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Merger Remedy Divestitures: the Agencies Zig and the Courts Zag

BY MATT REILLY, RICH CUNNINGHAM, AND BEN WALLACE

FEW MOMENTS GENERATE MORE SWEAT on the brow than counseling a client considering a bet-the-company M&A transaction that involves significant antitrust risk. Will a remedy be needed? And if so, what are the parameters of that remedy, and how should risk be allocated between or among the transaction participants?

For decades, in the context of mergers, "remedy" in the United States has been largely synonymous with "divestiture." To be sure, both the Antitrust Division of the Department of Justice and the Federal Trade Commission have accepted non-structural remedies in certain circumstances. But the vast majority of merger remedies have involved the sale of the assets of one party to maintain the structure of one or more relevant markets.

Divestitures are deeply ingrained in modern merger practice. Both DOJ and the FTC have published guidelines counseling companies (and their lawyers) on how to define an appropriate asset package, identify an acceptable buyer, and avoid questionable entanglements. The FTC has engaged in two retrospective assessments of its divestitures in the last 30 years, and both times the agency found that, on the whole, divestitures were highly successful. Courts have likewise accepted and ordered divestitures.

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During the last year, however, opposing forces have complicated this once fairly settled area of antitrust practice. On one hand, Assistant Attorney General (AAG) Jonathan Kanter and FTC Chair Lina Khan have both signaled their views that the bar for divestitures should, in their view, move significantly. DOJ has withdrawn its merger remedy guidance and only once agreed to accept a divestiture remedy since AAG Kanter took office, and that was in the context of a during-trial pause ordered by a D.C. District Court judge. The absence of any divestiture remedies approved pre-litigation reflects a remarkable break from prior DOJ practice. On the other hand, courts are not only accepting divestitures but calling into question the agencies, arguments that divestitures are irrelevant to the *prima facie* case against a proposed merger, which may significantly improve merging parties' chances of successfully litigating the fix.

The result of the interplay between these opposing forces remains to be seen. For the moment and the foreseeable future, however, clarity for firms considering a merger that may raise competition questions (and for the lawyers advising them) may be at a multi-decade low.

DOJ and the FTC Have Endorsed Divestitures for Years

DOJ and the FTC have accepted divestitures as viable, effective remedies to competition problems in mergers for more than 40 years. DOJ has been recommending divestiture as a remedy under the Tunney Act since at least 1982.[1] For the FTC, the term "divestiture" made its first appearance in the FTC's Annual Reports to Congress in 1979.[2] In that report alone, there are nine references to mergers that were remedied with divestitures.[3]

Both agencies have promulgated merger remedy guidelines blessing divestitures. In 2020, DOJ published a Merger Remedies Manual that claimed to serve two related goals: (i) supplying "Division attorneys and economists with a framework for structuring and implementing appropriate relief" in merger cases,[4] and (ii) giving regulated parties "transparency and predictability" into DOJ's approach to

merger remedies.[5] Among other things, the Manual articulates how parties should structure a divestiture so that it is effective and highlights common concerns DOJ considers when evaluating divestiture options.[6] The Manual states that structural remedies, such as divestitures, are "strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing governmental entanglement in the market."[7]

Likewise, the FTC in 2012 published guidance titled "Negotiating Merger Remedies" to assist merging parties "negotiating a settlement in a merger case" with the agency.[8] The document identified ideal ways to structure divestitures to expedite settlement, how to identify acceptable buyers, and cautioned against red flags that the FTC is wary of when reviewing and evaluating proposed divestitures. Like DOJ's Merger Remedies Manual, the FTC's guidance stated that the agency "prefers structural relief in the form of a divestiture to remedy the anticompetitive effects of an unlawful horizontal merger."[9]

The FTC hasn't just issued guidelines blessing divestitures as effective remedies—it has also twice retrospectively studied the divestitures it has approved and concluded that those divestitures effectively preserved competition. First, in 1999, the FTC published a study of prior divestitures with the goals of introspection and improvement.[10] As a result of the analysis, the FTC imposed several policy changes for how to implement divestitures. For example, it began requiring upfront buyers if the divestitures involved less than an ongoing business or if there were particular risks of deterioration.[11] It also shortened the default divestiture period for post-order buyers from a year to six months or less.[12] Second, in 2015, the FTC published an analysis of all 89 merger remedy orders the agency entered into between 2006 and 2012, 74 of which required divestitures.[13] The study found that "all remedies involving divestitures of assets comprising ongoing businesses succeeded, confirming that such divestitures are most likely to maintain or restore competition,"[14] and that such success "supports the Commission's general approach to merger remedies."[15] The study ultimately concluded that "divestitures can maintain or create viable and competitive entities" thereby "maintain[ing] the competition that otherwise would be eliminated by the merger."[16]

Up until very recently, both agencies resolved a substantial portion of their merger challenges with divestitures. Between 2012 and 2021, both DOJ and the FTC resolved approximately 43 percent of their merger challenges with a divestiture as reflected below in Figure 1. The remaining challenges resulted in litigation or deal abandonment by the parties.

Current Agency Leaders Have Expressed Hostility to Divestitures

On January 24, 2022—two months into his tenure as leader of the Antitrust Division—AAG Kanter expressed the view that divestures as a merger remedy should be viewed skeptically: "I am concerned that merger remedies short of blocking a transaction too often miss the mark."[17] AAG Kanter went on to say that "in [his] view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction."[18] AAG Kanter emphasized that his view was informed both by questions about the effectiveness of divestitures, and also by a desire to take actions that generate "new published opinions from courts that apply the law in modern markets."[19]

AAG Kanter did leave a ray of hope for divestitures. He caveated his comments by clarifying that he was not expressing that "divestitures should never be an option."[20] But he quickly pivoted to explain that this applies only where "business units are sufficiently discrete and complete that disentangling them from the parent company in a non-dynamic market is a straightforward exercise," and that such "circumstances are the exception, not the rule."[21]

Figure 1.

Year	FTC Merger Challenges Resolved with Divestiture	DOJ Merger Challenges Resolved with Divestiture
2012	10 of 25	9 of 19
2013	9 of 23	7 of 15
2014	6 of 17	8 of 16
2015	12 of 17	8 of 20
2016	13 of 22	8 of 25
2017	11 of 23	10 of 18
2018	11 of 22	8 of 17
2019	7 of 21	9 of 17
2020	10 of 28	7 of 15
2021	5 of 18	9 of 14
Total	**94 of 216 (43%)**	**83 of 176 (47%)**

Source: Fed. Trade Comm'n, *Annual Competition Reports: Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976*, https://www.ftc.gov/policy/reports/annual-competition-reports (Dec. 1, 2022).

It is fair to say that AAG Kanter's actions to date have backed up his words. With the exception of a handful of press-reported divestitures that were not subject to traditional DOJ agreement or Tunney Act proceedings and the mid-trial *Assa Abloy* settlement described below,[22] the Kanter-led Antitrust Division has not settled a single merger case by divestiture to date—a sharp departure from past practice as shown in the chart above.

DOJ also quietly withdrew its Merger Remedies Manual (described above) in October 2022. DOJ did not issue a press release or otherwise explain its decision to withdraw the Manual. As of our July 2023 press deadline the online version of the Manual has a stamp on it that says "[t]his guidance is now inactive and the manual has been withdrawn. The information here may be outdated and links may no longer function."[23] Notwithstanding the lack of explanation, it is hard to interpret this dead-of-night withdrawal of the Merger Remedies Manual—which had been updated only two years before—as anything other than a reflection of DOJ's desire to change its approach to remedies and, perhaps, to avoid having the Manual cited against it in litigation, as occurred in *United States v. UnitedHealth Group Inc. & Change Healthcare, Inc.* (*UHG/Change*).[24]

Although the FTC has accepted divestitures during Chair Khan's tenure (13 times as of our July 2023 press deadline),[25] there are clear signs that the FTC has also upped the ante for such remedies in merger matters. First, the FTC has imposed additional terms on divestures, including prior notice and prior consent terms. In July 2021, the FTC rescinded its then-longstanding policy against including "prior notice" and/or "prior approval" provisions in merger remedy consent decrees.[26] Then, in October 2021, the FTC issued a policy statement clarifying that it would include such provisions in all merger divestiture orders moving forward.[27] Prior notice provisions empower the FTC to review future deals in or near the relevant markets outside of the strictures of the HSR process. Prior approval provisions go even further, and permit the FTC to unilaterally block future transactions without judicial review. Since July 2021, these provisions—which do not address alleged competitive harm arising from the transaction at issue and make settlement divestitures more onerous—have become a standard part of FTC settlements.[28]

And second, like AAG Kanter, Chair Khan has made statements suggesting that the FTC would pursue litigation rather than investing extensive resources in negotiating complex settlements.[29] Specifically, in June 2022, Chair Khan explained during an interview that merging parties should not expect FTC staff to spend months working through the details of a divestiture, and should expect the agency to focus "resources on litigating, rather than on settling."[30] Holly Vedova, then the Director of the Bureau of Competition, amplified these points during a speech in February 2023, stating that the "Bureau of Competition will only recommend acceptance of divestitures that allow the buyer to operate the divested business on a standalone basis quickly, effectively, and independently, and with the same incentives and comparable resources as the original owner. . . . This change in our approach to merger remedies is necessary so that the Agency does not saddle consumers with the harmful effects of a merger that goes forward with an ineffective remedy. Alternatively, the Commission may avoid this risk altogether and move to block a merger."[31]

The FTC has not, however, withdrawn its 2012 Negotiating Merger Remedies guidance,[32] and, as noted, the agency has accepted more than a dozen divestitures across a range of industries under Chair Khan. This suggests that, although the FTC is tightening the screws on divestitures, its practices may have shifted to a lesser degree relative to DOJ. In all, though, there is ample evidence that the pendulum at the agencies is swinging away from accepting divestitures to remedy the potential for anticompetitive effects in merger matters.

Courts Permit Parties to Litigate the Fix and Are Questioning the Agencies' Preferred Standard for Evaluating Divestitures

Despite the agencies' increasing reluctance to approve divestiture remedies, courts continue to sign off on divestitures. Indeed, if the recent *UHG/Change* decision is any indication of a trend, merger defendants may soon have an easier time than ever before convincing courts that a proposed divestiture resolves potential antitrust concerns.

Courts in the D.C. Circuit have used two competing standards to evaluate divestitures.[33] Those standards differ with respect to all the following: "*Who* bears the burden of proving the competitive implications of the divestiture, *when* must that party satisfy its burden, and *what* exactly must that party prove?"[34] Because those differences spring from how the two standards interact with the D.C. Circuit's overarching burden-shifting framework for assessing horizontal mergers, a word on that framework is necessary. Under that framework—which was first set forth in *United States v. Baker Hughes, Inc.*[35]—the government bears the burden to establish a "presumption" or "prima facie case" that the merger would substantially lessen competition.[36] Typically, the government satisfies that burden by presenting market-share statistics showing that the merger would produce "undue concentration in the [relevant] market."[37] If the government establishes a presumption that the merger would substantially lessen competition, "[t]he burden of producing evidence to rebut this presumption then shifts" to the defendants.[38] Finally, if the defendants rebut the initial presumption, "the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times."[39]

We turn now to the specifics of the competing standards for evaluating divestitures. Under one standard, only the merger itself—separate from the proposed divestiture—is

analyzed at the first step of the *Baker Hughes* framework. The government can therefore establish a prima facie case by showing undue concentration in the post-merger market that would exist if there were no divestiture.[40] Then, at the second step of the *Baker Hughes* framework, the defendants can introduce divestiture-related evidence as part of their rebuttal case.[41] That evidence is sufficient to return the burden to the government only if the divestiture would "effectively preserve competition in the relevant market"[42] or "replac[e] the competitive intensity lost as a result of the merger."[43] In sum, under one standard that courts in the D.C. Circuit have used to evaluate divestitures, it is the *defendants'* burden to produce divestiture-related evidence; they must do so at the *second step* of the *Baker Hughes* framework; and they must show that the divestiture would preserve the *exact level* of competition that existed pre-merger.

Under the other standard for evaluating divestitures, both the merger and the proposed divestiture are analyzed at the first step of the *Baker Hughes* framework. To make a prima facie case, then, the government must show that the transaction as a whole—including both the merger and the divestiture—would lessen competition.[44] Further, the government must show that the lessening of competition would be substantial.[45] In sum, under the other standard that courts in the D.C. Circuit have used for evaluating divestitures, it is the *government's* burden to account for the divestiture; the government must do so at the *first step* of the *Baker Hughes* framework; and the government must show that, despite the divestiture, there would be a *substantial lessening* of competition.

That final difference between the two standards—whether the divestiture must preserve the exact level of pre-merger competition or instead merely prevent a substantial lessening of competition—is particularly significant. The *UHG/Change* court used the simple example of a pre-merger duopoly where each firm had a 50 percent market share.[46] Suppose that a merger and divestiture would result in one of the original firms having a 51 percent market share and a divestiture buyer having a 49 percent market share.[47] Under the former standard discussed above, "the merger would be enjoined because the companies would be unable to prove that the divestiture fully restored the pre-merger level of competition."[48] But under the latter standard discussed above, the merger would be allowed to proceed because there had been "only the slightest lessening of competition, not a substantial lessening."[49] Clearly, then, the former standard makes it significantly easier for the agencies to defeat a proposed divestiture.

Unsurprisingly, DOJ and the FTC have both advocated aggressively for the former standard. In *Arch Coal*, for example, the FTC moved *in limine* to exclude all evidence of a proposed divestiture, arguing that such evidence should not be considered at the preliminary-injunction stage.[50] And in *UHG/Change*, DOJ argued that divestiture-related evidence should be discounted in determining whether "a plaintiff establishes its prima facie" case and instead should be considered only "'*[i]n rebuttal*.'"[51] Moreover, DOJ claimed that a proposed divestiture is sufficient to rebut DOJ's prima facie case only if the divestiture "would 'restor[e]' the *pre-acquisition* situation" (not create a somewhat less competitive one) and "'*eliminate*' (not reduce) 'the anticompetitive consequences' of a merger."[52]

In *UHG/Change*, the court ultimately decided that it need not choose between the two standards for evaluating divestitures because the defendants would win under either standard.[53] The court nevertheless engaged in a thorough evaluation of the two standards, concluding that the former, more-government-friendly version was flawed in several respects. First, the text of Section 7 of the Clayton Act focuses on whether the effect of a merger "may be *substantially* to lessen competition."[54] But the more-government-friendly standard asks whether "the divestiture would preserve exactly the same level of competition that existed before the merger," which, the *UHG/Change* court found, "would effectively erase the word 'substantially' from Section 7."[55] Second, under the *Baker Hughes* framework, it is the government's burden to establish a prima facie case that the merger would substantially lessen competition.[56] And *Baker Hughes* itself cautioned against watering down the government's burden, "leaving the defendant to prove the core of the dispute."[57] But in the *UHG/Change* court's view, such improper watering down is exactly what the more-government-friendly standard permits. Under that standard, the government can "meet its *prima facie* burden based on a fictional transaction and fictional market shares"—that is, a transaction and market shares that counterfactually assume there will be no divestiture.[58] It then becomes the defendants' burden to show how competition would be affected in the post-merger market that would actually exist. Thus, the *UHG/Change* court concluded that the more-government-friendly standard "make[s] a mess of the *Baker Hughes* framework and the ultimate burden of persuasion."[59]

Even though *UHG/Change* is less than a year old, this issue is already arising in merger enforcement actions. In *United States v. Assa Abloy AB*, a merger challenge filed by DOJ just days after Judge Carl J. Nichols issued his decision in *UHG/Change*, the parties sought to litigate the fix for another proposed a divesture. Early in the case, Judge Amy Berman Jackson ordered the parties to brief "the questions posed in [*UHG/Change*]"—namely, "[w]ho bears the burden of proving the competitive implications of the divestiture, when must that party satisfy its burden, and what exactly must that party prove?"[60] During a hearing, Judge Berman Jackson commented that she would not take "away the burden for the government at any point," but she did not ultimately decide the issue because the case was subsequently transferred to Judge Ana C. Reyes. For her part, Judge Reyes commented during a pretrial hearing that she was "as troubled as Judge Nichols by the idea that the defense would have to prove point-for-point that the landscape would look

exactly the same without the merger, because that seems to me to run headlong into the decision in Baker Hughes."[61] But Judge Reyes also did not ultimately decide the issue because *Assa* settled mid-trial, before a decision.

In *FTC v. Microsoft Corp.*,[62] (*Microsoft//Activision*), a case decided in July 2023, just a few days before our press deadline, Judge Jacqueline Scott Corley of the Northern District of California explicitly adopted and cited Judge Nichols' logic in rejecting the FTC's argument that Microsoft's marketplace commitments have no "relevance to its *prima facie* burden."[63] After rejecting the Commission's arguments that its own 2023 *Illumina*[64] decision or the 1957 Supreme Court's *Du Pont*[65] decision were on point, Judge Corley stated that the "caselaw that directly addresses this issue contradicts the FTC's position."[66] *Microsoft./Activision* is particularly notable in this regard because it extends the logic of *UHG/Change* from the divestiture context to non-structural behavioral remedies.

Moreover, the issue of whether a divestiture is properly considered as part of the government's *prima facie* burden almost certainly would have been litigated again in *FTC v. Intercontinental Exchange, Inc. & Black Knight, Inc.*, another case filed by the FTC that was, until recently, pending in the Northern District of California.[67] The parties proposed a divestiture and, had the case not settled on the eve of trial, the central issue in the case would have been the adequacy of that divestiture.

If courts continue to follow the logic and analysis in *UHG/Change* with respect to the proper standard for evaluating divestitures, merger defendants will likely enjoy greater success in litigating the fix. In some cases, the proposed divestiture will keep the government from meeting its prima facie burden. And even if the government clears that hurdle, the defendants will need to show only that the divestiture keeps the merger from having a substantial effect on competition, rather than showing that the divestiture would ensure the merger has no effect on competition.

Conclusion

Implementing divestitures effectively is no small task, and careful thought and planning must be given to ensuring that the divestiture buyer will receive the hard, human, and intellectual-property assets that it needs to compete vigorously. But calling into question divestitures as a remedy, or imposing unnecessary frictions to such remedies, amounts to turning away from decades of accumulated knowledge and established practice. Agency reluctance to approve divestiture remedies or make such remedies more onerous or difficult to execute also risks denying consumers the benefits of merger-related synergies and cost savings that can be realized without any diminution of competition. Not only have courts not shown similar reluctance to sign off on divestitures, but *UHG/Change* indicates that courts may be more willing than ever to find that a divestiture resolves any potential anticompetitive concerns posed by a merger. ■

1 *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 170 (D.D.C. 1982).

2 Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report: Fiscal Year 1979, at 6 (1979), https://www.ftc.gov/system/files/documents/reports/3rd-report-fy-1979/3annrpt1979.pdf.

3 *Id.* at 6-7.

4 U.S. Dep't of Justice, Antitrust Division, Merger Remedies Manual 2 (2020), https://www.justice.gov/atr/page/file/1312416/download [hereinafter Merger Remedies Manual].

5 Press Release, U.S. Dep't of Justice, *Justice Department Issues Modernized Merger Remedies Manual* (Sept. 3, 2020), https://www.justice.gov/opa/pr/justice-department-issues-modernized-merger-remedies-manual.

6 Merger Remedies Manual, *supra* note 4, at 6–13, 22–33.

7 *Id.*

8 Richard Feinstein, *Statement of the Bureau of Competition of the Fed. Trade Comm'n, Negotiating Merger Remedies* 1, Fed. Trade Comm'n (2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

9 *Id.* at 5.

10 William Baer, *A Study of the Commission's Divestiture Process*, Fed. Trade Comm'n (1999), https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

11 Fed. Trade Comm'n, *The FTC's Merger Remedies 2006–2012: A Report of the Bureaus of Competition and Economics*, 3–4 (2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

12 *Id.*

13 *Id.* at 7.

14 *Id.* at 5.

15 *Id.* at 12.

16 Baer, *supra* note 10, at 43.

17 U.S. Dep't of Justice, *Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section* (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york#:~:text=We%20are%20law%20enforcers%2C%20not,structural%2C%20suffer%20from%20significant%20deficiencies.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *See* Bryan Koenig, *DOJ Quietly OKs West Coast Bank Merger, With Branch Sales*, Law360 (Sept. 21, 2022), https://www.law360.com/articles/1532650/doj-quietly-oks-west-coast-bank-merger-with-branch-sales; Austin Peay & Jenna Ebersole, *Quikrete-Forterra deal received US DOJ sign-off with divestitures without formal settlement*, MLex Market Insight (Mar. 30, 2022), https://mlexmarketinsight.com/news/insight/quikrete-forterra-deal-received-us-doj-sign-off-with-divestitures-without-formal-settlement.

23 Merger Remedies Manual, *supra* note 4.

24 *See* Defs.' Post-Trial Br. at 12, *United States v. UnitedHealth Grp. Inc.*, No. 1:22-cv-0481 (CJN) (D.D.C. Sept. 7, 2022), ECF No. 120; Defs.' Proposed Findings of Fact and Conclusions of Law ¶ 468, *United States v. UnitedHealth Grp. Inc.*, No. 1:22-cv-0481 (CJN) (D.D.C. Sept. 7, 2022), ECF No. 121.

25 Fed. Trade Comm'n, *Cases Tagged with Merger*, https://www.ftc.gov/enforcement/cases-proceedings/terms/708 (last visited June 2, 2023); Fed. Trade Comm'n, *ANI/Novitium*, FTC Docket No. C-4754, https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0101-aninovitium-matter (last visited June 2, 2023); Fed. Trade Comm'n, *DaVita Inc. and Total Renal Care, Inc.,* FTC File No. 211-0013, https://www.ftc.gov/legal-library/browse/cases-proceedings/2110013-davita-inc-total-renal-care-inc-matter (last visited June 2, 2023); Fed. Trade Comm'n, *Global Partners/Fuel*

Assets, FTC Docket No. C-4755, https://www.ftc.gov/legal-library/browse/cases-proceedings/global-partnersfuel-assets (last visited June 2, 2023); Fed. Trade Comm'n, *Price Chopper/Tops Markets*, FTC Docket No. C-4753, https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0002-price-choppertops-markets-matter (last visited June 2, 2023).

[26] Press Release, Fed. Trade Comm'n, *FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers* (July 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

[27] Press Release, Fed. Trade Comm'n, *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers* (Oct. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.

[28] *See, e.g.*, Decision and Order, Hikma Pharms. PLC, et al., FTC Docket No. C-4762, 2022 WL 1183982 (F.T.C. Apr. 18, 2022); Decision and Order, Golub Corp. & Top Mkts. Corp., FTC Docket No. C-4753, 2022 WL 248145 (F.T.C. Jan. 20, 2022); Decision and Order, Am. Sec. Partners VII, L.P., Prince Int'l Corp. & Ferro Corp., FTC File No. 211-0131, 2022 WL 1261909 (F.T.C. Apr. 21, 2022).

[29] Margaret Harding McGill, *FTC's new stance: Litigate don't negotiate*, AXIOS (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan ("We're going to be focusing our resources on litigating, rather than on settling.").

[30] *Id.*

[31] Holly Vedova, *Remarks at the 12th Annual GCR Live: Law Leaders Global Conference: Update from the FTC's Bureau of Competition* 10-11, Fed. Trade Comm'n (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

[32] Feinstein, *supra* note 8.

[33] *United States v. UnitedHealth Grp. Inc.*, No. 1:22-cv-0481 (CJN), 2022 WL 4365867, at *8-9 (D.D.C. Sept. 21, 2022).

[34] *Id.* at *8 (emphases in original).

[35] 908 F.2d 981 (D.C. Cir. 1990).

[36] *Id.* at 982.

[37] *Id.* at 982; *see also id.* at 992 ("The government . . . can carry its initial burden of production simply by presenting market concentration statistics.").

[38] *Id.* at 982.

[39] *Id.* at 983.

[40] *See, e.g.*, *United States v. Aetna, Inc.*, 240 F.Supp.3d 1, 42–43 (D.D.C. 2017) (concluding that "the government is entitled to a presumption that the merger would substantially lessen competition" based on market share statistics that did not account for the proposed divestiture); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 55, 61 (D.D.C. 2015) (similar).

[41] *See, e.g.*, *Aetna*, 240 F.Supp.3d at 60 (stating that "a defendant may introduce evidence [of] a proposed divestiture" "[i]n rebuttal" to the government's prima facie case); *Sysco*, 113 F. Supp. 3d at 72–73 (similar).

[42] *Aetna*, 240 F. Supp. 3d at 60 (quoting U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (2011), https://www.justice.gov/atr/page/file/1098656/download).

[43] *Id.* (alteration in original) (emphasis omitted) (quoting *Sysco*, 113 F. Supp. 3d at 72-73).

[44] *See FTC v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 125 (D.D.C. 2004) (assessing whether the government's market share statistics—which were "based on Arch's acquisition of the North Rochelle mine and Kiewit's [*i.e.,* the divestiture buyer's] acquisition" of a second mine—established a prima facie case).

[45] *Id.* at 129-30 (reiterating that the question at the first step of the *Baker Hughes* framework is whether "the merger will *substantially* lessen competition" (emphasis added)).

[46] *UHG/Change*, 2022 WL 4365867, at *9 n.4.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] FTC's Mot. *in Limine* to Exclude All Evidence and Argument on the Issue of Remedy at 5-8, *FTC v. Arch Coal, Inc.*, No. 1:04-cv-0534 (JDB) (D.D.C. June 3, 2004), ECF No. 50.

[51] DOJ's Notice of Authority in Resp. to the Ct.'s Questions at 2, *United States v. UnitedHealth Grp. Inc.*, No. 1:22-cv-0481 (CJN) (D.D.C. Sept. 12, 2022), ECF No. 128-1 (alteration and emphasis in original) (quoting *Aetna*, 240 F. Supp. 3d at 60).

[52] *Id*. at 3 (alteration and emphases in original) (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 573–74 (1972)).

[53] *UHG/Change*, 2022 WL 4365867, at *10.

[54] 15 U.S.C. § 18 (emphasis added).

[55] *UHG/Change*, 2022 WL 4365867, at *9.

[56] *Baker Hughes*, 908 F.2d at 982.

[57] *Id.* at 992.

[58] *UHG/Change*, 2022 WL 4365867, at *10 n.5; *see also id.* at *9 (noting that, under the more-government-friendly standard, "the government can meet its *prima facie* burden with market-share statistics that have no connection to the post-acquisition world").

[59] *Id.* at *9.

[60] Minute Order, *United States v. Assa Abloy AB*, No. 1:22-cv-02791 (ABJ) (D.D.C. Dec. 5, 2022) (alteration in original).

[61] Mar. 14, 2023 Hr'g Tr. at 38–39, *United States v. Assa Abloy AB*, No. 1:22-cv-02791 (ABJ) (D.D.C. Apr. 5, 2023), ECF No. 103.

[62] *FTC v. Microsoft Corp.*, No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

[63] *Id.* at *15.

[64] *In re Illumnia, Inc. & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *20 (F.T.C. Mar. 31, 2023).

[65] *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).

[66] *Microsoft Corp.*, 2023 WL 4443412 at *15 (citing *United States v. AT&T*, 916 F.3d 1029, 1041 (D.C. 2019); *UHG/Change*, 630 F. Supp.3d at 139–51; *FTC v. Arch Coal*, *Inc.*, No. 04-00534, Dkt. No. 67 (D.D.C. July 7, 2004)).

[67] *See* Complaint, *FTC v. Intercontinental Exch., Inc.*, No. 3:23-cv-01710-AMO (N.D. Cal. Apr. 10, 2023), ECF No. 1.