No. 23-6188

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,
Plaintiff

v.

IQVIA HOLDINGS, INC., and
PROPEL MEDIA, INC.
Defendants

BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT OF DEFENDANT IQVIA HOLDINGS, INC., and PROPEL MEDIA, INC.

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December 7, 2023

CORPORATE DISCLOSURE STATEMENT

TechFreedom is a non-profit entity and does not issue stock or ownership interests. It does not have a parent corporation; nor does any publicly held corporation have an ownership interest in it.

Dated: December 7, 2023

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INTEREST OF AMICUS CURIAE TECHFREEDOM[1]

TECHFREEDOM is a nonprofit, nonpartisan think tank based in Washington, D.C. TechFreedom has an interest in ensuring that antitrust law enforcement promotes the public interest by protecting efficient and welfare enhancing conduct from liability under the antitrust and other competition laws.

TechFreedom's employees have extensive expertise with the laws and regulations enforced by the Federal Trade Commission. Bilal Sayyed, Senior Competition Counsel for TechFreedom, served as Director of the Office of Policy Planning at the FTC from 2018 to 2021. The Office of Policy Planning (OPP) initiated and managed the Chairman's Hearings on Competition and Consumer Protection in the 21st Century during his tenure. Following the Hearings, staff of the Bureaus of Competition and Economics and OPP, working with the Department of Justice, drafted the 2020 VERTICAL MERGER GUIDELINES and the 2020 FEDERAL TRADE COMMISSION COMMENTARY ON VERTICAL MERGER ENFORCEMENT. Additionally, under his leadership, the Commission inquired into over 500 acquisitions by Google, Facebook, Amazon, Apple, and Microsoft. Sayyed has continued to focus on mergers and the FTC as Senior Competition Counsel at TechFreedom. *See, e.g.,* Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022* (Dec. 20, 2022), https://ssrn.com/abstract=4308233.

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person contributed money intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Trade Commission ("Commission") requests that this court preliminary enjoin the acquisition of substantially all of the assets of Propel Media, Inc., by IQVIA Holdings Inc., alleging that the acquisition will harm competition in a market for "health care professionals programmatic advertising."

The Commission makes an extraordinary argument: (i) that the district court may preliminarily enjoin the acquisition if the Commission shows it has "fair and tenable chance" of finding, after an administrative trial, that the acquisition is anticompetitive; (ii) that the Commission may establish that showing by reference to market share, concentration statistics, and the fact of existing competition between the defendants; and, (iii) that the court should not and cannot properly take account of defendants' evidence of potential efficiencies associated with the transaction, or actual or potential entry into the relevant market, in determining whether a preliminary injunction should issue. Such evidence, the Commission says, is only properly considered, in the first instance, by itself, sitting as the initial decider of fact.

The Commission is wrong. The district court may, and should, consider the defendants' evidence on efficiencies, entry, and any other factor that may call into question the Commission's prima facie case in this preliminary injunction proceeding. Like appellate courts and district courts have done over the past thirty-years (at least), this court should evaluate the Commission's ultimate likelihood of success in an administrative trial within the framework articulated in *United States v. Baker Hughes*, 908 F.3d 981 (D.C. Cir. 1990).

ARGUMENT

I. In Evaluating the Commission's Request for a Preliminary Injunction, the District Court Must Evaluate the Commission's Reasonable Probability of Prevailing on the Merits after an Administrative Trial

Section 13(b) of the Federal Trade Commission Act allows the Commission to obtain a preliminary injunction in advance of an administrative trial seeking to permanently enjoin a merger. 15 U.S.C. § 53(b). Here, the Commission seeks to preliminarily enjoin the acquisition of substantially all of the assets of Propel Media, Inc., by IQVIA Holdings Inc., prior to an administrative trial to "prohibit[ ] any transaction between [IQVIA Holdings and Propel Media] that combines their businesses in the relevant market, except as may be approved by the Commission." Federal Trade Commission, Complaint, In the Matter of IQVIA Holdings Inc., and Propel Media, Inc., Docket No. 9416 (July 17, 2023) at 47.

The Commission makes an extraordinary argument: (i) that the district court may preliminarily enjoin the acquisition if the Commission shows it has "fair and tenable chance" of finding, after an administrative trial, that the acquisition is anticompetitive; (ii) that the Commission may establish that showing by reference to market share, concentration statistics, and the fact of existing competition between the defendants; and, (iii) that the court should not and cannot properly take account of defendants' evidence of potential efficiencies associated with the transaction, or actual or potential entry into the relevant market, in determining whether a preliminary injunction should issue.

The Commission asks this court to interpret and apply language from one of the first matters to preliminarily enjoin a merger pursuant to Section 13(b) of the FTC Act. See *F.T.C. v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1090 (S.D.N.Y 1977). In doing so, the Commission asks this court to ignore the stubborn fact that no other court has interpreted and applied such a standard, and that, for nearly thirty-five years, appellate and district courts have applied the burden-shifting framework articulated in *United States v. Baker Hughes,* 908 F.3d 981 (D.C. Cir. 1990), in evaluating Commission requests to preliminary enjoin a merger.

In reviewing the Commission's request for a preliminary injunction, the court "must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities." *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)."To determine likelihood of success on the merits, [the court] measure[s] the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [merger] 'may be substantially to lessen competition, or to tend to create a monopoly' in violation of Section 7 of the Clayton Act." *FTC v. Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001). Appellate courts interpret this standard to require that the Commission "raise[ ] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984).

This standard requires the Commission show a likelihood of ultimate success in its later effort to permanently enjoin the transaction through an administrative hearing. Before granting a request for a 13(b) preliminary injunction, the court must evaluate the Commission's arguments and evidence in the context of the applicable Section 7 case law to evaluate whether there is a "reasonable probability of anticompetitive effect." *Warner Commc'ns Inc.*, 742 F.2d at 1160. Merging parties may rebut any presumption that attaches to the agency's success in raising serious, substantial, difficult, or doubtful questions. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008). In a vertical merger (or, as here, with respect to a merger that has a vertical component), "the government cannot use a short cut to establish a presumption of anticompetitive effect . . . because vertical mergers produce no immediate change in the relevant market share." *United States v. AT&T*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

Neither the district courts nor appellate courts are required to "rubber-stamp an injunction whenever the FTC provides some threshold evidence"; rather, the courts "must exercise independent judgment" and "evaluate the FTC's chance of success on the basis of all evidence before it, from the defendants as well as from the FTC." *Whole Foods Mkt., Inc.*, 548 F.3d at 1035. "[M]erging parties are entitled to oppose [a request for a preliminary injunction] with their own evidence, and that evidence may force the FTC to respond with a more substantial showing." *Id.*

Contrary to the Commission's argument that in a request for a preliminary injunction under 13(b) that it is owed significant deference and that the district court

should not seriously scrutinize its allegations, district courts frequently find that the Commission has not met its burden, and therefore deny requests for a 13(b) injunction. *See, e.g., FTC v. Microsoft Corp.,* 2023 WL 4443412 (N.D. Cal. Jul. 10, 2023); *FTC v. Meta Platforms Inc.*, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023); *FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d 522 (E.D. Pa. 2020); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020); *FTC v. Steris Corp*., 133 F. Supp. 3d 962 (N.D. Ohio 2015); *FTC v. LabCorp*., 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75,725 (D.N.M. 2007); *FTC v. Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004). But the standard is not tilted away from the F.T.C.; as referenced throughout this brief, district courts often find that the Commission has met its burden and grant a preliminary injunctions.

The Commission argues that the district court is not only authorized, but required, to issue a preliminary injunction if the Commission makes a prima facie case of potential harm from the merger. It further argues that the court not only need not, but must not, consider defendant's evidence that may undercut the Commission's prima facie case; that inquiry, the Commission says, is left for itself, initially in an administrative trial, and then on appeal. Only after an appeal can a federal court consider the merging parties arguments and evidence that may undercut or rebut the Commission's prima facie case.

The law requires no such thing; in fact, it requires the opposite -- that the district court consider and evaluate evidence the defendants introduce that may rebut any presumption of illegality arising from the Commission's market share and concentration evidence, or so-called direct evidence of potential competitive harm.

The is only sensible, for the only way that the District Court can consider the Commission's likelihood of ultimate success on the merits is to gauge how its evidence will be judged against the law that is applicable in a challenge under Section 7 of the Clayton Act.

II. The District Court Should Apply the *Baker Hughes* Framework to Evaluate the Commission's Request for a Preliminary Injunction

As many courts have done, the district court should adopt the *Baker Hughes* framework for its evaluation of the FTC's likelihood of success on the merits—the required showing of "reasonable probability."

The Commission appears to argue that reliance on and adherence to the *Baker Hughes* framework, which requires an inquiry into the strength of the plaintiff's evidence, and consideration of the defendant's rebuttal to the plaintiff's evidence of anticompetitive harm, goes beyond the district court's authority in a preliminary injunction hearing under 13(b). It does not.

In *Baker Hughes*, the D.C. Circuit articulated a now broadly accepted approach to evaluating the government's challenge to a horizontal merger:

> The basic outline of a Section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to

> rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the 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. *United States v. Baker Hughes*, 908 F.3d 981, 982-983 (D.C. Cir. 1990) (internal citations omitted).

"Although *Baker Hughes* was a permanent injunction matter," courts "can nonetheless use its analytical approach in evaluating the Commission's showing of likelihood of success" in a preliminary injunction matter. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *accord FTC v. Sanford Health*, 926 F.3d 959, 962, 964-66 (8th Cir. 2019) (to evaluate the FTC's request for a preliminary injunction in an acquisition of a health care company, "the district court employed . . . *Baker Hughes*" and, after considering the parties' rebuttal arguments, properly enjoined the merger, pending an administrative trial); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016) (in a review of a district court decision not to grant the Commission's request for a preliminary injunction in the merger of competing hospitals, the appellate court "assess[ed] Section 7 claims" under the *Baker Hughes* framework and, after reviewing the merging parties' rebuttal arguments, reversed the district court); *FTC v. Heinz*, 246 F.3d 708, 714-15 (D.C. Cir. 2001) (in evaluating whether the FTC was entitled to a preliminary injunction in the intended merger of two baby-food companies, the appellate court evaluated whether the FTC "raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance" using the approach of *Baker Hughes*, notwithstanding that "*Baker Hughes* was decided at the merits stage as opposed to

the preliminary injunction relief state."); *FTC v. University Health*, 938 F.2d 1206, 1218-19 (11th Cir. 1991) (evaluating the district court's denial of the Commission's request for a preliminary injunction in a merger of hospitals, using the *Baker Hughes* framework to evaluate whether the FTC "raise[d] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation and study by the FTC in the first instance").

District courts routinely apply the *Baker Hughes* framework when the Commission seeks a preliminary injunction in merger matters. *See FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d 522, 538 (E.D. Pa. 2020); *FTC v. Peabody Energy*, 492 F. Supp. 3d 865, 883, 907-18 (E.D. Mo. 2020); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278, 290-91 (D.D.C. 2020); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 44-45 (D.D.C. 2018); *FTC v. Tronox Ltd*., 332 F. Supp. 3d 187, 197 (D.D.C. 2018); *FTC v. Staples*, 190 F. Supp. 3d 100, 115-116 (D.D.C. 2016); *FTC v. Sysco*, 113 F. Supp. 3d 1, 23-4 (D.D.C. 2015); *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069, 1074-75 (N.D. Ill. 2012); *FTC v. LabCorp*., 2011 WL 3100372, at *21 (C.D. Cal. Feb. 22, 2011); *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 36 (D.D.C. 2009); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75,725, 2007 WL 1793441, *52-53 (D.N.M. 2007).

As noted above, unlike in a horizontal merger case, in a vertical merger (or a merger with a vertical component) "the government cannot use a short cut to establish a presumption of anticompetitive effect . . . because vertical mergers produce no immediate change in the relevant market share." *United States v. AT&T*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

In establishing its prima facie case—the first *Baker Hughes* step—the Commission must provide fact-specific evidence for a showing of possible harm before the burden shifts to the defendants to rebut the Commission's prima facie case. Where the Commission establishes its prima facia case, the district court does not commit reversible error in a 13(b) proceeding if it finds that the defendant has rebutted the Commission's prima facia showing and refuses to grant a preliminary injunction.

The appellate and district courts that have applied the *Baker Hughes* framework to the review of Commission requests for preliminary injunctions did not do so in error. The *Baker Hughes* framework is simply a structured mode of analysis to review the parties' factual evidence and arguments. The Commission mistakes the district court's potential reliance on the defendants' evidence rebutting the Commission's prima facia case as the adoption of a merits-based analysis; this court should not adopt the Commission's error as its own. The use of the *Baker Hughes* framework, and the court's consideration of factors other than market share, concentration, and definition of relevant market to evaluate the Commission's likelihood of success after an administrative trial is not legal error nor an abuse of discretion. A failure by the district court to consider evidence that rebuts the Commission's prima facia case is likely to be viewed as error.

III. Consideration of Entry and Expansion Evidence Is a Required Step in the Evaluation of a Preliminary Injunction Request

"If entry barriers are low, the threat of outside entry can significantly alter the anticompetitive effects of the merger by deterring the remaining entities from colluding or exercising market power." *FTC v. Heinz*, 246 F.3d 708, 717, n. 13 (D.C. Cir. 2001). "A court's finding that there exists ease of entry into the relevant product market can be sufficient to offset the government's prima facie case of anti-competitiveness." *FTC v. Cardinal Health, Inc.,* 12 F. Supp 2d 34, 55 (D.D.C. 1998). Because of this, district courts routinely consider the likelihood of third-party entry or expansion in preliminary injunction matters. *See, e.g.*, *FTC v. Peabody Energy*, 492 F. Supp. 3d 865, 911-12 (E.D. Mo. 2020) (consideration of entry and expansion by other coal producers) eliminated); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 66-70 (D.D.C. 2018) ("a prima facie showing of anticompetitive effects associated with a merger can be rebutted by … evidence that there are no significant entry barriers in the relevant market"); *FTC v. Tronox Ltd*., 332 F. Supp. 3d 187, 213 (D.D.C. 2018) ("entry or expansion into the relevant market by new competitors can mitigate the expected anticompetitive effects of a proposed transaction"); *FTC v. Sysco*, 113 F. Supp. 3d 1, 80-81 (D.D.C. 2015) (considering defendants arguments that the entry of new competitors and the expansion of existing competitors will keep the industry competitive); *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069, 1076 (N.D. Ill. 2012) (FTC likelihood of success in the primary care physician services market is distinctly lower than in the general acute care market because, among other things "the PCP market is not subject to the same prohibitive barriers to entry that exist in

the GAC market"); *FTC v. LabCorp.*, 2011 WL 3100372, ¶ 166 (C.D. Cal. Feb. 22, 2011) ("even assuming a prima facie case, defendants have presented sufficient rebuttal evidence, particularly about new entrants"); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75,725, 245 (D.N.M. 2007) ("The Defendants have, however, rebutted this presumption with proof of ease of entry, cognizable efficiencies, or other recognized defenses.")

No harm or legal error attaches to analyzing the entry evidence offered by the defendants at the preliminary injunction stage; it is, in fact, a necessary component of determining the Commission's ultimate likelihood of success.

IV. Consideration of The Parties' Efficiency Claims Is a Required Step in the Evaluation of a Preliminary Injunction Request

The Commission argues that it would be improper for the district court to consider efficiencies associated with the transaction in the evaluation of its preliminary injunction request. The Commission is simply wrong.

Efficiency claims are properly and routinely considered in a Section 13(b) proceeding. "It is a foundation of section 7 doctrine . . . that evidence on a variety of factors can rebut a prima facia case." *Baker Hughes*, 908 F.3d 981, 984 (D.C. Cir. 1990). The Commission argues that the evaluation of efficiencies "should [be], at a minimum, deferred to the merits stage" and thus excluded from the merging parties' rebuttal arguments. The Commission's position is not supported by merger case law.

Appellate courts have considered efficiency claims in requests to preliminarily enjoin a merger under 13(b) since at least the FTC's request to preliminary enjoin University Health's proposed acquisition of the assets of a competing hospital. *FTC*

v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991). "[I]n certain circumstances, a defendant may rebut the government's prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market." *Id.* at 1222. To the Eleventh Circuit, it was "clear that whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition. . . . [E]vidence that a proposed acquisition would create significant efficiencies benefiting consumers is useful in evaluating the ultimate issue—the acquisition's overall effect on competition." *Id.*

In the thirty years since *University Health*, other appellate courts have made clear that the evaluation of efficiency claims is a component of their review of a preliminary injunction request. S*ee*, *e.g.*, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-55 (8th Cir. 1999) (in a preliminary injunction matter, the court stated that "the evidence shows that a hospital that is larger and more efficient . . . will provide better medical care than either of those hospitals could separately."); *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019) (in preliminary injunction matter, efficiency claims relevant to the competitive effects analysis); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3rd Cir. 2016) (to overturn a district court's denial of a preliminary injunction against the merger of two hospitals, the Commission "must show either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger."); *FTC v. H.J. Heinz*, 246 F.3d 708, 720 (D.C.

Cir. 2001) (in a preliminary injunction matter, the court noted a "trend among lower courts . . . to recognize the [efficiency] defense"). *See also St. Alphonsus Med. Ctr. NAMPA v. St. Luke's*, 778 F.3d 775, 790 (9th Cir. 2015) (in the review of a consummated merger, this court noted that, "because Section 7 of the Clayton Act only prohibits those mergers whose effect 'may be substantially to lessen competition,' a defendant can rebut a prima facie case with evidence that a proposed merger will create a more efficient combined entity and thus increase competition").

Similarly, district courts routinely consider efficiencies in preliminary injunction matters. *See, e.g.*, *FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d 522, 538 (E.D. Pa. 2020) (defendants can rebut presumption by showing "that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger."); *FTC v. Peabody Energy*, 492 F. Supp. 3d 865, 913 (E.D. Mo. 2020) ("even if evidence of efficiencies alone is insufficient to rebut the government's prima facie case, such evidence may nevertheless be relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition.") (internal quotation marks eliminated); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 71-72 (D.D.C. 2018) ("efficiencies produced by a merger can form part of a defendant's rebuttal of the FTC's prima facie case") (internal citations omitted);; *FTC v. Sysco*, 113 F. Supp. 3d 1, 81 (D.D.C. 2015) ("efficiencies resulting from the merger may be considered in rebutting the governments prima facie case"); *FTC v. LabCorp*., 2011 WL 3100372, ¶ 164 (C.D. Cal. Feb. 22, 2011) ("In evaluating the legality of a merger

or acquisition under section 7, courts consider the procompetitive benefit of efficiencies related to the transaction."); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75,725, 245 (D.N.M. 2007) ("The Defendants have, however, rebutted this presumption with proof of ease of entry, cognizable efficiencies, or other recognized defenses.")

No harm or legal error attaches to analyzing the efficiency claims of the merging parties at the preliminary injunction stage; it is a necessary component of determining the Commission's ultimate likelihood of success.

CONCLUSION

The court should evaluate the Commission's request for a preliminary injunction consistent with the full burden-shifting framework of *Baker-Hughes* and disregard the Commission's request to enjoin this transaction solely on the basis of the to-be-combined firms' market share, industry concentration (which is disputed), and the loss of existing competition between the merging parties. Even at the preliminary injunction stage, this court must (and should) take account of the defendants' efficiency and entry claims in its evaluation of the Commission's ultimate likelihood of success on its challenge to the proposed acquisition.

Date: December 7, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2023, I filed the foregoing Amicus Brief with the Court's CM/ECF system. Counsel for Plaintiff and Counsel for Defendant are registered users of the Court's appellate CM/ECF system.

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