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THE LIMITATIONS AND IMPLICATIONS OF A NASCENT COMPANY ACQUISITION

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Introduction

Vertical mergers are useful tools to expand a firm's range of business and benefit consumers. But not all vertical mergers are benign. For example, a dominant firm may acquire a company developing an emerging technology (also called a "nascent company"). The technology that these companies are developing will either expand or add to the dominant firm's existing business. However, the now-combined firms displace competitors in the market by raising barriers to entry.

The United States antitrust enforcement agencies have tried to curb these vertical mergers that may harm competition. Despite the government's efforts, enforcement is difficult for two reasons: (1) there can be benefits to consumers when a dominant firm acquires a nascent company, and (2) when a dominant firm acquires a nascent company, it is difficult for judges to view one company as a future competitor to another if the former is in its infancy. When an antitrust case involves a future, infant competitor, it falls under the doctrine of actual potential competition. Judges determine the "reasonable probability of harm" in such cases based on three factors. One factor is that the nascent competitor has both the incentive and the ability to enter the market. Another factor is whether the nascent company's entry will result in a procompetitive effect. This paper assumes that these two conditions are met. The final factor is whether the dominant firm will face competition in the "near future." "Near future" means that a nascent company's entry into the market is imminent. A nascent company's potential entry is usually not imminent, though.

This paper considers how antitrust law should treat a dominant firm's acquisition of a nascent company. The paper concludes that judges apply too narrow a framework for a nascent company's time-to-market entry. Instead, when a company is not going to enter the market in the "near future" judges should use a test that considers whether: (1) competitors to the nascent company have received third-party venture financing; (2) these competitors have developed an operational business plan with steps for implementation; (3) the dominant firm has the financial and personnel resources to independently enter the market; and (4) the dominant firm is incentivized to enter the market because it will immediately be profitable. This procompetitive approach will account for companies at various growth stages. Judges should not draw a firm line at the "near future." The current standard cripples future competition.

Part I examines the current and historical antitrust landscape that led to the "near future" standard. Part II applies these laws to three recent vertical mergers involving nascent companies: Visa's aborted acquisition of Plaid; Meta's acquisition of Within; and Illumina's purchase of Grail. Finally, Part III proposes the new rule because of the limitations of the "near future" standard.

I. A Brief History of the Antitrust Landscape

A. *The Origin of Antitrust Concerns*

Trusts and corporate concentration came into greater political focus in the late 1800s. Indeed, "there was growing political pressure" to do something about the rapid social and economic changes of the time.[1] While "[s]tate corporate law complemented common law competition policy and provided regulatory content governing corporate behavior . . . its remedies proved difficult to deploy."[2] Trustbusters needed federal legislation, adopted through Congress's interstate commerce powers.[3]

Congress therefore passed the Sherman Antitrust Act. This statute used "common law" language.[4] The Sherman Act represented only a modest change to public policy since "the common-law opposition to restraints of trade, and to monopolies . . . was part of [the country's] English heritage."[5] The Act marshaled these common law rules and included provisions for damages rather than treating "restrictive contracts as simply unenforceable."[6] Practically speaking, Sections 1 and 2 of the Sherman Act both civilly and criminally prohibit "every contract, combination in the form of trust or otherwise, or conspiracy

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1. Wayne Dale Collins, *Trusts and the Origins of Antitrust Legislation*, 81 Fordham L. Rev. 2279, 2334 (2013).
2. Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* (Harv. Bus. Sch., Working Paper No. 19-110, 2019), https://www.hbs.edu/ris/Publication Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf.
3. *Id.*
4. *Id.*
5. George J. Stigler, *The Origins of the Sherman* Act, 14 J. Leg. Stud. 1, 7 (1985).
6. *Id.*

in restraint of trade" and "monopolization" respectively.[7] The Sherman Act recognized that "output is at a maximum under competition" and so sought to promote "rule[s] commanding competition."[8]

But the Sherman Act is not the lone piece of antitrust legislation. Congress also enacted the Clayton Act of 1914. This law has since undergone three major revisions, but the core of the law remains intact.[9] The Clayton Act addresses areas such as mergers which "the Sherman Act does not clearly" deal with.[10] The Clayton Act "views mergers among firms of any size in an explicitly suspicious way."[11] Both the Federal Trade Commission and the Department of Justice are authorized to enforce the Clayton Act.[12] Section 7 of the Clayton Act prohibits both mergers and acquisitions for which the effect "may be substantially to lessen competition, or to tend to create a monopoly."[13] Implicitly, the "may be" language requires courts to consider the effects of these mergers or acquisitions—before they go into effect. At its core, the Clayton Act provides "the power to brake [the] force [of concentration] at its outset and before it gather[s] momentum."[14]

The interpretation and application of these laws have varied greatly with time. These multiple approaches have to do with the broad generalities the statutes contain. For example, "the problem of congressional intent—and thus the scope and precise nature of the Sherman Act—has been a perennial issue."[15] Some have taken the statutes' language to promote strict antitrust enforcement. More recent measures reflect a desire to limit concentration at its outset. These modern approaches have historical roots. Following the passage of these laws, several Supreme Court cases left lasting impacts. *Standard*

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7. Sherman Antitrust Act, 15 U.S.C. §§ 1–2.

8. Stigler, *supra* note 5, at 4.

9. Alden F. Abbott, *U.S. Antitrust Laws: A Primer*, MERCATUS CENTER (Mar. 21, 2021), https://www.mercatus.org/research/policy-briefs/us-antitrust-laws-primer; *see also* Sawyer, *supra* note 2.

10. *Id.*

11. Peter C. Carstensen, *The* Philadelphia National Bank *Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L. J. 219, 220 (2015).

12. *See* Abbott, *supra* note 9; *see also* FED. TRADE COMM'N, THE ENFORCERS, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers (last visited Sept. 8, 2023).

13. Clayton Act, 15 U.S.C. §18.

14. Brown Shoe Co. v. United States, 370 U.S. 294, 317–18 (1962).

15. Sawyer, *supra* note 2.

Oil is perhaps the best-known case from this era.[16] Here, the Court examined a dominant firm's conduct and ruled that it violated the Sherman Act. *Standard Oil* set the precedent of "[using] high market shares as proxies for monopoly power." *United States v. Grinnell* has been the most frequently cited standard for Section 2 violations.[17] The Court explained that illegal monopolization contains two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[18]

The Supreme Court had also once encouraged strict enforcement under the Clayton Act. Take the *Brown Shoe* decision: here the Court wrote that "[t]he market share which companies may control by merging is one of the most important factors to be considered when determining the *probable effects of the combination* on effective competition in the relevant market" (emphasis added).[19] *Brown Shoe* also outlined the "practical indicia" to determine a submarket. The practical indicia are: (1) "industry or public recognition of the submarket as a separate economic entity," (2) the "product's peculiar characteristics and uses," (3) "unique production facilities," (4) "distinct customers," (5) "distinct prices," (6) "sensitivity to price changes," and (7) "specialized vendors."[20]

Brown Shoe's majority opinion extends from the Court's holding in *du Pont*. In *du Pont*, the Court wrote that a violation of §7 occurs when "at the time of the suit, there is *a reasonable probability* that the acquisition is likely to result in the condemned restraints."[21] The Court's Clayton Act jurisprudence even contained shades of its Sherman Act opinions. In *Philadelphia National Bank*, for example, the Court held that a merger that would lead to greater concentration in a market violated §7 absent evidence that it would not have anticompetitive effects.[22]

16. William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. of Econ. Persp. 43, 45 (2000).
17. Abbott, *supra* note 9.
18. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).
19. Brown Shoe Co. v. United States, 370 U.S. 294, 343 (1962).
20. *Id.* at 325.
21. United States v. du Pont & Co., 353 U.S. 586, 607 (1957).
22. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).

The Court favored a presumption of illegality but left room for judicial rulings on a "case-by-case" basis.[23]

Enforcement in the last fifty years has abandoned this pro-enforcement epoch. This is due, in part, to scholars arguing against the far-reaching use of these laws as an appropriate means of enforcement. Now-judge Frank Easterbrook explained that a presumption towards illegality overlooked the "competitive benefits in practices that once were thought uniformly pernicious."[24] Easterbrook also argued against presuming illegality for certain categories of conduct since "[i]t assumes that judges can tap a fount of economic knowledge that does not exist, and it disregards the costs of judicial decision-making."[25] Instead, market forces act as a more predictable, cost-efficient enforcement mechanism. In Easterbrook's own words: "[w]isdom lags far behind the market."[26]

Easterbrook's comments echo Robert Bork's analysis from a few decades earlier. Bork argued that the aim of the Sherman Act was economic efficiency and the welfare of consumers.[27] Bork explained the consumer welfare standard in *The Goals of Antitrust Policy*.[28] Bork wrote that "under existing antitrust statutes the courts may properly implement a variety of mutually inconsistent goals, most notably the goals of consumer welfare and small business welfare."[29] Bork proclaimed that "an exclusive adherence to a consumer welfare test is the only legitimate policy for the Supreme Court under present statutes."[30] A close approximation of "consumer welfare" means that courts should consider the "aggregate welfare of consumers as consumers, disregarding the welfare of producers."[31]

23. *See* Carstensen, *supra* note 11, at 239.
24. Frank H. Easterbrook, *Limits of Antitrust*, 63 Texas L. Rev. 1, 10 (1984).
25. *Id.* at 39.
26. *Id.* at 5.
27. Robert H. Bork, *The Goals of Antitrust Policy*, 57 Am. Econ. Rev. 242, 245 (1967).
28. *Id.* at 242.
29. *Id.*
30. *Id.* at 243.
31. Herbert Hovenkamp, *On the Meaning of Antitrust's Consumer Welfare Principle*, Revue Concurrentialiste (Jan. 17, 2020), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3154&context=faculty_scholarship.

Easterbrook and Bork sought to define harm "in terms as narrow as possible."[32] Acolytes of the so-called Chicago School favor "efficiency explanations" for many things.[33] These scholars "[focus] on behavior that tends toward maximizing output (taking into account quantity, quality, and innovation) in a way that is consistent with sustainable competition."[34] Unlike the Court of an earlier time, a firm's concentration mattered less when compared with the gains that consumers realized.

Bork, Easterbrook, and others' ideas quickly found a favorable audience in the Supreme Court. Starting in the 1970s with *General Dynamics*, the Court held that market concentration data is not dispositive.[35] By the 1980s, the Supreme Court said that predatory pricing "rarely made business sense" since a monopolist had a low probability of recouping "losses incurred through below-cost sales."[36] In short order, "the courts and agencies insisted on proof of specific anticompetitive effects before finding defendants' conduct illegal."[37] Lower court decisions followed in a similar vein. The D.C. Circuit Court of Appeals ruled in *Baker Hughes* "that the defendant's burden of proof in a merger case depends on whether the plaintiff relies solely on market share data or provides further evidence of *likely anti-competitive effect*s" (emphasis added).[38] *Baker Hughes* is atypical since it is a widely accepted circuit court opinion. Indeed, several other circuits have adopted the *Baker Hughes* "burden-shifting" approach including the Second, Sixth, and Eighth.[39]

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32. Eleanor M. Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714, 1715 (1989).
33. Kovacic & Shapiro, *supra* note 16, at 53.
34. Abbott, *supra* note 9, at 8.
35. Kovacic & Shapiro, *supra* note 16, at 51, 54.
36. *Id.* at 55.
37. Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L. J. 345, 351 (2007).
38. Kovacic & Shapiro, *supra* note 16, at 54.
39. *See e.g.*, *In re* AMR Corp., 2023 WL 2563897, at *4–5 (2d Cir. 2023); *see, e.g.*, FTC v. Sanford Health, 926 F.3d 959, 963 (8th Cir. 2019); *see e.g.*, FTC v. Butterworth Health Corp., 1997 U.S. App. LEXIS 17422, at *4–5 (6th Cir. July 8, 1997).

B. *A Startup's "Potential" and its Competitive Effects*

By now, the "consumer welfare" standard is firmly entrenched in the country's jurisprudence.[40] Now courts employ better predictive factors to make determinations about mergers at the time of agreement. The Supreme Court has repeatedly found that "the central point [of] Section 7 [is that it] does not require 'certain' harm, but instead permits courts to use predictive judgment to 'arrest anticompetitive tendencies in their 'incipiency.'"[41] How courts determine these "anticompetitive effects" relates to *du Pont*'s "reasonable probability" standard. Courts use several factors to determine whether there is a "reasonable probability" of harm.[42] One of the ways courts may predict this harm is whether a competitor will enter the market "in the near future."[43] Courts insist that plaintiffs show that entry to the market is imminent to better assess the "reasonable probability" of harm to competition.[44] *Du Pont* also requires that a plaintiff show a reasonable probability of harm.[45] Taken together, it is difficult for a plaintiff to demonstrate how a merger may be illegal.[46]

Plaintiffs still try to challenge vertical mergers. These challenges arise under two theories: "perceived potential competition"[47] and "actual potential competition."[48] There are two prerequisites for analyzing a case under an actual or perceived potential competition theory. First, the market must be concentrated.[49] Second, there must be few potential entrants.[50] There are two other prerequisites to satisfy a claim for actual

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40. *See* Josh Wright, *What is the Worst Antitrust Decision That is Good Law?*, TRUTH ON THE MARKET (July 22, 2008), https://laweconcenter.org/resources/what-is-the-worst-antitrust-decision-that-is-good-law/?doing_wp_cron=1693675130.5399019718170166015625 (follow "View Original Source" hyperlink); *see also* Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L. J. 377, 393 (2015).

41. United States v. AT&T Inc., 310 F. Supp. 3d 161, 189 n.16 (D.D.C. 2018) (citing United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171 (1964)).

42. Am. Bar Ass'n, Antitrust Law Developments 361 n.46 (9th ed. 2022).

43. *Id.* at 368.

44. *Id.* at 399–400.

45. *Id.* at 361 n.46.

46. *Id.* at 399–400.

47. *Id.* at 395.

48. *Id.*

49. *Id.* at 396*; see also* United States v. Marine Bancorporation, 418 U.S. 602, 629 (1974).

50. AM. BAR ASS'N, *supra* note 42, at 396.

potential competition: first, the dominant firm must possess the means to enter the market without an acquisition; second, entering through one of these means would lead to market de-concentration or "other significant procompetitive effects."[51] There are varying standards of proof to determine a reasonable probability of harm based on actual potential competition. The Supreme Court has declined to establish the standards of proof. Lower circuit courts have adopted varying standards of proof. The Second Circuit requires evidence that an already substantially-sized firm (one that would otherwise be considered a "dominant firm" if it were already in the target market, conceivably) "would likely" have entered the market.[52] The Fifth Circuit requires showing of a "reasonable probability" that the dominant firm would have entered the market absent the acquisition.[53] The Eighth Circuit has adopted a reasonable probability standard.[54] Whatever the standard of proof, courts consider the dominant "firm's capabilities, interest, and incentive to enter the market."[55]

An issue arises when determining the "reasonable probability" of harm when a dominant firm acquires a nascent company. While this note does not preclude any issues associated with horizontal mergers, given the stages of the merging parties—startups, in particular—vertical mergers are the exclusive focus here. It is already difficult for plaintiffs to show a reasonable probability of harm in established industries;[56] it is even harder to formulate a harm hypothesis in immature industries. Consider the following hypothetical: a dominant firm, a firm that holds significant market power in its present industry but not the market that the startup operates in, acquires a company developing an artificial intelligence language processor ("A.I."). The A.I. industry is still developing, quite rapidly too.[57]

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51. *Id.* at 398–99.
52. Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982).
53. Mercantile Tex. Corp. v. Bd. of Governors, 638 F.2d 1255, 1268–69 (5th Cir. 1981).
54. Yamaha Motor Co. v. FTC, 672 F.2d 971, 977–79 (8th Cir. 1981).
55. *See* Am. Bar Ass'n, *supra* note 42, at 399–400.
56. United States v. AT&T Inc., 310 F. Supp. 3d 161, 189 (D.D.C. 2018) (citing United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171 (1964)) (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963)).
57. *See, e.g.*, Noam Chomsky, *The False Promise of ChatGPT*, N.Y. Times (Mar. 8, 2023), https://www.nytimes.com/2023/03/08/opinion/noam-chomsky-chatgpt-ai.html.

If a dominant firm acquires this artificial intelligence company, plaintiffs will struggle to show that the acquisition harms competition. Even though courts employ the "near future" rule, it is limited in its reach. Due to a lack of time or financial resources, two companies may not look like competitors at the time of acquisition. Since the companies are at disparate growth stages, there is no obvious reasonable probability of harm. It is possible that in the absence of this acquisition, one company would have competed with the other. But the acquisition raises the barriers to entry insofar as the dominant firm is able to muscle out other A.I companies that may be in their infancy.

The general tilt toward the consumer welfare standard has made it difficult to ascertain harm. The Department of Justice and the Federal Trade Commission have struggled to succeed in numerous cases. This is especially so in cases that implicate "incipiency" arguments. "Incipiency" is a critical factor in developing technology cases. "Incipiency" means that "enforcement should err on the side of preventing possible harmful mergers by leaving at least one or two significant firms."[58] But the term is hard to operationalize. In *U.S. v. AT&T*, Judge Richard Leon "characterized the Justice Department's definition of incipiency as a 'moving target,' vacillating between a requirement to show that the transaction is 'likely' to harm competition and a requirement to show a 'reasonable probability'…of harm to competition."[59] This "moving target" could stem from nascent industries lacking comparable companies. For instance, without a concrete theory of harm—or an adequate test to examine an industry like this—the Justice Department's standard required some cobbling together. Regardless, under either of the government's definitions, the apparent likelihood of harm is low.

II.
Cases

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) have recently pursued three different vertical merger cases. All these cases involve nascent companies. Unsurprisingly, perhaps, the government lost two of these cases.

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58. Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, Wis. L. Rev., 783, 788 (2018).

59. Richard M. Steuer, *Incipiency*, 31 Loy. Consumer L. Rev. 155, 167 (2019).

In 2022, an administrative law judge denied the government's attempt to get an injunction when Illumina tried to acquire Grail. In another case, a district court judge denied an injunction motion when Meta announced its purchase of Within. Both deals were eventually finalized. In a third case, the government moved to block Visa's acquisition of Plaid. This deal was subsequently called off not long after the government announced its investigation. There is no judicial opinion for Visa's case. Still, the government's complaint brings to light many of the issues associated with the acquisitions of developing technologies.

A. *Illumina's Acquisition of Grail*

The government lost its challenge to block a recent deal. Illumina is a biotechnology company.[60] Illumina's principal business is "next-generation sequencing" and "describes itself as 'the global leader'" in this space.[61] About eight years ago, Illumina began to develop a cancer detection test and formed Grail.[62] Illumina provided Grail with seed funding and incorporated Grail as a wholly-owned subsidiary.[63] In 2016, several third-party investors provided Grail with $100 million in Series A financing.[64] By 2017, Illumina "spun off" Grail to reduce its ownership stake to less than 20%.[65] The relationship changed between the two companies too. Once Illumina's stake decreased, the two companies' relationship "became one of vendor and an important customer" (internal quotes omitted).[66] Grail had since raised nearly two billion dollars in financing. It had also "grown to over 400 employees" of varying skill sets and responsibilities.[67] Grail's keystone product is its cancer detection test called Galleri.[68] It is capable of detecting over fifty forms of cancer from a "single blood test."[69] Then, in September 2020, Illumina reached an agreement to acquire

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60. Illumina, Inc., FTC File No. 9401, at 6–7 (F.T.C. Sept. 9, 2022) (initial decision) [hereinafter Illumina Initial Decision], https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.
61. *Id.*
62. *Id.* at 7.
63. *Id.* at 8.
64. *Id.*
65. *Id.* at 10.
66. *Id.* at 11.
67. *Id.*
68. *Id.*
69. *Id.* at 12.

Grail.[70] The Federal Trade Commission filed a complaint on March 30, 2021.[71] The FTC claimed that if the parties consummated the deal it would violate §7 of the Clayton Act.[72] The FTC advanced several arguments to this effect. Principally, the FTC claimed that: Illumina's acquisition of Grail would lessen competition since Illumina is already a dominant player; the acquisition would lead to input foreclosure; and the acquisition would ultimately lead to Illumina concertedly and deliberately lessening competition in the multicancer early detection tests (MCED) test market.[73]

The FTC's own Administrative Law Judge, D. Michael Chappell, ruled against the Commission. There are several critical facets of the case. Virtually all relate to the market for MCEDs. Judge Chappell notes that "the relevant product market" was highly contested. The Commission even attempted to "prove" the MCED market. At the time of acquisition, Grail was the only marketable MCED test. Judge Chappell explained that MCED tests are distinct from other oncology tests.[74] This means that Grail's MCED test is not "interchangeable" with another test. This failed *Brown Shoe*'s "practical indicia" test.[75] The "relevant inquiry is whether there is current . . . competition among the companies engaged in [selling] MCED tests."[76] Judge Chappell tried to demonstrate that there is no such competition. In fact, "companies engaged in the research and development of MCED tests are on varying timelines . . . [so it] cannot be predicted with certainty who will ultimately commercialize a rival test." At best, one of these companies would not launch a product for many years.[77] Moreover, "even if the tests . . . could . . . launch earlier than a 5 to 7-year range," there is nothing to indicate that these products would be "reasonably interchangeable" with Grail's test.[78] Since these companies were all in the "early phase of development," Judge Chappell could

70. *Id.*
71. *Id.* at 1.
72. *Id.*
73. Complaint at 17–23, Illumina, Inc., FTC File No. 9401, https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf.
74. Illumina Initial Decision, *supra* note 60, at 162.
75. *Id.* at 162.
76. *Id.* at 163–64.
77. *Id.* at 142–43, 167.
78. *Id.* at 145.

not say that Grail faced competition in the near future. Absent this competition, then, the FTC's argument was "deprived of its factual premise."[79] Following this ruling, Illumina and Grail consummated their agreement. The FTC voted to overturn Judge Chappell's ruling and ordered the companies to unwind the merger.

There are some facts that Judge Chappell did not consider, though. Grail's market was slightly more complex than the opinion lets on. For one, the MCED market featured other companies. Exact, through Thrive, developed an MCED test. Exact had conducted clinical trials and even "published two . . . peer-reviewed articles." Helio Health was also focused on early detection tests. The FDA had not yet approved Helio's tests. Lastly, Singlera had not yet started clinical trials. At the time Judge Chappell issued his opinion, Singlera was several years away from conducting these trials—let alone getting FDA approval. Granted, these companies were at varying stages of development. These companies were also at various stages of the approval process. But the approval process is key to Illumina's victory. After all, "MCED tests require multi-year, large-scale clinical studies to receive FDA approval."[80] This undertaking alone makes it difficult for a company to enter the near future. If it takes a few years to conduct these studies to just receive approval, then a company cannot enter in the near future. Again, "near future" implies imminence. Putting aside the differing growth stages, these companies were not given a basic opportunity to try to compete. It is impossible to even enter the market without this approval process. Now, it is likely Illumina's acquisition will prevent a company from "leap frogging" the technology that Grail developed. Grail was not only further ahead in the approval process, Grail's MCED test now has access to Illumina's resources (research and development as well as financial).

B. *Meta's Acquisition of Within*

The government also recently lost its case challenging Meta's Acquisition of Within. Meta is a near-ubiquitous company. The company operates "a collection of social networking

79. *Id.* at 193.
80. *Id.* at 145.

platforms" including Facebook, Instagram, and WhatsApp.[81] Recently, the company has moved into developing a virtual reality platform.[82] Meta also manufactures virtual reality headsets and devices through an internal division.[83] But, Meta sought to broaden its scope of available virtual reality applications. Mark Zuckerberg, the chief executive officer of Meta, had expressed interest in acquiring Within in early 2021.[84] Within's "flagship product" is a subscription virtual reality fitness platform called Supernatural.[85] In the spring of that year, Meta executives met to discuss investment opportunities.[86] Then, in October 2021, Meta and Within signed a merger agreement.[87] The Federal Trade Commission moved to block the deal in the United States District Court for the Northern District of California.[88] Initially, the court granted a review order.[89] The court then granted a second stipulated order that enjoined the possible acquisition until December 31, 2022.[90] Under this order, the FTC filed a motion for a preliminary injunction.[91] An evidentiary hearing followed this injunction motion.[92] A temporary restraining order enjoined the acquisition until January 31, 2023.[93] Judge Edward J. Davila denied the FTC's preliminary injunction order.[94] Meta and Within quickly finalized the deal following this opinion.[95]

Judge Davila's opinion turns on a straightforward application of precedent. Judge Davila begins by outlining that there are threshold questions to determine a Section 7 violation. Citing *Brown Shoe*, Judge Davila writes that "Section 7 deals with neither certainties nor ephemeral possibilities but rather

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81. FTC v. Meta Platforms, Inc., No. 5:22-cv-04325-EJD, 2023 WL 2346238, at *1 (N.D. Cal. 2023).
82. *Id.* at 1–2.
83. *Id.*
84. *Id.* at 5.
85. *Id.* at 2.
86. *Id.* at 5.
87. *Id.* at 7.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 8.
92. *Id.*
93. *Id.*
94. *Id.* at 33.
95. Amanda Silberling, *Meta Acquires Within Despite FTC Concerns*, TechCrunch (Feb. 9, 2023, 9:56 AM), techcrunch.com/2023/02/09/meta-acquires-within-despite-ftc-concerns/.

'probabilities.'"[96] To examine these "probabilities" the "Court must not only consider the effects of future scenarios where the Acquisition occurs and where it is blocked, but it must also gauge the likelihood . . . that the blocked would-be acquirer would enter the relevant market independently."[97]

This raises another point about the relevant market. Up to this point, Meta concentrated on virtual reality devices and a platform. Meta had dedicated neither time nor resources to an application. Judge Davila believed this to be central to undermining the government's claims. Indeed, Judge Davila writes that the "user of a VR dedicated fitness app can exercise in a VR setting." The distinction between the two is "indicative of a submarket."[98] This means that Meta had to have entered a submarket within the virtual reality market. On this point, there is no doubt to the Court that Meta could have independently entered the market *de novo*.[99] But Meta's financial and personnel resources "alone are insufficient to conclude that it was 'reasonably probable'" that Meta would try to develop a fitness application.[100] As Judge Davila explains, while Meta already has "an abundance of VR personnel on hand," Meta simultaneously "lacks the capability to create fitness and workout content."[101] There needed to be more facts aimed at the reasonable probability of market entry. Instead, "the FTC [rested its case on the] evidence of Meta's considerable resources and the company's clear zeal for the VR dedicated fitness app market as a whole."[102] Resources did not "show that Meta had *some* feasible and reasonably probable path to *de novo* entry."[103] Judge Davila concluded by stating that the "objective evidence does not support a reasonable probability that firms in the relevant market perceived Meta as a potential entrant."[104] The Section 7 claim failed.

As with Illumina, there are other factors that the court did not consider. Judge Davila did not consider the fact that Meta's personnel cache allows them to develop its own apps. Even still,

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96. *See Meta Platforms, Inc.*, 2023 WL 2346238, at *22.
97. *Id.*
98. *Id.* at 11.
99. *Id.* at 23.
100. *Id.*
101. *Id.*
102. *Id.* at 28.
103. *Id.*
104. *Id.* at 33.

Judge Davila claims that Meta's "engineering manpower [is] counterbalanced by its necessary reliance on external fitness companies or experts to provide the actual workout content and a production studio for filming and post-production."[105] Meta conceded that it "does not take a large team or substantial resources to make a successful VR app."[106] The court even "made a detailed analysis of all the ways that Meta might have entered on its own."[107] The court did not apply a standard that the "market will find a way" for Meta to implement one of these possible means of market entry.[108] It was also conceivably profitable for Meta to acquire Within. The court does not consider the immediate profits that Meta may reap from its acquisition of Within. That this market is immediately profitable is reason to believe that Meta would have entered the market de novo absent this acquisition. The court acknowledges that there are "certainly some incentives for Meta to enter the market de novo."[109] But "it is not clear that Meta . . . would [have] . . . buil[t] its own dedicated fitness app."[110] This does not square with Meta's apparent enthusiasm for the market itself. At the time the court issued its opinion, Meta had spent $12.4 billion on virtual reality applications.[111] Meta's want for a virtual reality application speaks to the profitability of the industry. Given Meta's financial might, the company could have entered a profitable market without an acquisition. It was just more expedient to acquire Within.

C. *Visa's Attempted Acquisition of Plaid*

Visa is the United States' foremost debit card company. According to the Department of Justice, Visa represents about 70% of all online debit transactions.[112] In 2019, Visa's 500 hundred million debit cards produced forty-three billion

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105. *Id.* at 25.
106. *Id.* at 23.
107. Herbert Hovenkamp, *Reclaiming the Antitrust Law of Potential Competition Mergers*, ProMarket (Feb. 27, 2023), https://www.promarket.org/2023/02/27/reclaiming-the-antitrust-law-of-potential-competition-mergers/.
108. Illumina Initial Decision, *supra* note 60.
109. *Id.*
110. *Id.* at 83.
111. *Id.* at 72.
112. Complaint at 2, United States v. Visa, Inc., 3:20-cv-07810 (N.D. Cal. 2020).

transactions, ten billion of which occurred online.[113] Plaid is a payment processor. Plaid's network includes more than 200 hundred million consumer bank accounts.[114] Plaid's technology works by directly accessing consumers' bank accounts.[115] Plaid links these bank accounts with other apps including Venmo and Acorns.[116] Plaid does not directly compete with Visa.[117] On January 13, 2020, Visa agreed to purchase Plaid for more than five billion dollars.[118] Visa's chief executive officer said the move was "strategic, not financial."[119] The Department of Justice moved to block Visa's deal with Plaid. The case did not go to trial. Visa did not ultimately acquire Plaid.

The Justice Department grounded its complaint in the idea that Plaid could eventually compete with Visa. Plaid even stated that it intended to "become a 'formidable competitor to Visa and Mastercard.'"[120] This would "[chip] away at Visa's monopoly" but lead to "substantial savings [for] merchants and consumers."[121] Plaid's "nascent technology would allow merchants to shift transactions easily from traditional forms of online debit to Plaid's pay-by-bank debit service."[122] Visa viewed Plaid as a unique threat.[123] Visa has a historical practice of eliminating such threats with "lucrative partnerships."[124] The Justice Department alleged that Visa's proposed deal would result in higher fees for merchants and consumers.[125] The government also alleged that the deal would lead to less innovation and higher barriers to entry.[126] These are somewhat related stances. For the former, Plaid's threat incentivizes Visa to "degrade" or altogether "shelve" Plaid's technology.[127] Similarly, Visa "has a strong incentive to . . . suppress [the entry] by prospective

113. *Id.* at 2.
114. *Id.* at 3.
115. *Id.*
116. *Id.*
117. *Id.* at 5.
118. *Id.*
119. *Id.*
120. *Id.* at 4.
121. *Id.*
122. *Id.* at 13.
123. *Id.*
124. *Id.* at 14.
125. *Id.* at 10.
126. *Id.* at 18.
127. *Id.*

rivals."[128] By acquiring Plaid, Visa "could take steps to partner with, buy out, or otherwise disadvantage . . . competitors."[129] Plaid's position within the market would give Visa unique ready access to technological developments. Visa could ultimately "insulate itself from competition."[130]

As with the two other cases, the Justice Department tried to prevent a dominant firm from "eliminating a potential disrupter to the entire ecosystem that could eventually supplant the dominant company."[131] Insofar as Visa abandoned the deal, the Justice Department was successful. The government's arguments also highlight issues related to nascent technology. First, the acquirer is a dominant firm. Visa controls a sizable, near-monopoly share of all debit transactions. Second, the nascent company has the potential to disrupt the dominant firm's position. Though Plaid was not a competitor at the time of the acquisition it could have become one. Plaid had already established a vast network of accounts. Third, the nascent company has already received and developed a business plan. Plaid "seemed to meet the necessary conditions to escape the cold start that commonly hinders entry."[132] Fourth, the dominant firm has the resources and manpower to develop the technology. While the primary concern of this case was a question of whether Plaid could develop a rival to Visa, a reverse scenario is also at issue: Visa controls vast swaths of the debit transaction market and could have conceivably developed a processor that rivaled Plaid's. Fifth, both Plaid and Visa demonstrate that the market is immediately profitable. Visa had reasons to enter this market independent of a more defensive approach. While the relevant market in the case referred to Visa's debit card market, Visa's acquisition of Plaid allowed Visa to cobble up space in the nascent technology market too. These facts help to explain some of the issues associated with the acquisition of a nascent technology.

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128. *Id.* at 19.
129. *Id.*
130. *Id.*
131. Frédéric Marty & Thierry Warin, *Visa Acquiring Plaid: A Tartan over a Killer Acquisition?*, Center for Interuniversity Research and Analysis on Organizations 1, 4 (2020), https://cirano.qc.ca/files/publications/2020s-62.pdf.
132. *Id.* at 12.

III.
A New Rule

All three of these cases explain the shortcomings of the precedents, like *du Pont*, discussed earlier. Even Visa's case is hindered by precedent. The case did not go to trial because Visa abandoned the deal. This may be an encouraging sign—perhaps the Justice Department advanced strong arguments. But, more likely is the fact that Visa backed out of the agreement because Visa would have to answer the government's allegations that it "used threats and exclusive deals to undermine competitors."[133] Precedent, namely *du Pont* and *Marine Bancorporation*, appears to be on Visa's side. If anything, this merger is welfare enhancing. Visa chairman Al Kelly said that "the acquisition, combined with [Visa's] many fintech efforts already underway, will position Visa to deliver even more value for developers, financial institutions and consumers."[134] A new rule is necessary for nascent company acquisitions. Courts should deploy this rule when a competitor would not otherwise enter the market in the near future. The rule considers whether: (1) competitors to the nascent company have received third-party venture financing; (2) these competitors have developed an operational business plan with steps for implementation; (3) the dominant firm has the financial and personnel resources to independently enter the market; and (4) the dominant firm is incentivized to enter the market because it will immediately be profitable. An acquisition must feature all four components to violate the Clayton or Sherman Acts. This rule adheres to consumer welfare principles. This rule also uses objective measures to predict a company's ability to enter the market. The rule also examines a dominant firm's independent ability to enter a market and why it may do so.

A. *Competitors to the Nascent Company Have Received Third-Party Venture Financing*

The first element of this new rule is that the competitors to the nascent company have received third-party venturing

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133. Victoria Graham, *DOJ Suit over Visa, Plaid Deal Sounds a Lot Like a Monopoly Case*, Bloomberg Law (Nov. 10, 2020), https://news.bloomberg law.com/antitrust/doj-suit-over-visa-plaid-deal-sounds-a-lot-like-a-monopoly-case.

134. *Visa to Acquire Plaid*, Visa USA (Jan. 13, 2020), https://usa.visa.com / about-visa/newsroom/press-releases.releaseId.16856.html.

financing. Judge Chappell did not address the venture financing in the Illumina case. While Grail was the dominant player in the MCED test market, Helio was not far behind in its development. Helio and Grail's other competitors had all received venture financing. Both firms and individuals may provide venture financing. If a nascent company received venture financing, then it speaks to the promise of the technology. Investors expect returns on their investments. Venture capital commitments may be, and often are, substantial. Grail, for example, had received more than $100 million in financing. Companies fail despite venture financing. But venture financing speaks to the nascent company's potential and of the market itself. Companies need not publicly disclose specific information—how much funding the venture financers have provided or even who the venture financers are; courts may redact this sort of information in opinions and view it *in camera*.

Let's return to the A.I. hypothetical from Section II. A dominant firm that does not have an A.I. division has reached an agreement to acquire A.I. Company X. Company X is already in the A.I. market. Two other companies, Y and Z, have both received venture financing—but are not at a growth stage capable of entering the market for five years. Companies Y and Z's entries are not "imminent" then. Nor are Companies Y and Z's entries into the market now "probable" in the event the acquisition is legal. Absent the acquisition, Companies Y and Z would have had greater room to grow; however, because of the acquisition, the market is deprived of this competitive benefit. Any one company receiving venture financing is not an indication that it will "probably" enter the market. But if several companies receive venture financing, it increases the likelihood that one of them will eventually reach the market. That's why the rule is "competitors" not "competitor." The likelihood that one of several companies that received venture financing will enter the market is collectively high. When a merger is consummated, this probability effectively becomes zero because the acquirer may marshal its established brand, resources, and employees to crush smaller players.

Independently, venture financing is an indication of a nascent company's "promise." In conjunction with the other elements, venture financing undercuts near future's "imminence" requirement. A company that has met the other criteria and has received venture financing may nevertheless be far off from entering the market. Capital commitments demonstrate a

desire for more companies to enter a market. A company would have entered the market, but for the acquisition of a nascent company competitor. Venture financing could indicate there is a reasonable probability of harm. Venture financing does not alone increase that probability though.

B. *Competitors to the Nascent Company Have Developed an Operational Business Plan with Steps for Implementation*

The second element of this rule is that the competitors to the nascent company have developed an operational business plan with steps for implementation. Grail's competitors received venture financing. Grail's competitors also had business plans. Many of them professed a desire to enter the market at various times. The business plan also provided steps for how these competitors to Grail intended to enter the market. There are no named competitors to Plaid. However, Stripe has now taken steps to "[position] the company directly against Plaid."[135] Developing a business shows a commitment to the product. A business plan demonstrates a desire to see a business and idea through. Both are indicative of a want to eventually enter the market.

The A.I. hypothetical helps illustrate this point. Once again, there are three A.I. companies: X, Y, and Z. A dominant firm that is not currently in the A.I. space acquires X. Y and Z are not close to entering the market. They have developed business plans with steps for implementing them. Companies Y and Z are planning to enter the market in five to seven years. Companies Y and Z demonstrate this through their business plan. A business plan does not confer any special status on these companies. Plenty of companies can develop a business plan—even on the back of a proverbial napkin. But per the other element of this new rule, these companies have also received venture financing. These elements increase the probability that one company will enter the market. One of these companies entering the market will contribute to the market's de-concentration or provide another procompetitive effect.

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135. Mary Ann Azevedo, *From Partners to Competitors: What Stripe's Latest Move Means for Plaid*, TechCrunch (May 4, 2022), https://techcrunch.com/2022/05/04/from-partners-to-competitors-what-stripes-latest-move-means-for-plaid/#:~:text=Interestingly%2C%20Stripe's%20new%20product%20is,Plaid%20competitors%20MX%20and%20Finicity.

Standing alone, a business plan with steps for implementation shows commitment. Along with the other elements of this proposed rule, a business plan with steps for implementation shows that a company wants to enter the market. This company is committed to entry. Based on various circumstances—from the founding of the company to bureaucratic approval—a company may not enter the market in "the near future." But a business plan with steps for implementation shows that the company will try to enter the market at some point. When a dominant firm purchases a nascent company, this forecloses the market to competitors.

C. *The Dominant Firm has the Financial and Personnel Resources to Independently Enter the Market*

The third element is that the dominant firm has the financial and personnel resources to independently enter the market. Meta is the prototypical example here. Meta had a vast engineering team and finances in reserve. Meta still chose to acquire Within rather than devote its own resources. Meta still could have developed a rival product to Within. It could have come with a significant opportunity cost. Visa also has tremendous financial resources. Visa is a dominant firm, with nearly 70% market share, in the debit card industry. Visa is a dominant firm in online transactions too. An issue with the "near future" standard is that it excuses expedience. To create a rival product, Meta would have had to dedicate time, money, and personnel. Visa would have had to also change its course of business. Neither company may have entered the market for many years. Within or Plaid could have continued to develop in this time. Other competitors may have entered the market. But Meta and Visa gave themselves a head start.

This would be like a dominant firm acquiring an A.I. language processor and having a language processing team in place. It has not worked on artificial intelligence yet. The dominant firm has the infrastructure to develop a new team to accommodate this need. Instead, it enters the market through acquisition. The dominant firm meets the first prerequisite of *Marine Bancorporation*: The dominant firm has the feasible means of entry other than through the merger. The dominant firm may enter the artificial language processing market by developing its own team. This will help diversify the choices for consumers. A dominant firm using one of these means will

lead to de-concentration—or at least a procompetitive outcome. Acquiring a nascent company will "deprive . . . rivals [to the nascent company] of a fair opportunity to compete."[136] The nascent A.I. language processing companies will have met the other two elements of this new proposed rule. They may be far off from entering the market. But it is likely that one of them would have entered the market absent the acquisition.

Courts should let the nascent market play out. Courts should try to give competitors more time to enter the market by effectively mandating that a dominant firm try to enter independently. Time is critical given the "swiftly" developing nascent industries.[137] These hypothetical nascent competitors have developed a plan and have received venture financing. It is more likely than not that one of these nascent companies would have come to compete with both the dominant firm and the acquired nascent company. By acquiring the nascent technology, it forecloses the development of other rivals. The entry of an established player creates a kind of unfair competition in which smaller, less funded, or less staffed companies must try to out-muscle corporate Goliath. This deprives the market of a welfare enhancing competitor. The existence of financial and personnel resources shows that a dominant firm can enter the market.

D. *The Dominant Firm is Incentivized to Enter the Market Because It Will Immediately Be Profitable*

The fourth and final element of this rule is that the dominant firm is incentivized to enter the market because it will immediately be profitable. Within charged a monthly membership rate. Plaid also made money based on merchant transactions. Presumably, though the price is not listed, Grail was able to charge for MCED tests. Visa may have sought to purchase Plaid in a defensive move. Visa may have made money because of the transaction (had it gone through). Profitable markets are a signal to other entrepreneurs. More nascent companies may have begun to spring up in due time because of the profit signal. These nascent companies would likely have had to make a business plan and received venture financing. Visa,

136. Brown Shoe Co. v. United States, 370 U.S. 294, 323–24 (1962).

137. Jonathan D. Rockoff, *FTC Rejects Illumina's $7 Billion Deal for Cancer-Test Developer Grail*, Wall St. J., Apr. 4, 2023, at 3.

Meta, and Illumina were all firms that had personnel resources too. A profitable market alone is an indication that a market is desirable. Profitable markets attract business developers. Under *Marine Bancorporation*, "economic incentive" is one of the reasons a dominant firm may enter the market *de novo*.[138]

In connection with the other elements, a profitable market is a signal for companies to enter the market. That entry may not be in the "near future." Still, these budding companies have met two of this proposed rule's criteria and the dominant firm has met the other. A hypothetical nascent company could take steps toward entering the market because it is profitable. The dominant firm trying to enter the market could likewise do so by itself. The dominant firm is trying to enter the market because it will be a profitable merger. A dominant firm's merger with a nascent company may foreclose competitors from entering this profitable market. More companies will be foreclosed when the market is profitable since other companies will want to enter the market. The profits are not illusory. The market is profitable at the time of acquisition. Immediate profits are an incentive. Taken collectively, a profitable market indicates that there is a reasonable probability of harm.

Conclusion

Courts assess the reasonable probability of harm in merger cases. One of the ways that a court finds there is this probability is by examining whether the acquiring firm would face competition in the near future. If a firm would not face such competition, then the merger is legal. Ending the inquiry here ignores significant factors. Instead, if a dominant firm would not face competition in the near future, courts should employ a test to see whether there is still a reasonable probability of harm. This rule promotes welfare enhancing mergers. It is also critical that nascent markets continue to develop. Innovation is a benefit to consumers. This rule calls attention to markets where harm is likely—but unrecognized—under the current framework. Courts can promote both consumer welfare and competition by adopting this rule.

138. United States v. Marine Bancorporation, 418 U.S. 602, 624 (1974).