DOJ'S FAILURE TO PROVE ITS "KILLER ACQUISITION" CLAIM IN *SABRE/FARELOGIX* AND PARALLELS TO OTHER RECENT GOVERNMENT MERGER LITIGATION LOSSES

Steven C. Sunshine and Julia K. York[*]

On August 20, 2019, the U.S. Department of Justice (DOJ) sued to block Sabre Corporation (Sabre), a provider of a global distribution system (GDS) to travel agents, from acquiring Farelogix, Inc. (Farelogix), an IT provider to airlines.[1] DOJ advocated a killer acquisition theory, portraying Sabre as a dominant firm intent on "tak[ing] out" Farelogix, a "disruptive competitor that has been an important source of competition and innovation.'"[2] Yet after a full trial, Judge Leonard P. Stark of the U.S. District Court for the District of Delaware roundly rejected the notion that Sabre was buying Farelogix simply to snuff out a nascent competitor.[3] Tasked with predicting future competitive conditions, he instead reached the opposite conclusion: that Sabre "intend[ed] to continue offering [Farelogix's product] by integrating it into the Sabre GDS platform," which would allow Sabre "to better meet the demands of airlines and travel agencies."[4] Thus, far from diminishing innovation, Judge Stark believed that the merger "may well promote" it.[5]

---

[*] Steve Sunshine is the head of the Global Antitrust/Competition Group at Skadden, Arps, Slate, Meagher & Flom LLP and Julia York is a partner Skadden's Antitrust/Competition Group. Skadden represented both Sabre Corporation in the Department of Justice's merger challenge and Sprint Corporation in New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 199, 206–07 (S.D.N.Y. 2020); however, the views presented in this Article are the authors' own and are not necessarily the views of Skadden or any of its clients.

1. Complaint at 1, United States v. Sabre Corp., No. 1:19-cv-01548 (D. Del. Aug. 20, 2019) [hereinafter *Sabre* Complaint].

2. Press Release, U.S. Dep't of Just., Justice Department Sues to Block Sabre's Acquisition of Farelogix (Aug. 20, 2019) (citation omitted), https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix [https://perma.cc/76YE-ERTS]; *see also Sabre* Complaint, *supra* note 1, at 1 ("Sabre's proposed acquisition of Farelogix is a dominant firm's attempt to eliminate a disruptive competitor after years of trying to stamp it out.").

3. United States v. Sabre Corp., 452 F. Supp. 3d 97, 130–31 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. 2020).

4. *Sabre Corp.*, 452 F. Supp. 3d at 146; *see also id.* (alterations in original) ("[T]he claim the government has brought necessarily requires the Court to undertake a forward-looking analysis." (quoting United States v. Baker Hughes Inc., 908 F.2d 981, 988, 991 (D.C. Cir. 1990) for the proposition that "merger analysis 'focus[es] on the future' and requires Court to '[p]redict[] future competitive conditions'")).

5. *Id.* at 148. The Department of Justice appealed Judge Stark's decision to the United States Court of Appeals for the Third Circuit; however, on April 9, 2020, while the appeal was pending, the United Kingdom's Competition and Markets Authority issued an order prohibiting the merger. *See* Joint Status Report at 1, United States v. Sabre Corp., No. 1:19-cv-01548 (D. Del. Apr. 14, 2020), ECF No. 280. Following the parties' decision to abandon the transaction, the Department of Justice asked the Third Circuit to vacate Judge Stark's decision. Though the Third Circuit granted the government's motion to vacate on the basis of mootness, the panel was careful

Where did the DOJ's theory go wrong? And what parallels can be drawn between *Sabre* and other recent merger litigation losses by government enforcers?

I. *SABRE/FARELOGIX*: COMPETING VISIONS OF THE MARKET AND ITS PROBABLE FUTURE

Ultimately, the DOJ's case failed as a result of various strategic choices that the Antitrust Division made in attempting to position the deal as a "killer acquisition." Chief among these was DOJ's effort to cast Sabre and Farelogix as horizontal competitors by drawing a relevant market that corresponded neither to the law nor to market realities. Having rejected the DOJ's proposed relevant market, Judge Stark found that DOJ was not entitled to a presumption that the merger was reasonably probable to substantially lessen competition.[6] But Judge Stark went even further: even assuming the DOJ had been successful in showing a likelihood of anticompetitive effects, Judge Stark found that Sabre and Farelogix successfully rebutted any such showing.[7] He concluded that DOJ had failed to prove that a post-merger Sabre would harm competition by eliminating FLX Open Connect (FLX OC) or raising FLX OC or GDS prices, and—fatal to DOJ's "killer acquisition" theory—that DOJ had not proven that the merger would harm innovation.[8]

A. *Merger Analysis*

Section 7 of the Clayton Act requires the government to show a "reasonable probability that the merger will substantially lessen competition,"[9] an analysis which, as Judge Stark emphasized, is necessarily forward-looking.[10] To prevail, the government has the initial burden of showing that the effects of the merger are likely to be anticompetitive; if the government succeeds in doing so, the court evaluates whether defendants have rebutted the prima facie case; and if

---

to note that it "express[ed] no opinion on the merits of the parties' dispute before the District Court[,]" and that its 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." *See* United States v. Sabre Corp., No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. 2020).

6. *Sabre Corp.*, 452 F. Supp. 3d at 127–29, 136, 145.

7. *Id.* at 136 ("In the alternative, even if the Court were to assume that DOJ has identified a relevant product market, and were to assume that the record at least supports a prima facie case that the effects of the merger are likely to be anticompetitive, the Court further concludes that Defendants have rebutted the government's prima facie case.").

8. *Id.* at 146–47.

9. *Id.* at 135 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)).

10. *Id.* at 146 (citing United States v. Baker Hughes Inc., 908 F.2d 981, 988, 991 (D.C. Cir. 1990) for the proposition that "the claim the government has brought necessarily requires the Court to undertake a forward-looking analysis").

the rebuttal is successful, "the burden of production shifts back to the [g]overnment and merges with the ultimate burden of persuasion, which is incumbent on the [g]overnment at all times."[11]

B. *Relevant Market*

Fundamental to DOJ's "killer acquisition" theory was that Sabre's GDS and Farelogix's FLX OC product competed in the same relevant product market. A GDS is a computerized system that allows travel agencies to search for and book flights across multiple airlines.[12] Sabre offers a GDS, as do Amadeus and Travelport.[13] DOJ alleged that the GDSs "provide three main functions: they help airlines construct the initial offer (offer creation); they aggregate offers across multiple airlines (offer aggregation); and they enable airlines to deliver their offers to travel agencies and to process resulting orders (booking services)."[14] It was this last function, "booking services," that DOJ pinpointed as the relevant market in which both Farelogix and Sabre compete.[15] DOJ alleged that Farelogix offers a competing product called "Open Connect," a New Distribution Capability Application Programming Interface (NDC API) product, which is also referred to as "FLX OC."[16] FLX OC's NDC API essentially provides the "pipe" that carries messages between an airline and a travel agency or third party and normalizes/standardizes the content transmitted between those systems.[17]

Judge Stark first rejected DOJ's proposed relevant market as a matter of law, citing the U.S. Supreme Court's *American Express* decision as requiring the conclusion that "[a]s a matter of antitrust law, Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre's platform."[18] But even if Judge Stark were to assume, in the alternative, that Farelogix and Sabre *could* be found to compete in a relevant market, Judge Stark concluded that DOJ had still failed to meet its burden because DOJ had "selectively [and] (without persuasive explanation)" tried to "dissect[]" Sabre's overall GDS services into a market of DOJ's own creation, namely a "booking services" market.[19]

The DOJ had sought to support its market definition through

11. *Id.* at 135 (alterations in original) (citation omitted).
12. *Sabre* Complaint, *supra* note 1, at ¶ 22.
13. *Id.*
14. *Id.*
15. *Id.* at ¶ 1.
16. United States v. Sabre Corp., 452 F. Supp. 3d 97, 107, 113 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. 2020).
17. *Id.* at 113.
18. *Id.* at 136; *see also id.* at 136–39 (discussing Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018)).
19. *Id.* at 139.

testimony from its economic expert, Dr. Aviv Nevo.[20] However, Dr. Nevo admitted to having separated the GDS bundle of services for his analysis, an approach that Judge Stark called "arbitrary" and "unpersuasive" because (among other reasons) Dr. Nevo was "unable to identify basic features of his purported product,"[21] and conceded that Sabre had not actually provided any "booking services" in a commercial transaction in the United States.[22] Dr. Nevo's inability to answer which products comprised the "booking services" market or the value or price for either Sabre's or Farelogix's "booking services" sounded the death knell for DOJ's proposed product market, as DOJ was unable to establish that the slice of Sabre's GDS and Farelogix's FLX OC product were reasonable substitutes for one another.[23]

The DOJ had similarly ignored actual market dynamics in "wrongly exclud[ing] airline.com" (i.e., sales made by airlines through their websites).[24] Here, Judge Stark credited Defendants' economic expert, Dr. Kevin Murphy, who had "opined persuasively, and consistent with the record, that airlines have recognized that much of their revenues derived through sales via OTAs can be replaced by sales through airline websites," and that "airline direct sales have exerted significant competitive pressure on GDS fees."[25]

Judge Stark was no more persuaded by DOJ's geographic market definition, which focused on travel agencies' point of sale; while Dr. Nevo claimed to have based his geographic market on "who the customer for the product is," the point of sale he used was not where the airline using FLX OC is based, as one would assume if the market is based on the customer's location.[26] Instead, the point of sale was where the travel agent—with whom Farelogix has no relationship and who does not use FLX OC—is based.[27]

The DOJ's strategic choice of seeking to establish horizontal competition where there was none led Judge Stark to chastise DOJ for attempting to "gerrymander its way to an antitrust victory without due regard for market realities."[28] Indeed, DOJ's proposed market was entirely "at odds with the 'commercial realities of the industry,'"[29] and

---

20. *Id.* at 127.

21. *Id.* at 140.

22. *Id.* at 125.

23. *Id.* at 125, 140.

24. *Id.* at 141; *see also id.* at 125–26 ("[A]irline.com has to be included in the relevant market, at least with respect to the OTA market.").

25. *Id.* at 126 (citations omitted).

26. *Id.* at 127.

27. *Id.*

28. *Id.* at 139–40 (quoting It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 683 (4th Cir. 2016)).

29. *Id.* at 140 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018)).

thus failed at the first hurdle.

C. *Competitive Effects Analysis*

Judge Stark's competitive effects analysis further highlighted the failures of DOJ's "killer acquisition" theory. Despite acknowledging the presence of significant barriers to entry, and that Sabre had "at various points" viewed FLX OC as a competitive threat, with "some at Sabre [viewing] the acquisition . . . as [a] way to neutralize this perceived threat," the government failed to persuade the Court that Sabre would actually harm competition if the merger were allowed to proceed.[30]

The DOJ had put its eggs in the basket of proving that the future of the industry would be in GDS bypass—in other words, that airlines and travel agencies would be seeking direct connections to one another rather than doing business across the GDS platform. But the merging parties provided a different vision of the future, and this was the one that persuaded Judge Stark. Rather than establishing that Sabre was acquiring Farelogix to *eliminate* FLX OC from the marketplace, "[the evidence] support[ed] the opposite conclusion: that Sabre intend[ed] to continue offering FLX OC by integrating it into the Sabre GDS platform," which would allow Sabre "to better meet the demands of airlines and travel agencies."[31] Thus, far from killing FLX OC, or seeking to delay innovation, the ability to integrate the FLX OC NDC API into Sabre's GDS would allow Sabre "to use new technology to deliver services airlines and agencies are demanding in a more efficient manner."[32] Other factors supporting Judge Stark's conclusion included public commitments that Sabre's CEO had made to continue offering FLX OC to airlines at current or better prices post-merger, the fact that Sabre would continue to face competition from Travelport and Amadeus, and that Farelogix's rivals would through vigorous competition continue to constrain Sabre's ability to raise prices without driving customers away.[33]

As further support for its "killer acquisition" theory, the DOJ had also argued that the merger would chill innovation. But all DOJ could muster in support were "vague theories" from its expert Dr. Nevo; these "generalities" did nothing to help the Court conclude that the merger would harm innovation.[34] Though Farelogix was the first to develop the original technology at issue and had undeniably been an innovator many

30. *Id.* at 146.

31. *Id.*

32. *Id.* at 134; *see also id.* at 146.

33. *Id.* at 144, 146; *see also id.* at 131–32 (discussing evidence); *id*. at 132–33 ("[T]he Court does believe that [Sabre's CEO] intends to abide by the commitments he has expressed to customers and the market" and "find[s] credible Sabre's representations to the market that it intends to hold or even lower prices for FLX OC if it succeeds in acquiring Farelogix.").

34. *Id.* at 148.

years in the past, no party offered evidence that Farelogix had "more recently created or introduced innovative products or services."[35] Here, again, realities of the market contradicted the future that DOJ sought to portray.

II. LESSONS LEARNED FROM *SABRE* AND THE OTHER RECENT GOVERNMENT MERGER LITIGATION LOSSES

Several themes emerge when the *Sabre* decision is placed side-by-side with other recent losses by government plaintiffs in merger challenges, specifically the challenges to T-Mobile's acquisition of Sprint (*New York v. Deutsche Telekom AG*[36] [hereinafter *T-Mobile/Sprint*]); to Evonik's acquisition of Peroxychem (*FTC v. RAG-Stiftung*[37] [hereinafter *Evonik/Peroxychem*]); and to AT&T's acquisition of Time Warner (*United States v. AT&T, Inc*.[38] [hereinafter *AT&T/Time Warner*]). While these other merger litigation losses did not involve so-called killer acquisitions, a number of similar threads run through these decisions in which the courts uniformly denied the government plaintiffs' requested injunctive relief.

A. *Whose Burden Is It, Anyway?*

Each of these four decisions is notable in the degree of emphasis that each judge placed on the allocation of burdens of proof and persuasion. Judge Stark, applying the burden-shifting framework articulated by the D.C. Circuit in *United States v. Baker Hughes Inc.*,[39] concluded that the defendants had won the case "because the burden of proof was on the DOJ, not Defendants," and DOJ had failed to prove that the Sabre-Farelogix transaction would harm competition in a relevant product and geographic market.[40]

In *Evonik/Peroxychem*, Judge Timothy Kelly of the U.S. District Court for the District of Columbia likewise held the FTC had not met its burden of demonstrating a prima facie case; he deemed the FTC's overly simplified market definition to have been an "important misstep."[41] Just as Judge Stark had concluded in *Sabre/Farelogix*, Judge Kelly found that even if the FTC *had* succeeded in establishing a prima facie case that Evonik's acquisition of Peroxychem would likely result in significant anticompetitive effects, he still "could not conclude that [FTC] ha[d]

35. *Id.*
36. 439 F. Supp. 3d 179 (S.D.N.Y. 2020).
37. 436 F. Supp. 3d 278 (D.D.C. 2020).
38. 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).
39. *See* 908 F.2d 981 (D.C. Cir. 1990).
40. *Sabre*, 452 F. Supp. 3d at 148.
41. *RAG-Stiftung*, 436 F. Supp. 3d at 287.

shown a likelihood of success based on Defendants' rebuttal evidence and the FTC's additional evidence of anticompetitive harm."[42]

Like Judges Stark and Kelly, Judge Victor Marrero of the U.S. District Court for the Southern District of New York also applied the *Baker-Hughes* burden-shifting framework in *T-Mobile/Sprint*.[43] There, despite having established a presumption of illegality through market share statistics, the plaintiff state attorneys general still lost because they were unable to overcome the defendants' rebuttal evidence consisting of claimed efficiencies; the future competitive significance of the target company; and evidence relating to remedies.[44]

Judge Leon's decision in *AT&T/Time-Warner* likewise emphasized the importance of burden allocation. In that vertical merger challenge, where no presumption of illegality was even available to the government, Judge Leon similarly found that the DOJ had failed to meet its burden of showing that the effect of the proposed merger was likely to be anticompetitive.[45] He concluded that "the *Government's* evidence, as 'undermined['] and 'discredit[ed]' by defendants' attacks, [was] insufficient to 'show[] a probability of substantially lessened competition,'" and therefore the government had "failed to carry its ultimate burden of persuasion."[46]

B. *You Can't Ignore Market Realities in a Totality-of-the-Circumstances Analysis*

Another cross-cutting theme in these four merger litigation decisions is the courts' approach to the forward-looking analysis that Section 7 of the Clayton Act requires. Judge Stark in *Sabre* criticized the government for ignoring market realities in its ill-fated attempt to define a relevant market, and also for failing to adduce sufficient evidence to enable him to conduct the requisite forward-looking analysis of likely

---

42. *Id.* at 312.

43. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 199, 206–07 (S.D.N.Y. 2020).

44. *Id.* at 206–07 ("Defendants may . . . rebut evidence of high market concentration by producing evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the acquisition['s] probable effects on competition'"; "while no one category [of rebuttal evidence] serves as the sole basis to rebut Plaintiff States' prima facie case, Defendants have satisfied their burden of rebuttal under the totality of the circumstances." (quoting United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975))); *see also id.* at 234–39 (concluding that the States failed to satisfy their ultimate burden of proof through evidence other than concentration and relevant market share data).

45. United States v. AT&T, Inc., 310 F. Supp. 3d 161, 192, 198–99 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

46. *Id.* at 191 n.17 (quoting United States v. Baker Hughes Inc., 908 F.2d 981, 983, 990–91 (D.C. Cir. 1990)).

anticompetitive effects.[47] The government's failure to persuade Judge Stark that the world with the merger would be less competitive than the world without the merger, and its inability to contextualize the claimed anticompetitive effects within the realities of the marketplace, is another theme that runs through the other three cases.

In *T-Mobile/Sprint*, Judge Victor Marrero emphasized the importance of the "totality-of-the circumstances approach" to Section 7 of the Clayton Act, which requires courts to "judge the likelihood of anticompetitive effects in the context of the 'structure, history, and probable future' of the particular markets that the merger will affect."[48] This mandate required him to "weigh[] a variety of factors to determine the effects of [the proposed] transaction[] on competition."[49] Within this analysis, market share evidence was but one component of the holistic assessment of the merger's likely effects.[50] Judge Marrero considered the parties' competing views of the world with and without the merger, leading him to conclude that the combined weight of the defendants' rebuttal evidence undercut the plaintiffs' concentration and market share statistics, such that those statistics "[did] not accurately reflect the variety of ways in which the Proposed Merger is *not* likely to substantially lessen competition."[51] In rejecting the plaintiffs' further evidence on coordinated and unilateral effects, Judge Marrero also highlighted "the particularities of the wireless telecommunications industry and its exceptional impact both on the entire population of the country and on

---

47. *See, e.g.*, United States v. Sabre Corp., 452 F. Supp. 3d 97, 146 (D. Del. 2020) (citation omitted) ("DOJ has not persuaded the Court that Sabre will likely act consistent with its history or [the claimed] incentives and actually harm competition if it is permitted to complete the acquisition of Farelogix. This is yet another problem for the government's case because the claim the government has brought necessarily requires the Court to undertake a forward-looking analysis."), *vacated*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. 2020).

48. *Deutsche Telekom*, 439 F. Supp. 3d at 198, 206 (quoting United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974)).

49. *Id.* at 206 (quoting *Baker Hughes*, 908 F.2d at 984).

50. *Id.* at 207 (citation omitted) ("Relevant evidence may include unique economic circumstances and nonstatistical evidence that undermines the predictive value of market share statistics, such as ease of entry into the market, the trend of the market toward or away from concentration, and the continuation of active price competition.").

51. *Id.* at 233 (emphasis added); *see also id.* at 189 (explaining that the Court (i) was "not persuaded that Plaintiff States' prediction of the future after the merger of T-Mobile and Sprint is sufficiently compelling insofar as it holds that New T-Mobile would pursue anticompetitive behavior that, soon after the merger . . . will yield higher prices or lower quality for wireless telecommunications services, thus likely to substantially lessen competition in a nationwide market;" (ii) "disagree[d] with the projection Plaintiff States present[ed] contending that Sprint, absent the merger, would continue operating as a strong competitor in the nationwide market for wireless services"; and (iii) "[did] not credit Plaintiff States' evidence in arguing that DISH would not enter the wireless services market as a viable competitor nor live up to its commitments to build a national wireless network, so as to provide services that would fill the competitive gap left by Sprint's demise").

the national economy"—circumstances that "create[d] unusual procompetitive pressures and incentives while constraining anticompetitive forces."[52] The "complexity and dynamism that characterize the [relevant] markets"—two considerations that "provide[d] essential context for resolution of [the] litigation"—led Judge Marrero to reject the plaintiffs' predictions of post-merger price increases or a decline in the quality of wireless service.[53]

Similarly, in *Evonik/Peroxychem*, the FTC lost its motion for preliminary injunctive relief because the court perceived the FTC as having presented an "oversimplifi[ed]" view of competitive conditions in the industry, failed to support a prima facie case, and had "not otherwise shown a likelihood that the proposed . . . merger [would] substantially harm competition."[54] Like Judge Stark and Judge Marrero, Judge Kelly emphasized the holistic nature of the Section 7 analysis, which requires "courts [to] judge 'the probable anticompetitive effects of the merger' 'functionally' and based on 'a further examination of the particular market[.]'"[55] In performing this analysis, Judge Kelly observed that "[t]here is no science to weighing the factors at play"; rather, "[o]nly an examination of the real-world evidence—including ordinary course documents, bidding data, and testimony from market participants—can supply an accurate picture of the industry and competitive dynamics."[56]

Judge Richard Leon took a similar approach in *AT&T/Time Warner*, likewise endorsing the totality-of-the-circumstances framework in analyzing the proposed merger's likely effects. Judge Leon described his role as an "'uncertain task'" that required him to "weigh[] the parties' competing visions of the future of the relevant market and the challenged merger's place within it"—an analysis that demanded "[n]othing less than a comprehensive inquiry into future competitive conditions in that market."[57]

These decisions reflect the courts' recognition that the realities of the market play a central role in the competitive effects analysis. In none of these four cases was the government plaintiff able to persuasively counter the merging parties' portrayal of the world with, and the world without, the proposed merger.

---

52. *Id.* at 239.

53. *Id.*; *see also id.* at 239–48.

54. FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 287 (D.D.C. 2020).

55. *Id.* at 291 (quoting United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974)).

56. *Id.* at 312–13 (footnote omitted).

57. United States v. AT&T, Inc., 310 F. Supp. 3d 161, 165 (D.D.C. 2018) (quoting United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990)), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *see also id.* at 190.

C. *Beware the Perils of Litigation By Slide Deck*

Of course, the evidence proffered in a merger litigation is of paramount importance, for judges rely heavily on the plausibility and persuasiveness of the witnesses' trial presentations and the documents admitted into evidence at trial.[58] A repeated theme across these government merger litigation losses is the government plaintiffs' over-reliance on, and efforts to inflate the evidentiary value of, certain of the merging parties' business documents.

In *AT&T/Time Warner*, Judge Leon was not impressed by the DOJ's reliance on the defendants' own prior public statements and ordinary course business documents; following the "require[d] . . . examination of the context, circumstances, and foundation of the proffered evidence," the documents proved to be "of such marginal probative value that they [could not] bear the weight the Government seeks to place on them."[59] In particular, Judge Leon criticized the DOJ's reliance on "random statements from defendants' 'ordinary course' business documents, including employees' emails and internal slide decks," the government's use of "snippets of such statements" in its Complaint and pre-trial filings, and DOJ's general strategy of "trial by slide deck."[60] The probative value of statements that were "drafted by a lower-level AT&T employee who had nothing to do with the substance of the decision to acquire Time Warner, and in any event, were contained in a preliminary draft and were subsequently removed or changed," and had not been shown to be viewed or relied upon by any upper-level AT&T witness, was, "[t]o say the least, . . . minimal."[61]

In *T-Mobile/Sprint*, Judge Marrero was similarly unmoved by text messages and business documents that the plaintiffs' introduced in an effort to show that the merger would result in coordinated effects.[62] In Judge Marrero's view, business documents written by executives of Deutsche Telekom, T-Mobile's controlling shareholder, that discussed theories regarding the effects of consolidation in a foreign market "merit[ed] . . . less weight . . . than T-Mobile's actual history of aggressive

---

58. *See, e.g.*, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 188 (S.D.N.Y. 2020) ("[C]ourts acting as fact-finders ordinarily turn to traditional judicial methods and guidance[,] . . . resort[ing] to their own tried and tested version of peering into a crystal ball. Reading what the major players involved in the dispute have credibly said or not said and done or not done, and what they commit to do or not do concerning the merger, the courts are then equipped to interpret whatever formative conduct and decisive events they can reasonably foresee as likely to occur.").

59. *AT&T*, 310 F. Supp. 3d at 204 (footnote omitted).

60. *Id.* at 208.

61. *Id.* (citations omitted).

62. *Deutsche Telekom*, 439 F. Supp. 3d at 236 ("The Court is not persuaded that the evidence Plaintiff States point to forms a sufficiently credible or plausible basis to conclude that the Proposed Merger will substantially lessen competition.").

competition and the incentives for the company to continue competing that the Proposed Merger would provide."[63] Text messages written by a Sprint executive similarly lacked probative value, where "[the executive] lack[ed] any input on T-Mobile pricing or regulatory strategy and [had] stressed at trial that he expressed this hypothetical without any underlying basis."[64]

Finally, in *Evonik/Peroxychem*, Judge Kelly was likewise underwhelmed by the evidence the FTC put forward to demonstrate the threat of post-merger price increases. He pointedly observed that, "unlike many cases in which the FTC alleges that a proposed merger would be anticompetitive," the record before him contained "*no* evidence that Evonik intends to raise prices post-merger."[65] Instead, "[l]acking a smoking gun," the FTC "fir[ed] away with a few squirt guns"—documents that, when put into context, were insufficient to outweigh the record evidence of "decreasing prices, aggressive competition . . . and substantial cost savings."[66]

D. *Novel Theories Have Their Pitfalls*

Several of these recent government merger litigation losses also highlighted the dangers of gambling on an unorthodox or novel application of the law to the facts at hand. In *Sabre*, it was the DOJ's decision to ignore Supreme Court precedent instructing how markets are defined when two-sided platforms are at play.[67] In *Evonik/Peroxychem*, it was the FTC's insistence on pursuing a supply-side substitution theory—a departure from the typical demand-side substitution analysis—and its inability to back up that unorthodox theory with real-world facts.[68] In *AT&T/Time Warner*, it was the government's invocation of the novel "increased bargaining leverage" theory, which concededly had never been successfully used to block a proposed vertical merger, and where DOJ failed to show that the proposed merger would, in fact, increase bargaining leverage as alleged.[69]

---

63. *Id.*

64. *Id.*

65. FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 320 (D.D.C. 2020).

66. *Id.* at 320–21 (citation omitted).

67. United States v. Sabre Corp., 452 F. Supp. 3d 97, 136–38 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. 2020).

68. *RAG-Stiftung*, 436 F. Supp. 3d at 292 ("The Court agrees with Defendants that the FTC has not met its burden of establishing its prima facie case because it has not identified a relevant market within which to analyze the merger's possible anticompetitive effects. That failure begins and ends with the FTC's theory of supply-side substitution, or 'swinging,' a substantial departure from the typical way in which a product market is defined.").

69. United States v. AT&T, Inc., 310 F. Supp. 3d 161, 198–99 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

E. *Make Sure Your Expert is Battle-Ready*

Another lesson clearly taught by these cases is that where the government's case rests largely upon its expert's analysis, the expert better be ready to defend that analysis. In *Sprint/T-Mobile*, the experts battled to a draw.[70] But as seen in *Sabre/Farelogix* and *AT&T/Time-Warner*, the government's experts experienced significant blows to their credibility which reverberated throughout the courts' assessment of the transactions' likely competitive effects. In *Sabre/Farelogix*, Judge Stark observed that "[DOJ] based its case on the expert analysis of Dr. Nevo, but that analysis—including Dr. Nevo's explanation and defense of it—was simply unpersuasive."[71] In *AT&T/Time Warner*, Judge Leon devoted many pages to charting the deficiencies in the government's economic model, concluding that its lack of reliability and factual credibility resulted in a "fail[ure] to generate probative predictions of future harm."[72] The shortcomings in the modeling were only amplified by the government expert's seeming lack of familiarity with the materials he had presented to the court.[73] And while Judge Kelly did not offer as harsh a critique of the FTC's expert in *Evonik/Peroxychem*, he did point out that expert modeling that rests on flawed relevant markets is of "little use."[74]

F. *Take the Parties' "Fixes" Seriously*

These four decisions also reflect the government plaintiffs' failure adequately to account for steps the merging parties had taken to remedy concerns and/or prove the *bona fides* of their deals. In both *T-Mobile/Sprint* and *Evonik/Peroxychem*, the parties had negotiated divestitures with other government agencies: in the case of *T-Mobile/Sprint*, it was a proposed divestiture to DISH Corporation that had been negotiated with the DOJ and the FCC, and in *Evonik/Peroxychem*, the parties' agreement to divest a plant in Canada was approved in a

---

70. New York v. Deutsche Telekom AG*,* 439 F. Supp. 3d 179, 187 (S.D.N.Y. 2020) (footnote omitted) ("[T]he parties' costly and conflicting engineering, economic, and scholarly business models, along with the incompatible visions of the competitive future their experts' shades-of-gray forecasts portray, essentially cancel each other out as helpful evidence the Court could comfortably endorse as decidedly affirming one side rather than the other.").

71. *Sabre Corp.*, 452 F. Supp. 3d at 148–49.

72. *AT&T*, 310 F. Supp. 3d at 241 (citing United States v. Anthem, Inc., 855 F.3d 345, 363 (D.C. Cir. 2017)).

73. *Id.* at 231 & n.41 ("Professor Shapiro's lack of familiarity with the contents of his report and with his own data analysis presents a credibility problem . . . .").

74. FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 319 (D.D.C. 2020) ("A quantitative analysis of the unilateral effects, like market concentration, is impossible without data reflecting a properly defined relevant market, bounded by both product and geography. . . . Because the Court has found the FTC's proposed product and geographic markets wanting, Dr. Rothman's models are of little use to the FTC in showing likely unilateral effects of the merger.")

Consent Agreement with the Canadian Competition Bureau.[75] In both cases, the courts found that the divestitures and associated commitments played a significant role in addressing the transaction's potential competitive effects.[76] Indeed, Judge Kelly in *Evonik/Peroxychem* observed that the plant divestiture, agreed to "[w]ithin days of the FTC moving for a preliminary injunction," had "[thrown] a wrench in the FTC's argument that [the] merger will substantially lessen competition in its proposed Pacific Northwest geographic market."[77] And Judge Marrero was persuaded that "the FCC and DOJ remedies, and particularly those designed to ensure that DISH becomes an aggressive fourth national MNO, significantly reduce the concerns and persuasive force of Plaintiff States' market share statistics."[78]

While the parties in *AT&T/Time-Warner* and *Sabre/Farelogix* had no formal remedies in play, the court in each case nevertheless recognized the parties' informal efforts to ensure that the merger would not have the claimed competitive effects. In *AT&T/Time-Warner*, a week before the government filed its complaint, the acquisition target had sent out binding offers of baseball arbitration to its distributors, pursuant to which service would continue to be provided during the pendency of the arbitration.[79] The government argued that this arbitration commitment should be ignored, or, at the very least be proven binding and effective by the defendants, but Judge Leon disagreed as he had "confidence that Turner's arbitration offer [would] have real-world effect."[80] Importantly, Judge Leon explicitly disagreed with the government's efforts to impugn the reasons for and timing of the offer. Specifically, he "[declined to] view the offer as akin to an admission by defendants that the proposed merger would lead to the anticompetitive harms that the Government posits," crediting executives' testimony that the commitment was intended to show that the proposed merger was a "vision deal" being pursued to achieve lower prices, improved quality, enhanced service, and new products.[81] Similarly, in *Sabre/Farelogix*, Sabre's CEO had made public commitments around FLX OC, including that Sabre would continue offering FLX OC to airlines at their current or better prices post-merger.[82] Judge Stark "believe[d] that Menke intends to abide by the commitments

75. *Deutsche Telekom*, 439 F. Supp. 3d at 197–98; *RAG-Stiftung*, 426 F. Supp. 3d at 305 & n.19, 308.

76. *Deutsche Telekom*, 439 F. Supp. 3d at 224–33; *RAG-Stiftung*, 426 F. Supp. 3d at 308.

77. *RAG-Stiftung*, 426 F. Supp. 3d at 304.

78. *Deutsche Telekom*, 439 F. Supp. 3d at 233.

79. United States v. AT&T, Inc., 310 F. Supp. 3d 161, 184, 217 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

80. *Id.* at 184, 218 n.30; *see also id.* at 241 & n.51.

81. *Id.* at 241 & n.51.

82. United States v. Sabre Corp., 452 F. Supp. 3d 97, 131–32 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. 2020).

he has expressed to customers and the market," and cited these commitments as supporting his conclusion that DOJ had failed to prove that Sabre would eliminate FLX OC or raise prices after the merger.[83]

G. *Merely Calling it a "Defense" Doesn't Make it So*

A final observation is that in several of these cases, the court rejected the government plaintiff's effort to cast defense arguments as standalone defenses on which the defendants bore the ultimate burden of proof, rather than as rebuttal evidence to be weighed in the overall competitive effects analysis.

This was most apparent in *T-Mobile/Sprint*, where the plaintiffs sought to portray the parties' claimed efficiencies as an impermissible defense to a presumptively anticompetitive deal and throughout the litigation had treated arguments about Sprint's future competitive significance as a standalone "failing firm" defense. With respect to efficiencies, Judge Marrero observed that "[t]he trend among lower courts has . . . been to recognize or at least assume that evidence of efficiencies may rebut the presumption that a merger's effects will be anticompetitive, even if such evidence could not be used as a defense to an actually anticompetitive merger."[84] With regard to Sprint's competitive significance, Judge Marrero accepted that "[e]vidence that a merging party is a 'weakened competitor' that cannot compete effectively in the future may serve to rebut a presumption that the merger would have anticompetitive effects," and found Sprint to "fall[] squarely within the framework for a weakened competitor established by *General Dynamics*, 'facing the future with relatively depleted resources at its disposal.'"[85] Together with efficiencies, this conclusion "strengthen[ed] Defendants' case that Plaintiff[s'] . . . market share statistics do not accurately reflect the Proposed Merger's likely effects on competition."[86]

Similarly, Judge Stark in *Sabre/Farelogix* appears implicitly to have considered the defendants' efficiencies-related evidence as part of his competitive effects analysis, also without accepting the DOJ's effort to characterize it as a defense.[87] For example, Judge Stark recognized that

---

83. *Id.* at 132, 145.

84. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020) (citing Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015) and FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054–55 (8th Cir. 1999)).

85. *Id.* at 217, 224 (quoting United States v. Gen. Dynamics Corp., 415 U.S. 486, 501–04 (1974)).

86. *Id.* at 224.

87. *See, e.g.*, Plaintiff's Post-Trial Brief (Public Redacted Version) at 43–44, United States v. Sabre Corp., No. 1:19-cv-01548 (D. Del. Feb. 20, 2020), ECF No. 243.

Sabre intended to integrate FLX OC into the Sabre GDS platform, allowing Sabre "to better meet the demands of airlines and travel agencies,"[88] which mirrored the defendants' argument that the merger would allow Sabre to build a "better mousetrap."[89]

III. WHERE DOES THIS LEAVE US?

Despite the diversity in enforcers, judges, and industries involved in these four government merger litigation losses, the number of cross-cutting themes in these cases is quite surprising. After many years of DOJ and FTC victories,[90] these losses make clear that merely establishing a presumption of likely anticompetitive effects does not guarantee a government plaintiff a litigation victory, and that the government's cases faltered on an inability to muster the evidence needed to support a prima facie case. These decisions also emphasize the importance of allocating burdens under the *Baker Hughes* framework, as well as a recognition that Section 7's "totality of the circumstances" approach to competitive effects requires courts to take a comprehensive view of the marketplace and how it will likely develop with and without the merger.

From a litigation strategy perspective, these four cases additionally teach (unsurprisingly) that new or unorthodox theories of harm must still be supported by sufficient facts and by the law. They also reflect the (perhaps obvious) conclusion that where a case is heavily reliant on

> At closing, Defense counsel explicitly disclaimed any efficiencies defense, . . . and then proceeded to repeat an argument that sounded a lot like an efficiencies defense[.] . . . If Defendants were trying to make an efficiencies defense, they would have the burden of showing that anticompetitive effects of the merger would be offset by 'extraordinary efficiencies' resulting from the merger. . . . Efficiencies must be merger-specific, verifiable, and 'must not arise from anticompetitive reductions in output or service.' Here, Defendants failed to produce any specific, verifiable evidence of efficiencies from this transaction.

Id. (quoting FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347, 348–49 (3d Cir. 2016))).

88. United States v. Sabre Corp., 452 F. Supp. 3d 97, 146–47 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. 2020).

89. Plaintiff's Post-Trial Brief (Public Redacted Version) at 43, *Sabre Corp.*, No. 1:19-cv-01548, ECF No. 243 (quoting the transcript of defendants' closing argument).

90. *See, e.g.*, Jonathan M. Barnett et al., *Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the H. Judiciary Comm. on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets* 7 (May 15, 2020), https://laweconcenter.org/wp-content/uploads/2020/05/house_joint_antitrust_letter_20200514.pdf [https://perma.cc/5LG8-AAA6] ("[T]he DOJ and FTC have lost only a handful of cases. Until the FTC's loss in *Evonik/PeroxyChem* earlier this year, it had not lost a merger challenge since 2015 (*Steris/Synergy Health*), and the most recent loss prior to that was in 2011 (*LabCorp/Westcliff Medical*). Similarly, the DOJ has lost only two merger litigations in the last 10 years (*AT&T/Time Warner* and *Sabre/Farelogix*).").

expert testimony, that expert testimony must be credible. These cases further teach that government plaintiffs cannot simply ignore or discount the parties' efforts to "put their money where their mouth is" in making commitments to the marketplace about post-merger conduct. Nor can government plaintiffs expect to put the merging parties' efficiencies or weakened competitor evidence beyond the purview of the court's competitive effects analysis simply by labeling it a "defense."

Whether this trend of government merger litigation losses will continue remains to be seen. However, *Sabre/Farelogix* and the other three cases discussed in this Article present valuable lessons for both government plaintiffs and the merging parties in future merger challenges.