December 2021 complaint to enjoin NVIDIA, a manufacturer of microprocessors, from acquiring Arm, which develops and licenses microprocessor designs and architectures. The FTC alleged that NVIDIA would have an incentive to restrict licensing of Arm designs to competing manufacturers because the benefits to its processor business would outweigh any losses stemming from curtailing Arm's licensing.

According to the FTC, competitors would also be wary to share proprietary information with Arm, as was necessary and routine in Arm's pre-merger business model, because of the risk that it could be used against them by NVIDIA. The complaint further alleged that those competitors' inability to work with Arm to incorporate Arm designs into their processors would limit competition even if NVIDIA did not formally limit design licensing. In February 2022, NVIDIA and Arm abandoned the transaction because of the 'significant regulatory challenges' the transaction faced, including investigations from the United Kingdom's CMA and the European Commission.[113]

In February 2022, the DOJ brought suit to prevent UnitedHealth from acquiring Change Healthcare, which controls an electronic data interchange transaction platform used by insurers, pharmacies and healthcare providers to transmit sensitive claims data to one another. In addition to a typical foreclosure theory and alleged horizontal overlap in the first-pass claims market, the DOJ focused on how UnitedHealth could allegedly use its access to sensitive insurance data flowing across Change's platform to benefit its own products and reduce competition among health insurers, calling Change's data the real 'prize in the merger', allowing UnitedHealth to peer into rivals' strategies and prices.[114] The judge ruled against the DOJ in September 2022, and after initially challenging the decision, the DOJ dropped its appeal in March 2023. *UnitedHealth/Change Healthcare* and how the parties ultimately succeeded is discussed further later in the chapter.

Conglomerate effects

Merger conglomerate effects have been defined as:

113 NVIDIA, 'NVIDIA and SoftBank Group Announce Termination of NVIDIA's Acquisition of Arm Limited' (7 February 2022): https://nvidianews.nvidia.com/news/nvidia-and-softbank-group-announce-termination-of-nvidias-acquisition-of-arm-limited.

114 Leah Nylen and John Tozzi, 'UnitedHealth and DOJ trial begins: handling sensitive data', Benefits Pro (3 August 2022): www.benefitspro.com/2022/08/03/unitedhealth-and-doj-trial-begins-handling-sensitive-data.

> *a distinct category of competitive effects arising from transactions in which the parties' products are not in the same antitrust product market and the products are not inputs or outputs of one another, but in which the products are complementary or in closely related markets.*[115]

The United States noted in its June 2020 submission to the Organisation for Economic Co-operation and Development regarding conglomerate effects that the agencies 'typically do not view such mergers through a distinct lens, finding that our standard theories of horizontal and vertical harm capture most modern, economically-sound theories of . . . "conglomerate" effects'.[116]

This approach appears to be changing under Chair Khan's leadership, however. In July 2021, the FTC reportedly opened an investigation into Amazon's planned acquisition of Metro-Goldwyn-Mayer (MGM). According to an article in the publication *The Information*, 'the FTC [was] wary of whether the deal [would] illegally boost Amazon's ability to offer a wide array of goods and services, and [was] not just limited to content production and distribution.'[117] Senator Elizabeth Warren also sent a letter to Chair Khan calling for a broad investigation into the transaction, including beyond just the effects in the video streaming market.[118]

The transaction closed in March 2022 without a vote or challenge by the FTC, which was split 2–2 between Democrats and Republicans from October 2021 to May 2022, while the third Democratic Commissioner, Alvaro Bedoya, awaited Senate confirmation. This meant that Chair Khan could not file a complaint without the support of at least one Republican Commissioner. Chair Khan warned that the investigation would continue, and after the deal closed, the FTC released a statement reminding parties that the agency may challenge a deal

115 See 'Conglomerate effects of mergers – Note by the United States', Organisation for Economic Co-operation and Development, Directorate for Financial and enterprise Affairs Competition Committee, 2 (4 June 2020): www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

116 id.

117 Josh Sisco, 'FTC Opens Probe of Amazon's MGM Purchase, Signaling a Lengthy Inquiry, *The Information* (9 July 2021): www.theinformation.com/articles/ftc-opens-probe-of-amazons-mgm-purchase-signaling-a-lengthy-inquiry.

118 Letter from Senator Elizabeth Warren to Lina M Khan, Chair, FTC (29 June 2021): www.warren.senate.gov/imo/media/doc/Letter%20to%20FTC%20re%20Amazon-MGM%20Deal.pdf.

'at any' time if determined to be in violation of law.[119] The European Commission approved the transaction, finding limited overlap between the companies and that Amazon faced strong competition in the video streaming market.[120]

The FTC has been investigating Amazon on a variety of issues since 2019, and after Bedoya's confirmation, the FTC pursued additional questions about the MGM acquisition.[121]

The FTC's apparent contemplation of conglomerate effects in the *Amazon/MGM* acquisition represents a divergence from the investigation into Amazon's acquisition of Whole Foods in 2017, where the FTC let the acquisition proceed without a Second Request.[122] There, the FTC rejected a host of non-horizontal theories of harm put forth by opponents of the transaction, such as concern that Amazon's acquisition of Whole Foods would allow it to leverage its scale, logistics and buyer power in other retail areas to quickly dominate the grocery business (as it claims it did with book retailing).[123,124]

119 Todd Spangler, 'Following Amazon's MGM Acquisition Close, FTC Warns It May "Challenge a Deal at Any Time"', *Variety* (17 March 2022): https://variety.com/2022/biz/news/ftc-may-challenge-amazon-mgm-deal-1235208241.

120 Press Release, European Commission, 'Mergers: Commission approves acquisition of MGM by Amazon' (15 March 2022): https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1762.

121 Leah Nylen, 'FTC's Antitrust Probe of Amazon Picks Up Speed Under New Boss', *Bloomberg* (31 May 2022, 4:01pm): www.bloomberg.com/news/articles/2022-05-31/ftc-s-antitrust-probe-of-amazon-picks-up-speed-under-new-boss.

122 Press Release, FTC, 'Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc.' (23 August 2017): www.ftc.gov/news-events/news/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau-competition-agencys-review-amazoncom-incs.

123 Diane Bartz, 'Critics say Whole Foods deal would give Amazon an unfair advantage', *Reuters* (22 June 2017): www.reuters.com/article/us-whole-foods-m-a-amazon-com-antitrust/critics-say-whole-foods-deal-would-give-amazon-an-unfair-advantage-idUSKBN19D2Q8.

124 Outside the digital markets space, the FTC recently challenged Amgen's acquisition of Horizon, two biopharmaceutical companies, based on a conglomerate effects theory and concerns that Amgen could leverage its portfolio of highly demanded products to advantage Horizon's products. The FTC reached a settlement with the parties in September 2023. See Press Release, FTC, 'Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition' (1 September 2023): https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

Remedies

Divestitures

Under the Biden administration, agency leaders have been more hesitant to enter into consent decrees rather than block a merger. Assistant Attorney General Kanter explained that 'when the [DOJ] concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition.'[125] That said, divestitures continue to be the primary merger remedy of the US agencies when a remedy is accepted, and several of the transactions discussed above resolved competitive concerns with simple structural remedies. For example, the FTC's recent settlement with ICE in August 2023 in connection with its proposed acquisition of Black Knight, discussed above, required Black Knight's divestiture of two businesses that provide services in the mortgage origination process overlapping with ICE.[126]

In divestiture remedies, the US agencies historically have strongly preferred divestiture of a stand-alone business, or assets that already comprised a single business. Mixing and matching of different assets to create a new divestiture business, typically, is disfavoured by US agencies.

The DOJ's approach to the *Sprint/T-Mobile* merger is a notable deviation from that policy. T-Mobile's US$26 billion acquisition of Sprint, announced in 2018, involved a more complicated remedy package comprising both structural and behavioural terms.[127] To prevent competitive effects in the market for retail mobile wireless services, the DOJ negotiated a consent decree designed to enable Dish Network, a satellite TV distributor that had been accumulating wireless spectrum, to build an internet of things 5G network to replace Sprint as a fourth national wireless competitor.[128] T-Mobile agreed to divest Sprint's prepaid

125 'Prepared Remarks of Assistant Attorney General Jonathan Kanter of the Antitrust Division', New York State Bar Association Antitrust Section Event (24 January 2022): https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

126 Press Release, FTC, 'FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal' (31 August 2023): https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-secures-settlement-ice-black-knight-resolving-antitrust-concerns-mortgage-technology-deal.

127 Kori Hale, 'T-Mobile Closes $26 Billion Sprint Deal, Budget Conscious Consumers Beware' (6 April 2020): www.forbes.com/sites/korihale/2020/04/06/t-mobile-closes-26-billion-sprint-deal-budget-conscious-consumers-beware/?sh=7e59ab366785.

128 Competitive Impact Statement at 6, *US v. Deutsche Telekom AG, et. al.*, No. 1:19-cv-02232-TJK (D.D.C. 30 July 2019).

brands, Boost Mobile and Virgin Mobile, to Dish Network, as well as an array of spectrum assets, and provide an opportunity to acquire any redundant retail stores and wireless cell sites.[129]

To help Dish compete while it built out its own national 5G network over the span of several years, the consent decree also required T-Mobile to provide Dish wholesale access to its network for seven years without discrimination against Dish subscribers or preferential treatment of its own subscribers.[130] The remedy was therefore unusual in:

- creating a new competitor out of a mix of different assets that did not comprise a stand-alone business; and
- being a hybrid between structural and long-term behavioural relief: certain assets were divested, but Dish will also rely on the T-Mobile network and service agreements for years to come.

Another noteworthy aspect of the *Sprint/T-Mobile* merger was that a number of state attorneys general sued to block the merger, despite the DOJ indicating its approval for the deal subject to a consent decree and other states joining with the DOJ as part of the settlement. They claimed that the DOJ had done only a 'cursory investigation' and that the acquisition still violated the Clayton Act, even subject to the settlement with the DOJ.[131] The court ultimately ruled in favour of the merging parties, however, giving 'some deference' to the DOJ and the Federal Communications Commission and finding that the federal remedy package resolved any likelihood of harm from the merger.[132]

Behavioural remedies

In the early to mid-2010s, behavioural remedies were more common and accepted, particularly for vertical mergers. For example, in 2011, the DOJ required Google to agree to certain commitments to provide rivals access to ITA Software's airfare pricing and shopping engine to clear the deal.[133] It also required behavioural

129 Final Judgment at 3-4, 13-18, *US v. Deutsche Telekom AG, et. al.*, No. 1:19-cv-02232-TJK (D.D.C. 20 August 2020).

130 id. at 19–20.

131 Marguerite Reardon, 'DOJ's backing of T-Mobile, Sprint merger challenged by state attorneys general', *CNET* (9 January 2020): www.cnet.com/tech/mobile/states-urge-court-to-disregard-doj-backing-of-t-mobile-sprint-merger.

132 Makena Kelly, 'T-Mobile and Sprint win lawsuit and will be allowed to merge', *The Verge* (11 February 2020): www.theverge.com/2020/2/11/21132924/tmobile-sprint-merger-approved-federal-court-antitrust-lawsuit.

133 *United States v. Google, Inc.*, see footnote 117.

commitments that year from Comcast in its acquisition of video programming provider NBCUniversal. Additionally, the DOJ accepted behavioural remedies to resolve concerns with the 2010 merger of Live Nation and Ticketmaster, although issues with this decree and ongoing violations led the DOJ to pursue modification and extension of the decree in 2019.[134]

Under the Trump administration, the DOJ suggested that it was less likely to rely on ongoing behavioural remedies, as there was a strong preference for structural remedies, even in vertical mergers. Makan Delrahim, in a keynote address at the American Bar Association's 2017 Antitrust Fall Forum, stated that he would 'cut back on the number of long-term consent decrees' in place and favour structural remedies over behavioural relief.[135]

A week later, the DOJ demonstrated its commitment to Delrahim's position by challenging AT&T's acquisition of Time Warner, rejecting a remedy similar to what was accepted in the 2011 *Comcast/NBCUniversal* merger. The DOJ further memorialised this position in its 2020 Merger Remedies Manual, which states that 'remedies should not create ongoing government regulation of the market', and that conduct remedies are typically 'difficult to craft and enforce', making them 'inappropriate except in very narrow circumstances'.[136]

While some expected that the *AT&T/Time Warner* loss would deter future challenges to vertical mergers and make agencies more open to behavioural remedies in such cases, that is not necessarily the case. In fact, Khan and the Democratic wing of the FTC have taken a similarly strong stance against behavioural remedies while also expressing scepticism towards the widely accepted approach to analysing vertical mergers. In a letter to Senator Elizabeth Warren dated 6 August 2021, FTC Chair Lina Khan wrote that she shared Senator Warren's concerns about behavioural remedies, writing that 'both research and experience

134 Press Release, DOJ, 'Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster' (19 December 2019): www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live.

135 Makan Delrahim, Assistant Attorney General, US Department of Justice Antitrust Division, Keynote Address at American Bar Association's Antitrust Fall Forum (16 November 2017).

136 DOJ, Antitrust Division, Merger Remedies Manual, 4 (September 2020). The 2020 Manual replaced the Antitrust Division Policy Guide to Merger Remedies (June 2011), which was enacted under Obama appointee Christine Varney and expressed more openness to behavioural remedies: www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

suggest that behavioral remedies pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics enabled by the transaction.'[137]

Momentum against vertical mergers and behavioural remedies has continued with challenges to numerous vertical mergers and with the agencies arguing in each case that the remedies offered were inadequate to prevent competitive effects. In *NVIDIA/Arm*, discussed above, the defendants offered a 'comprehensive set of commitments' to address concerns that NVIDIA would disadvantage or harm its rivals through control of Arm's licensing operation or chill innovation through its access to sensitive competitor information shared with Arm.[138] The defendants offered to:

- create a separate entity dedicated to licensing Arm's intellectual property;
- erect firewalls between that entity and NVIDIA to protect competitors' sensitive information;
- license Arm intellectual property on non-discriminatory terms;
- maintain pre-merger levels of technical support at Arm;
- provide access to Arm intellectual property at the same time that it is given to NVIDIA design teams;
- continue offering licensees the opportunity to participate in the Arm technical advisory board;
- publish all Arm instruction set architecture modifications and instructions shared with NVIDIA's design teams; and
- enable interoperability between Arm-based products and any other product requested by licensees, without discrimination in favour of NVIDIA.[139]

The transaction was abandoned before the FTC had to litigate the fix and identify the perceived flaws in this package. The CMA found five-year commitments insufficient given the long development cycles in the industry.[140]

137 Letter from Lina M Khan, Chair, FTC, to Senator Elizabeth Warren (6 August 2021): www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

138 Answer and Defences, *NVIDIA Corp. et. al.*, FTC Docket No. 9404 (21 December 2021).

139 id.

140 Andrea Coscelli, 'A report to the Secretary of State for Digital, Culture, Media & Sport on the anticipated acquisition by NVIDIA Corporation of Arm Limited', Competition & Mkts. Auth., § 12 (20 July 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033732/GOV.UK_-_NVIDIA_Arm_-_CMA_Report_to_DCMS__Web_Accessible_.pdf.

The DOJ also rejected behavioural remedies in *UnitedHealth/Change Healthcare*, discussed above. The parties sought to resolve the DOJ's vertical concerns with commitments to Change customers that UnitedHealth would maintain firewalls and take other steps to protect sensitive data, but the DOJ declined such commitments and opted to proceed to trial. The DOJ emphasised that the preferred remedy for an anticompetitive merger is a 'full stop injunction'[141] and that the parties' proposed remedies carry risks that could be avoided by blocking the merger outright.[142] The court ultimately rejected the DOJ's challenge.

While regulators continue to show reluctance to accepting behavioural remedies, Microsoft successfully employed behavioural commitments pre-emptively as part of its efforts to obtain clearance of its proposed acquisition of Activision. As discussed above, the FTC challenged the proposed acquisition in 2022, arguing that the merged firm would have the ability to harm rivals by denying them access to Activision's content, such as the popular game Call of Duty. As the US challenge was ongoing, Microsoft was negotiating remedies with the European regulators and ultimately entered into agreements committing to make Call of Duty available to rivals, as well as agreements to bring Activision's content to several cloud gaming services. In July 2023, the US court denied the FTC's request for a preliminary injunction in part because of these commitments, holding that the FTC had not shown a likelihood that 'this particular vertical merger in this specific industry may substantially lessen competition' but rather '[t]o the contrary, the record evidence points to more consumer access to Call of Duty and other Activision content.'[143]

141 ECF 70, Plaintiffs' Pretrial Statement, at 4 (13 July 2022).

142 Nylen & Tozzi, see footnote 128.

143 Preliminary Injunction Opinion, *FTC v. Microsoft Corp.*, ECF 305, 3:23-cv-02880-JSC (N.D. Cal. Jul. 10, 2023).