DRAWING THE LINE: REFINING THE *BAKER HUGHES* BURDEN-SHIFTING FRAMEWORK FOR VERTICAL MERGERS

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Abstract

This Note both analyzes the problems that vertical mergers present in antitrust law and explores solutions to combat the difficulties enforcement agencies and merging entities face during injunctive relief proceedings. This Note was written to edify practitioners in both antitrust law and unrelated specialties. Although the goal of antitrust enforcement is the protection of *competition*, not *competitors*, vertical mergers pose a unique challenge for antitrust practitioners and enforcement agencies when they attempt to persuade a court of the proposed merger's procompetitive and anticompetitive effects. This is because vertical mergers do not inherently result in the elimination of competition. To better understand why some vertical mergers are challenged, this Note engages in a comprehensive exploration of vertical mergers themselves; their history within antitrust law; and their potential for producing economic benefits or harms. This understanding lays the foundation for tackling the overarching problem that appeared in the U.S District Court for the District of Columbia's 2018 opinion of *United States v. AT&T, Inc.*: a lack of specifics on the types of evidence that will satisfy each party's burden under the *Baker Hughes* framework.

To address this problem, this Note investigates the *Baker Hughes* burden-shifting framework used to analyze vertical mergers to find what is both unclear and what can be improved. From there, this Note draws from three burden-shifting frameworks outside of antitrust law to find commonalities with the *Baker Hughes* framework: a novel contribution to vertical merger analysis. These common elements are incorporated into this Note's proposed solutions: detailing the specific evidence that both parties can introduce to satisfy their respective burdens and establishing a definite articulation of the government's burden of persuasion in vertical merger cases as satisfied by a preponderance of the evidence standard. This Note's attempt to fill in the *Baker Hughes* framework's missing gaps will hopefully propel antitrust law forward into a new era

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of vertical merger enforcement that results in more equitable and evenhanded decisions.

INTRODUCTION

In general, mergers are challenged prior to their occurrence; as such, there is no proof that competitive harm has occurred, but there is fear that it might occur.[1] Vertical mergers are mergers "that combine firms or assets at different stages of the same supply chain"[2] for the purpose of

1. Hebert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 610 (2018).

2. U.S. DEP'T OF JUST. & FTC, VERTICAL MERGER GUIDELINES 1 (2020) [hereinafter VERTICAL MERGER GUIDELINES], https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-

harnessing the efficiencies of organized production that emerge from coordination as a single business entity.[3] Factors like higher prices, reduced quality, or reduced output are used to analyze a proposed merger's potential for anticompetitive harm.[4] Vertical mergers are difficult to challenge because they do not inherently result in the elimination of competition.[5] In the majority of challenged merger cases, courts have approved vertical mergers because their "anticompetitive effects are outweighed by potential efficiencies or because there are no anticompetitive effects."[6]

Antitrust law policy is far from optimal because it analyzes proposed mergers that are approved without a record of anticompetitive effects.[7] In the first litigated vertical merger case in forty years,[8] *United States v. AT&T, Inc.*,[9] the burden-shifting framework used to evaluate vertical mergers' predicted harm was applied in an unclear, inconsistent manner that may potentially result in subsequent divergent outcomes.[10] *AT&T, Inc.* is significant for being one of the most recent precedents on vertical mergers and for highlighting the need for a more definite application of

guidelines/vertical_merger_guidelines_6-30-20.pdf [https://perma.cc/6CY2-V3PB]. Examples of vertical mergers include a manufacturer acquiring one of the firms that supplies it with parts, or a retail chain buying the manufacturer of one of the consumer products that it sells. *Id.* at 3, 11; *see also id.* at 1 n.1 (mentioning that "[t]hese Guidelines supersede the extant portions of the Department of Justice's 1984 Merger Guidelines" to reflect the "ongoing accumulation of experience at the Agencies" and that "[t]hese Guidelines may be revised from time to time as necessary . . . to reflect new learning").

3. Brief *Amici Curiae* of 37 Economists, Antitrust Scholars, and Former Government Antitrust Officials in Support of Appellees and Supporting Affirmance at 5, United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019) (No. 18-5214), 2018 WL 4628092, at *5. *See generally* George J. Stigler, *The Division of Labor is Limited by the Extent of the Market*, 59 J. POL. ECON. 185 (1951) (applying economic theory to vertical integration).

4. *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rts. of the S. Comm. on the Judiciary*, 116th Cong. 5 (2019) (statement of the Federal Trade Commission), https://www.ftc.gov/public-statements/2019/09/prepared-statement-federal-trade-commission-competition-digital-technology [https://perma.cc/K8D5-5UQ9].

5. *See* James A. Keyte, *The* AT&T/Time Warner *Decision: More Than Meets the Eye*, ANTITRUST, Summer 2019, at 20, 22.

6. D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 FLA. L. REV. 1357, 1364 (2018); *see* James A. Keyte & Kenneth B. Schwartz, *Getting Vertical Deals Through the Agencies: "Let's Make a Deal,"* ANTITRUST, Summer 2015, at 10, 11–12; Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, ANTITRUST, Fall 2007, at 74, 81.

7. Sokol, *supra* note 6, at 1360–61 (discussing the analytical obstacles to overcome and inferential steps required to create an optimal vertical merger policy).

8. *See* Koren W. Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, ANTITRUST SOURCE, Feb. 2019, at 1, 2.

9. 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

10. *See infra* note 139 and accompanying text.

the *Baker Hughes* burden-shifting framework.[11] In response, this Note engages in a multi-disciplinary approach to find the commonalities in burden-shifting frameworks available in other areas of the law. Based on these observed commonalities, this Note suggests two proposals that antitrust law can incorporate into the burden-shifting framework to better apply and analyze the harm that a fraction of proposed vertical mergers are likely to pose: (1) detailing the specific evidence parties can present to satisfy their respective burdens and (2) establishing a definite articulation of the government's burden of persuasion as satisfied by a preponderance of the evidence standard (instead of described in general terms).

To begin, Part I provides a brief overview of antitrust law and policy. Part II then discusses the results of empirical evidence on vertical mergers, provides an overview of the economic benefits and harms of vertical mergers, and analyzes the seminal vertical merger cases, including *AT&T, Inc*. Next, Part III examines comparable burden-shifting frameworks, similar to the *Baker Hughes* framework, in four areas outside of antitrust law and resolves a perceived error in *AT&T, Inc.* Practical takeaways from the analogous frameworks are incorporated into the suggested proposals found in Part IV. Finally, Part IV concludes by suggesting the addition of an initial procompetitive presumption if the challenged merger meets certain conditions, identifying the evidentiary standard each party must meet to satisfy its burden, and discussing the types of evidence each party may present to do so.

I. A BRIEF OVERVIEW OF ANTITRUST LAW

Antitrust law's dislike of mergers has a long history, and today's courts analyze mergers under a rule of reason approach.[12] Two salient

11. The framework is named after the case *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

12. *Northern Securities Co. v. United States*, arguably the first U.S. Supreme Court decision on mergers, involved two competing railroad companies whose major stockholders had agreed to merge their interests by creating the Northern Securities Company and transferring their stock to its control. 193 U.S. 197, 320–22 (1904). Writing for the majority, Justice Harlan concluded that Congress had the same power, as did the states, to regulate combinations between private parties that restrain interstate commerce under the Sherman Act, i.e., mergers. *Id.* at 338–45. Notably, Justice Brewer's concurrence influenced the Court's subsequent merger cases by articulating the idea that mergers should be evaluated under a rule of reason approach. *See id.* at 361 (Brewer, J., concurring) ("Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. . . . The purpose [of the act] rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy."). Under the rule of reason approach, "the factfinder weighs all of the

federal statutes applied to the analysis of vertical mergers are the Clayton Antitrust Act of 1914[13] and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).[14] The Clayton Act was passed as a preventative measure to combat the growing power of trusts for consolidating corporate monopolies. The Clayton Act also served as a check on the effects of anticompetitive acts, such as mergers, before they reached the level of a violation.[15] After being amended in 1950 by the Celler-Kefauver Act,[16] Section 7 of the Clayton Act was textually expanded to cover all mergers, including vertical ones.[17]

The legal standard set forth by Section 7 of the Clayton Act for rejecting proposed mergers is whether the effects of the merger "may be

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circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977). This approach stands in stark contrast to per se rules of illegality. The Court explained,

> *Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive. As the Court explained in *Northern Pac. R. Co.* . . . "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

Id. at 49–50 (quoting N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)).

13. Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27); *see* 15 U.S.C. § 18a(b)(1)–(2) (empowering the Federal Trade Commission (FTC) and the Department of Justice (DOJ) with the authority to review mergers required to be reported prior to completion); *id.* § 21(a)–(b) (granting the FTC the authority to review mergers that would substantially lessen competition via adjudication); *id.* § 25 (granting the DOJ the authority to seek preliminary and permanent injunctions of mergers before their completion before a federal court). The FTC Act, while also relevant to merger enforcement, will not be the focus of this Note. *See* Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58). However, for more information on how it applies to the analysis of vertical mergers, see KATHLEEN ANN RUANE, CONG. RSCH. SERV., R44971, PRE-MERGER REVIEW AND CHALLENGES UNDER THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT 1–2 (2017), https://fas.org/sgp/crs/misc/R44971.pdf [https://perma.cc/V8GV-D5YR].

14. Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. §§ 15c–15h, 18a, 66).

15. United States v. Koppers Co., 202 F. Supp. 437, 439–40 (W.D. Pa. 1962) (discussing the legislative history of the Clayton Act).

16. Ch. 1184, 64 Stat. 1125 (1950). In 1980, Congress amended the statute to include mergers by non-corporate entities and acquisitions in or "affecting commerce." Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1154, 1157–58 (codified as amended at 15 U.S.C. § 18).

17. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2018 (2018); *see* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 590 (1957) (mentioning that Congress' revisions to the Clayton Act were made in an effort to "make it clear" that the enforcement agencies had the authority to challenge anticompetitive vertical mergers under § 7 of the Act (quoting H.R. REP. NO. 81-1191, at 11 (1950))).

to substantially lessen competition" or to "tend to create a monopoly."[18] Thus, a showing of the reasonable probability of a vertical merger's substantial anticompetitive effects may be enough to block the merger.[19] Section 7 changed the time horizon of analysis[20] for assessing the anticompetitive harm of vertical mergers by introducing the "incipiency"[21] doctrine, whereby reviewing courts analyze proposed mergers "*before* the harm they threaten is achieved."[22] Section 7's incipiency standard allows vertical mergers "to be prohibited on proof of probable anticompetitive effects, as opposed to actual anticompetitive effects."[23]

While the Clayton Act does not define the term "lessened competition," the Horizontal Merger Guidelines clearly define competitive harm in terms of mergers as "encourag[ing] one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."[24] And although the Clayton Act does not provide a test to measure when competition has decreased as a result of a merger, caselaw has filled in some of the blanks.[25] For a multitude of reasons, including to allow the enforcement agencies "to prevent interim harm to competition and consumers,"[26] Congress enacted the HSR Act.[27]

In general, the HSR Act requires that certain "proposed acquisitions of voting securities, non-corporate interests, or assets be reported to the

18. § 7, 38 Stat. at 731–32; Larry Bumgardner, AT&T *& Time Warner's Vertical Merger: The Court Battle and Political Undercurrent*, J.L. BUS. & ETHICS, Winter 2019, at 31, 39.

19. Bumgardner, *supra* note 18, at 39.

20. Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155, 160 (2019). The incipiency test requires a prediction of a merger's "impact upon competitive conditions in the future." United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963).

21. United States v. Koppers Co., 202 F. Supp. 437, 439–40 (W.D. Pa. 1962) (referring to the Senate Committee Report that supported the idea that the bill would not apply to the mere possibility but only to the reasonable probability of the prescribed effect).

22. Steuer, *supra* note 20, at 157 (emphasis added).

23. Sean P. Sullivan, *What Structural Presumption?: Reuniting Evidence and Economics on the Role of Market Concentration in Horizontal Merger Analysis*, 42 J. CORP. L. 403, 408 n.11 (2016); *see* Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962). In other words, Section 7 of the Clayton Act requires a prediction of a merger's "impact upon competitive conditions in the future." United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966) (quoting *Phila. Nat'l Bank*, 374 U.S. at 362).

24. U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES 2 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES], https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/WK59-UDA4].

25. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 87 (2018).

26. JOSEPH J. SIMONS & MAKAN DELRAHIM, FTC & U.S. DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT 1 (2019), https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports [https://perma.cc/T8BJ-9X4C].

27. Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. §§ 15c–15h, 18a, 66).

[Federal Trade] Commission and the Antitrust Division" prior to their effectuation.[28] The purpose of the HSR Act's Pre-Review process is to give the Federal Trade Commission (FTC) and the U.S. Department of Justice Antitrust Division (DOJ) (collectively, the Agencies) the time and information necessary to review mergers and acquisitions for potential anticompetitive concerns.[29] This process requires the merging parties to fill out the HSR form and disclose certain nonpublic information.[30] Disclosure of this type of information remains confidential and can only be disclosed to the public in the course of either an administrative or judicial proceeding.[31] Procedurally, one of the Agencies will obtain clearance from the other to begin its investigation into the proposed merger; if both agencies request clearance, then the agency with the most expertise in reviewing transactions in the relevant market(s) will conduct the investigation (subject to jurisdictional limitations).[32]

The merging parties must then wait a specified period, between fifteen to thirty days, before they may complete the proposed merger.[33] Before the waiting period expires, the reviewing agency can either decide to issue a request for more information or allow the transaction to complete itself.[34] When the reviewing agency decides within the thirty-day waiting period that further inquiry is necessary (usually because of unresolved anticompetitive concerns), it is allowed to issue what is called a Second Request, i.e., a request for more documentary material and additional information from the merging parties.[35] For the purposes of this Second Request, the investigating agency may gather evidence from others apart from the merging parties, such as market participants and academics.[36] Once the parties have complied substantially with the Second Request, the reviewing agency has approximately thirty days to decide on how to proceed.[37] If the parties fail to comply substantially with the Second

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28. SIMONS & DELRAHIM, *supra* note 26, at 4.

29. *Id.*

30. *Id.* The types of nonpublic information that the parties must provide include: "(1) information about themselves, including their balance sheets; (2) information related to the proposed transaction's planning and execution; and (3) information regarding the product, service, and geographic markets in which they operate." RUANE, *supra* note 13, at 3.

31. 15 U.S.C. § 18a(h).

32. RUANE, *supra* note 13, at 3–4.

33. 15 U.S.C § 18a(b)(1).

34. *See id.* § 18a(b)(2). The transaction can be completed by the Agency terminating the waiting period early or letting the waiting period expire without taking further action. RUANE, *supra* note 13, at 4.

35. *See* § 18a(e)(1)(a).

36. *Id.*; *see* VERTICAL MERGER GUIDELINES, *supra* note 2, at 3 ("The sources of evidence on which the Agencies rely are the same as those set forth in Section 2.2 of the Horizontal Merger Guidelines and include documents and statements of the merging parties, their customers, and other industry participants and observers.").

37. § 18a(e)(2).

Request, the reviewing agency may request a federal district court to order the parties to comply.[38] If the waiting period expires, the parties are allowed to complete the merger transaction.[39]

If the agency decides to challenge a proposed merger, it will do so in one of two ways. First, the agency may negotiate a consent agreement with the parties allowing the transaction to complete itself under conditions that alleviate anticompetitive concerns.[40] Second, the agency may attempt to block the merger entirely by either petitioning a court for injunctive relief or through administrative litigation.[41] Whether a particular transaction is subject to the HSR's reporting requirements depends on various factors, including the value of the acquisition and the size of the parties as measured by their sales and assets.[42] Because these thresholds are adjusted, based on the 2000 Amendments to the HSR Act,[43] the FTC publishes revised thresholds on a periodic basis. On March 4, 2019, the FTC published a notice[44] to reflect adjustment of the reporting thresholds that included (among other revisions) the size of transaction threshold rising to $90 million.[45]

II. ANTITRUST LAW AND VERTICAL MERGERS

The overarching theoretical goal of merger enforcement policy in antitrust law is to promote competition, even if larger, more efficient business firms win the competitive battle against smaller, less efficient firms.[46] In practice, merger policy has been adopted to promote competition through application of the consumer welfare standard by "protecting consumers against high prices or reduced output, product

38. *Id.* § 18a(e)(2), (g)(2)(A).

39. RUANE, *supra* note 13, at 5.

40. *See* 15 U.S.C. § 16(b) (allowing the entry of consent judgments in a civil proceeding brought by the federal government under the antitrust laws).

41. 15 U.S.C. § 45(a)(4)(B), (b) (authorizing the federal government to undertake administrative proceedings to, e.g., enjoin or dissolve a proposed merger); *see* 15 U.S.C. § 25 (granting the Department of Justice the authority to institute preliminary injunctive proceedings to restrain violations of the Clayton Act); *see also* 15 U.S.C. § 53(b) (authorizing the Federal Trade Commission to seek preliminary and permanent injunctive relief against potential violators of the antitrust laws).

42. SIMONS & DELRAHIM, *supra* note 26, at 4.

43. *See* DC Appropriations—FY 2001, Pub. L. No. 106-553, tit. VI, § 630(a), 114 Stat. 2762, 2762A-108 (2000); § 18a(a)(2)(A) (codifying the amendments that made the adjustments applicable to "each fiscal year beginning after September 30, 2004, in the same manner as provided in section 19(a)(5) of this title to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003").

44. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 84 Fed. Reg. 7369, 7369–70 (Mar. 4, 2019).

45. SIMONS & DELRAHIM, *supra* note 26, at 8.

46. Hovenkamp & Shapiro, *supra* note 17, at 2017.

variety, product quality, or innovation."[47] When applying the consumer welfare standard, a court will find a merger as anticompetitive "if it disrupts the competitive process and harms trading parties on the other side of the market."[48] This Note recognizes that this standard has gained broad bipartisan support over the past fifty years based on extensive practical experience and thus is not advocating for its replacement in antitrust law.[49]

A. *Empirical Studies on Vertical Mergers*

The overall consensus resulting from the two leading empirical surveys conducted on vertical mergers is that the majority of them benefit consumers;[50] only a minority of them may be harmful to competition and the public.[51] The first survey, authored by a group of DOJ & FTC economists, reviewed twenty-four papers published between 1984 and 2005, analyzing their observed empirical effects; the survey concluded that no paper published in that period identified instances where vertical mergers were likely to have harmed competition.[52] The second survey reviewed twenty-three papers relating to vertical mergers and concluded that, as a result of these mergers, consumers benefit from higher quality products and better service.[53] In addition, a 2018 summary of eleven papers in peer-reviewed journals that empirically analyzed the welfare effects of vertical mergers in the United States since 2009 supports the conclusions of the prior surveys.[54] Some of the specific economic benefits and harms derived from vertical mergers are reported below.

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47. *Id.* at 2000; *see* ROBERT H. BORK, THE ANTITRUST PARADOX 10–11, 21–26, 66 (1978).

48. Hovenkamp & Shapiro, *supra* note 17, at 2018.

49. *See id.* at 2020.

50. Wong-Ervin, *supra* note 8, at 3; *see* Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629, 663 (2007).

51. Elyse Dorsey et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861, 902 & n.243 (2020).

52. Wong-Ervin, *supra* note 8, at 3

53. Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS 391, 391–409 (Paolo Buccirossi ed., 2008).

54. Glob. Antitrust Inst., Comment Letter on the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century (Sept. 6, 2018), https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf [https://perma.cc/98BN-QDBF].

B. *A Brief Review of the Economic Benefits and Harms of Vertical Mergers*

In theory, as well as in the market, vertical mergers can present both benefits and potential anticompetitive effects.[55] A non-exhaustive list of these effects is explored here. First, vertical mergers benefit the market by improving innovation, lowering transaction costs,[56] or reducing production or distribution costs[57] since firms at differing levels of production must work together to design, produce, and distribute goods.[58] Second, vertical mergers both allow for efficient allocations of risk[59] and incentivize asset specific investments[60] "in situations where a firm needs to invest in a specialized asset (and where market exchange is difficult),"[61] which benefits consumers by expanding output.[62] Third, vertical mergers reduce inventory costs,[63] which again helps to expand output.[64] Fourth, vertical mergers may allow for increased innovation thereby leading to positive externalities for consumers.[65] Fifth, vertical

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55. *See* Michael A. Salinger, *Vertical Mergers*, *in* 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 551, 551–54 (Roger D. Blair & D. Daniel Sokol eds., 2015); *see also* Roger D. Blair et al., *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies*, 27 GEO. MASON L. REV. 761, 763 & nn.8–9, 767 & nn. 28–29 (2020) (highlighting economic evidence from articles and the results of empirical studies published over the last twenty years pointing to the procompetitive nature of vertical mergers).

56. Specifically, transaction costs related to issues of specificity, uncertainty, and complexity. Blair et al., *supra* note 55, at 775.

57. Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 720 (2017); Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347, 351 (1950).

58. Wong-Ervin, *supra* note 8, at 6.

59. Vertical mergers help mitigate and manage asymmetric risk between contracting firms, where one is more risk averse to contracting than the other. Blair et al., *supra* note 55, at 775–76. For example, a risk averse manufacturer may be unwilling to distribute its product using a distributor; to avoid agency law problems from how its product gets marketed, the manufacturer may decide to vertically integrate by merger. *Id.* at 776.

60. Oliver E. Williamson, *Credible Commitments*, 29 ANTITRUST BULL. 33, 46–47 (1984); Blair et al., *supra* note 55, at 762.

61. Sokol, *supra* note 6, at 1366.

62. Blair et al., *supra* note 55, at 762.

63. For example, vertical mergers may facilitate "faster optimization and control over inventory, and it also may reduce forecast bias . . . . [or] creat[e] a lean supply chain system." *Id.* at 779. The strength of this efficiency is limited if the merging firms do not have effective management and coordination among different information technology infrastructures or if the merged firm does not have a unified information technology infrastructure. *Id.* at 779–80.

64. *Id.* at 765.

65. *See* Sokol, *supra* note 6, at 1367 n.58 (presenting the possibility that consumers could see efficiency gains even in market situations where consumers pay zero on one side of a platform pre-merger for a good or service and continue to pay zero post-merger for the same good or service). The caveat with this merger-related efficiency is that it occurs only if the merged firm

mergers eliminate double marginalization, i.e., double markups in price by separate firms each with market power at different levels in a supply chain,[66] and lead to the creation of a maverick, i.e., a firm that plays a disruptive role in the market to the benefit of consumers.[67] Finally, vertical mergers allow for the merging firms to become a coordinated and innovative merged firm as a result of the internal knowledge sharing and spillover that can occur.[68]

For all its praise, however, some vertical mergers have the potential to produce various anticompetitive effects. Notably, the work supporting the following negative effects is mostly theoretical.[69] Again, a non-exhaustive list is explored here. First, vertical mergers may lead to input foreclosure in the market[70] because the merged firm can disadvantage rivals who rely on the input by acquiring the supplier of an important output.[71] In other words, a vertical merger "may diminish competition by allowing the merged firm to profitably use its control of the related

(similar to agile startup firms) applies the acquired internal research and development knowledge to its current and subsequent products or services. Blair et al., *supra* note 55, at 780–81.

66. "Elimination of double marginalization" (EDM) is a term that describes when a merged firm is able "to eliminate a markup it would otherwise pay a supplier." Blair et al., *supra* note 55, at 762. Simply put, the merged firm eliminates double marginalization:

> Double marginalization refers to the situation in which two different firms in the same industry, but at different levels in the supply chain, each apply their own markups (reflecting their own margins) in pricing their products. Those "stacked" margins are both incorporated into the final price that consumers have to pay for the end product. By vertically integrating two such firms into one, the merged company is able to "shrink that total margin so there's one instead of two," leading to lower prices for consumers.

United States v. AT&T, Inc., 310 F. Supp. 3d 161, 197–98 (D.D.C. 2018) (citations omitted), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019). Ordinarily in a competitive market, "[t]he price that a downstream firm pays for an input supplied by an independent upstream firm may include a markup over the upstream firm's marginal cost." VERTICAL MERGER GUIDELINES, *supra* note 2, at 5. If the upstream and downstream firm successfully merge, and the merged firm is able to supply "itself with its own related product, it will have access to the input at cost" and the merger will result in either an increase or decrease in downstream prices for the related product. *Id.*; *see* Blair et al., *supra* note 55, at 768–73 (providing a thorough explanation of the economics behind EDM).

67. Wong-Ervin, *supra* note 8, at 3.

68. Blair et al., *supra* note 55, at 776–77. A related efficiency that results from vertical mergers is knowledge transfers between the merging firms. *Id.* at 777–78.

69. *See, e.g.*, Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345, 345 (1988); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 213–15 (1986).

70. Sokol, *supra* note 6, at 1367. Input foreclosure "includes price increases, cost increases, and other disadvantages placed on downstream rivals." Blair et al., *supra* note 55, at 790 n.134 (quoting Jonathan B. Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, ANTITRUST, Summer 2019, at 12, 13).

71. Jonathan M. Jacobson, *Vertical Mergers: Is It Time to Move the Ball?*, ANTITRUST, Summer 2019, at 6, 7.

product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market."[72] This includes situations where the merging firms (and if successful in consummating the merger, the merged firm) have the incentive and ability to raise its prices, raise rivals' costs,[73] lower the quality of the related product,[74] refuse to supply rivals with the related product altogether,[75] or help to make downstream collusion happen.[76]

A merged firm has the ability to begin engaging in unilateral foreclosure or raising rivals' costs if it can alter the terms by which it provides a related product to its rivals, likely resulting in its rivals losing significant market share or competing less aggressively for customers' business.[77] Likewise, a merged firm has the incentive to begin engaging in unilateral foreclosure or raising rivals' costs if it would likely find it profitable to do either one because "it benefits significantly in the relevant market when rivals lose sales or alter their behavior in response."[78]

Second, vertical mergers can lead to consumer foreclosure where a supplier disadvantages its rivals by acquiring a downstream distributor and its customer base, depriving its rivals of scale and lessening their ability to constrain the supplier's market power.[79] The foreclosure caused

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72. VERTICAL MERGER GUIDELINES, *supra* note 2, at 4. A *relevant market* is the "'area of effective competition' within which the [merging firms] operate." United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 649 (1957) (quoting Standard Oil Co. v. United States, 337 U.S. 293, 299 n.5 (1949)). A relevant market is composed of a *product market* and a *geographical market*. Unites States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974); HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 8, 13. The *relevant product market* "identifies the product and services with which the [merging firms'] products compete. Second, the '*relevant geographical market*' identifies the geographic area in which the [merging firms'] compete[] in marketing its products or service." FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 119 (D.D.C.) (emphasis added), *appeal dismissed*, No. 04-5291, 04-7120, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004) (per curiam).

73. Blair et al., *supra* note 55, at 786–87. One potential scenario where this can occur is bargaining rounds between a merged firm (who has less to lose from a breakdown in negotiations) and other firms (who have more to lose) on a mutually agreeable price. *Id.* at 786.

74. A *related product* is "a product or service that is supplied or controlled by the [merging firms] and is positioned vertically or is complementary to the products and services in the relevant market." VERTICAL MERGER GUIDELINES, *supra* note 2, at 3. Products that are positioned complementary to each other are referred to as *complements*, which can be component goods that make up a related product. *Id.* at 9. When the price of a complement falls, manufacturers make more of the related product and demand more of the complement goods. *See id.*

75. *But see* Blair et al., *supra* note 55, at 788 (arguing that there is little support for this assumption, but more support for vertical mergers "incentiviz[ing] the merged firm to offer less favorable terms to unintegrated rivals").

76. Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1975 (2018).

77. VERTICAL MERGER GUIDELINES, *supra* note 2, at 4.

78. *Id.* at 5.

79. Jacobson, *supra* note 71, at 7.

by vertical mergers is a different way of raising rivals' costs,[80] which makes the market inefficient. Third, vertical mergers may give a merged firm access to competitively sensitive information about other trading partners and allow it to act upon that information in a way that harms the market.[81] Finally, vertical mergers may lead to difficulty in potential rival entry[82] and information exchange,[83] which describes situations where an upstream firm[84] acquires a distributor handling competing products, and the merged firm may have increased opportunities and incentives to collude with the distributor's other customers by sharing promotional plans of its products.[85]

C. *A Survey of Vertical Merger Caselaw*

Antitrust policy presumes that integration by vertical merger is procompetitive,[86] i.e., less likely to create competitive problems,[87] because purely vertical mergers do not eliminate direct competition. This presumption leads to cost-saving efficiencies for consumers from reduced transaction costs and facilitates product design enhancements.[88] Vertical mergers are benign, and thus unlikely to have an anticompetitive effect, under two market situations: (1) when the "upstream and downstream" markets are not concentrated,[89] and (2) when the market is

80. Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 538 n.54 (2013).

81. Blair et al., *supra* note 55, at 792.

82. D. Bruce Hoffman, Acting Dir., Bureau of Competition, Remarks at Credit Suisse 2018 Washington Perspectives Conference: Vertical Merger Enforcement at the FTC 4–5 (Jan. 10, 2018) (transcript available at https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc [https://perma.cc/J92M-TD8V]) ("[B]ut now we are interested in cases in which the firms are most likely to enter each other's market . . . . [when the market] makes it inherently more likely or easier for the merging firms to enter each other's markets, as compared to de novo entry by another firm. We also look at entry facilitation . . . whether prior to the merger, one firm had an incentive to sponsor entry, and absent the merger, that the firm would have partnered with another company . . . ."); Salop, *supra* note 76, at 1969, 1975. The merged firm would accomplish this by declining "to sell to or buy from a new entrant." Blair et al., *supra* note 55, at 791.

83. Salop, *supra* note 76, at 1978.

84. "In describing a vertical relationship, a stage closer to final consumers (such as a distributor, retailer, or finished goods manufacturer) is termed '*downstream*,' and a stage further from final consumers (such as a supplier, wholesaler, or input manufacturer) is termed '*upstream*.'" VERTICAL MERGER GUIDELINES, *supra* note 2, at 1 (emphasis added).

85. Jacobson, *supra* note 71, at 7.

86. *See* IVA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1000b, at 139 (3d ed. 2009).

87. BORK, *supra* note 47, at 226–27.

88. Jacobson, *supra* note 71, at 8.

89. *See* AREEDA & HOVENKAMP, *supra* note 86, ¶ 1032a, at 234. Professors Areeda and Hovenkamp explain:

competitive.[90] That being said, vertical mergers are discouraged because they arguably create a second-level monopoly, which would make the merging firms' rivals more resistant to competitive entry and less likely to innovate.[91]

When compared to horizontal mergers, vertical mergers are conceptually different. Antitrust law for horizontal mergers adheres to a different set of merger guidelines[92] than its vertical counterpart.[93] Horizontal mergers are mergers between competitors in the same relevant market.[94] Horizontal mergers do not always create a monopoly market share, although some plainly do,[95] but may nonetheless result in an overall substantial lowering of competition.[96] Today, horizontal mergers are proscribed if they "realistically threaten higher consumer prices."[97]

In *United States v. Philadelphia National Bank*,[98] the U.S. Supreme Court articulated the following proposition that is now accepted as the structural presumption in merger analysis[99]:

> [O]ne set of circumstances where vertical mergers can be presumptively condemned . . . . requires (1) that both markets are highly concentrated; (2) each market independently has significant entry barriers; and (3) insufficient unintegrated capacity exists at the *B* level to support efficient entry or operation at the *A* level.
>
> Absent any one of those factors, a vertical merger cannot cause significant foreclosure of existing firms, increase significantly barriers to entry that already exist, or significantly raise the costs of existing rivals.

Id.

90. *See* Sokol, *supra* note 6, at 1363 n.25 ("[F]oreclosure has no anticompetitive effect whatsoever in competitive markets . . . ." (alteration in original) (quoting AREEDA & HOVENKAMP, *supra* note 86, at 159)).

91. *See* Hovenkamp, *supra* note 1, at 608 (discussing this idea of a second-level monopoly).

92. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 1.

93. VERTICAL MERGER GUIDELINES, *supra* note 2, at 1 ("These Vertical Merger Guidelines outline the principal analytical techniques, practices, and enforcement policies of . . . (the 'Agencies') with respect to a range of transactions often described as *vertical mergers* and acquisitions." (emphasis added)).

94. Sullivan, *supra* note 23, at 408; *see supra* note 72.

95. *See* Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 310 (1975).

96. *Id.* at 302.

97. Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369, 379 (2016). In simple terms, the competitive difference between horizontal mergers and their vertical counterparts is that with horizontal mergers "competitors generally have a mutual interest in raising prices (which hurts consumers), [whereas] vertically [merged] firms generally have a mutual interest in lowering prices (which helps consumers)." Salinger, *supra* note 55, at 552.

98. 374 U.S. 321 (1963).

99. Sullivan, *supra* note 23, at 411.

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[100]

The structural presumption articulated in *Philadelphia National Bank* is, arguably, a presumption based solely on economic theory.[101] When read in light of the D.C. Circuit's opinion in *United States v. Baker Hughes Inc.*,[102] a wrinkle to the approach emerges:

> By showing that a transaction will lead to undue concentration . . . the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.[103]

Specifically, *Baker Hughes* articulates a rebuttable presumption that is "divorced from the specific probative value of market concentration evidence."[104] When used to analyze the anticompetitive effect of proposed vertical mergers, this burden-shifting framework is interpreted to reflect the fact that vertical mergers do not increase market concentration.[105]

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100. *Phila. Nat'l Bank*, 374 U.S. at 363.

101. *See* Sullivan, *supra* note 23, at 411.

102. 908 F.2d 981 (D.C. Cir. 1990).

103. *Id.* at 982–83 (citations omitted).

104. Sullivan, *supra* note 23, at 411. Market concentration is a method for assessing the risk of consumer harms, like high prices, by analyzing the amount of market share that a merging entity will control after a merger takes place. Hovenkamp & Shapiro, *supra* note 17, at 2019; Keyte, *supra* note 5, at 22. In antitrust cases, market concentration is defined either "in terms of product or in terms of geographic locus of competition." Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). For horizontal mergers, it is generally agreed that a sufficiently large increase in market concentration is probative of likely anticompetitive harm for horizontal mergers; thus, measuring market concentration is one way of judging the risk that a proposed horizontal merger will be anticompetitive. *See* Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 277 & nn.45–46 (2015) (noting a number of economic studies which support some form of anticompetitive-effect inference from sufficient market concentration evidence).

105. *See* Wong-Ervin, *supra* note 8, at 7. Market concentration evidence may be used by enforcement agencies (along with measures of market shares) in vertical merger cases; however,

D. United States v. AT&T, Inc.*: What Was Old Is New Again*

AT&T, Inc. is significant for various reasons. It is the first litigated vertical merger challenge in forty years.[106] Although *AT&T, Inc.* did not break new legal ground, it expanded the *Baker Hughes* burden-shifting framework to vertical mergers.[107] In brief, vertical merger cases are analogous to seeing an antitrust unicorn, and the parties involved in *AT&T, Inc.* are current industry powerhouses.[108] Indeed, *AT&T, Inc.* may have the unintended effect of signaling to firms that their proposed mergers will survive because the DOJ or FTC is weak in its ability to bring a major case against the firms[109] under a rule of reason approach.[110]

In *AT&T, Inc.*, the U.S. Government challenged the proposed merger between AT&T, Inc., a "large downstream purchaser and distributor of video content," and Time Warner, a "creator and supplier of popular video content," on three grounds.[111] The Government's main contention was that the merger would harm competition in the video programming and distribution industry, which operates in a three-stage chain of production.[112] The Government's first argument was that the challenged merger would enable Time Warner to charge rival distributors and consumers higher prices for its content because of its post-merger

they are used "in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition." VERTICAL MERGER GUIDELINES, *supra* note 2, at 3–4. Further, while the Agencies have established that they will not rely on certain market concentration thresholds as "screens for or indicators of competitive effects" from vertical mergers, "high concentration in the relevant market may provide evidence about the likelihood, durability, or scope of anticompetitive effects in that relevant market." *Id.* at 4; *see* HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 19 (listing the market concentration thresholds that the Agencies will not rely on for vertical mergers).

106. Blair et al., *supra* note 55, at 764, 813.

107. United States v. AT&T, Inc., 310 F. Supp. 3d 161, 190–91 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); *see* Sokol, *supra* note 6, at 1364–65.

108. Sokol, *supra* note 6, at 1366.

109. *See* D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1084–85 (2010) (noting how judicial decisions may have chilled DOJ merger challenges in court).

110. Steven Salop, Professor, Georgetown Univ. L. Ctr., Presentation at the Federal Trade Commission's Public Hearing on Competition and Consumer Protection in the 21st Century: Vertical Mergers 13, 16, 30–31 (Nov. 1, 2018) (transcript available at https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century [https://perma.cc/SQ5P-CZYN]).

111. 310 F. Supp. 3d at 194; *see also* Sokol, *supra* note 6, at 1364–66 (providing an overview of the DOJ's three arguments at the district court level).

112. *See AT&T, Inc.*, 916 F.3d at 1033, 1035. For an explanation of the three-step chain of production at issue in this case and the relevance of affiliate fees and negotiations, see *id.* at 1033–34.

relationship with AT&T.[113] The district court found that the Government had not met its burden of production[114] because its argument was "speculative, based on unproven assumptions, or unsupported—or even contradicted—by the Government's own evidence."[115]

The Government's second argument was that the challenged merger would substantially lessen competition by "creating an increased risk that the merged firm will act, either unilaterally or in coordination with . . . [sellers] to thwart the rise" of new entrants.[116] On this argument, the district court found that the Government merely presented a "theoretical 'possibility' of coordination," failed to acknowledge that it would be unprofitable for the merged firm to engage in coordination, and ignored the fact that the merged firm would have a great advantage by not coordinating activities with its rivals.[117] The Government's third argument was that the merged firm could harm competition by preventing AT&T's rival distributors from using a relevant product[118] (the HBO rights) as a promotional tool to attract and retain customers;[119] the Government alleged that this would foreclose the merging firm's competitors "from access to a potential source of supply, *or from access on competitive terms*."[120] On this argument, the district court rejected the Government's theory because the Government failed to prove that

113. *AT&T, Inc.*, 310 F. Supp. 3d at 194, 204. The Government alleged that the proposed merger was likely to increase Time Warner's bargaining leverage in affiliate negotiations with rival distributors. *AT&T, Inc.*, 916 F.3d at 1035. The Government attempted to show that the merged firm would have an incentive to charge higher prices to its affiliates and pass those higher prices onto consumers. *Id.* at 1036. Indeed, the Government's trial expert testified that the proposed merger could cause an annual fee increase of $587 million for rival distributors to license Time Warner's content, with an annual net increase of $286 million in costs passed on to consumers in 2016 and increases in subsequent years. *Id.*

114. A *burden of production* is the burden of "producing evidence, satisfactory to the judge, of a particular fact in issue. . . . The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced." KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 336 (Robert P. Mosteller ed., 8th ed. 2020). "A party who has the burden of production on an issue must introduce sufficient evidence to enable the trier of fact to find in his or her favor on that issue or else the court, as a matter of law, will decide the issue in favor of the opposing party." JACK H. FRIEDENTHAL & ARTHUR R. MILLER, CIVIL PROCEDURE § 12.3510 (7th ed. 2008). Even if the government proffers sufficient evidence to satisfy its burden of production, that does not mean that it will "necessarily prevail on the issue . . . . [since] the party with the burden of persuasion on an issue must convince the trier of fact that it is more probable than not that the facts are as that party contends; otherwise the issue must be decided for the opposing party." *Id.* § 12.3520.

115. *AT&T, Inc.*, 310 F. Supp. 3d at 214 (D.D.C. 2018), *aff'd*, 916 F.3d 1029.

116. *Id.* at 194.

117. *Id.* at 246–48.

118. *See supra* note 74.

119. *AT&T, Inc.*, 310 F. Supp. 3d at 194.

120. *Id.* at 250.

marketplace substitutes for HBO were "inferior, inadequate, or more costly."[121]

Subsequently, the Government appealed the district court's denial of its request for a permanent injunction,[122] challenging the district court's findings on the Government's failure to prove its increased leverage theory.[123] The D.C. Circuit affirmed the district court's findings,[124] leading to the conclusion that the Government failed to meet its burden of persuasion for various reasons. Upon review of the record, the circuit court found that the Government had failed to overcome the merging firm's rebuttal evidence; the Government did not present a comparable data analysis that showed a "statistically significant effect on . . . prices" related to prior vertical mergers in the industry.[125] Instead, the Government's real-world evidence, made up of executive statements made in regulatory findings and expert opinions and models, were "subject to deficiencies identified by AT&T's experts, some of which [the Government's expert] conceded."[126] Thus, the circuit court acknowledged that although the district court accepted the Government's economic theory generally, the district court rejected the model's specific prediction in light of the credited rebuttal evidence.[127] Indeed, the circuit court found that the district court "reached a fact-specific conclusion based on real-world evidence" that it would be costly for the merged firm to engage in foreclosure (in the form of a long-term blackout).[128]

Ultimately, the D.C. Circuit agreed with the district court that the Government's supporting evidence had inaccurately predicted the proposed merger's probable effect on competition[129] and accepted AT&T's explanation using real-world evidence of data from prior vertical mergers in the video programming and distribution industry that showed "no significant results."[130] In spite of the Government's evidence that arguably showed more than a "mere possibility" of competitive

121. *Id.* at 250–51.

122. United States v. AT&T, Inc., 916 F.3d 1029, 1031 (D.C. Cir. 2019).

123. *Id.*

124. *Id.* at 1032, 1047.

125. *Id.* at 1031.

126. *Id.* at 1039.

127. *Id.*

128. United States v. AT&T, Inc., 916 F.3d 1029, 1040–41 (D.C. Cir. 2019). For more information on foreclosure as a theory of harm, see *supra* note 78 and accompanying text. For a detailed discussion on blackouts in affiliate negotiations, see United States v. AT&T, Inc., 310 F. Supp. 3d 161, 172 (D.D.C. 2018), *aff'd*, 916 F.3d 1029. The circuit court also recognized the importance the district court gave to the merged firm's "'irrevocable' offer of arbitration agreements with a no-blackout guarantee." *AT&T, Inc.*, 916 F.3d at 1041.

129. *AT&T, Inc.*, 916 F.3d at 1037, 1046.

130. *Id.* at 1037–38.

harm,[131] the circuit court affirmed the district court's conclusion that the Government had failed to show that the proposed merger was likely to *substantially* lessen competition to a "reasonable probability."[132]

Although several amici had urged the circuit court to speak definitively on the proper legal standard for evaluating vertical mergers,[133] neither party challenged the legal standard used by the district court, leaving the circuit court without the need to opine.[134] The circuit court, however, acknowledged the lack of precedent on vertical mergers, noting that the relevant merger guidelines were enacted over thirty years ago.[135] This case is symptomatic of a larger trend in antitrust law cases (not just in vertical merger cases) reviewed under the rule of reason: from 1977–1999, courts disposed of 89% of burden-shifting cases at the first stage on the ground that there was no anticompetitive effect;[136] from 1999–2009, courts disposed of 97% of burden-shifting cases at the first stage on similar grounds.[137]

Ten years after the above survey was conducted, the D.C. Circuit in *AT&T, Inc.* affirmed the district court's dismissal of the Government's anticompetitive argument.[138] The D.C. Circuit's opinion in *AT&T, Inc.*

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131. Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39 (1962) (quoting S. REP. NO. 81-1775, at 6 (1950)).

132. *AT&T, Inc.*, 916 F.3d at 1032 (quoting *Brown Shoe*, 370 U.S. at 323 n.39); *see id.* at 1040–41.

133. *Id.* at 1037.

134. *Id.*

135. *Id.*; *see* U.S. DEP'T OF JUST., 1984 MERGER GUIDELINES ¶ 4.0, at 24 (1984), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf [https://perma.cc/6BGY-AS8A]. *But see* VERTICAL MERGER GUIDELINES, *supra* note 2, at 1 n.1 (withdrawing the 1984 Non-Horizontal Merger Guidelines to reflect the FTC and DOJ's current enforcement policies).

136. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1269, 1275 [hereinafter Carrier, *Real Rule*]. Carrier reviewed a total of 495 rule of reason cases during this time period. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827 (2009) [hereinafter Carrier, *Empirical Update*]. For 118 cases involving challenges to vertical restraints (mergers), the courts found that the plaintiff failed to demonstrate a significant anticompetitive effect in 105 of them. Carrier, *Real Rule*, *supra*, at 1275.

137. Carrier, *Empirical Update*, *supra* note 136, at 828–30. Carrier reviewed a total of 738 antitrust cases where the courts applied a rule of reason analysis, but this figure did not include cases where courts denied summary judgment motions or motions to dismiss and did not include grants or denials of preliminary injunctions unaccompanied by final findings. *Id.* at 828–29. Out of the 738 cases, 222 cases all involved a court's final determination using a rule of reason analysis. *Id.* at 829. "Out of the 222 cases, 215 were resolved on the grounds that the plaintiff [generally, the enforcement agencies] did not prove an anticompetitive effect." *Id.* at 829. In 221 of 222 cases, the defendant (generally, the merging parties) won. *Id.* at 830.

138. 916 F.3d at 1033, 1037 (finding the district court's factual determinations were not "clearly erroneous" because the Government had not met its burden of establishing, "through 'case-specific evidence,' that the merger . . . at this time . . . is likely to substantially lessen competition in the manner it predicts" (quoting United States v. AT&T, Inc., 310 F. Supp. 3d 161, 194 (D.D.C. 2018), *aff'd*, 916 F.3d 1029))).

reveals antitrust law's tendency to achieve inconsistent results if the *Baker Hughes* burden-shifting framework is not refined to analyze a proposed vertical merger.[139] Perhaps the economic data supporting the procompetitive effect of these challenged restraints (like mergers) in all of these cases were unambiguous and sufficient to refute the Government's evidence of anticompetitive harm.[140] More likely, however, is that perhaps antitrust law can improve in the area of merger analysis.

Courts reviewing vertical mergers today insist that factual findings of competitive harm in vertical merger challenges be sufficient and justified.[141] Unfortunately, the lack of precedent in vertical merger caselaw leaves more questions unanswered than resolved. Indeed, the U.S. Supreme Court has not decided a vertical merger case since 1972,[142] and a circuit court has not decided a vertical merger case since 1979.[143] The last time a circuit court decided a private merger case was in 1987.[144] Further, the last time a district court decided a private vertical merger case was in 1997.[145] Although horizontal mergers fall under a different set of caselaw,[146] courts (after *AT&T, Inc.*) will apply the *Baker Hughes*

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139. *Compare* Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962) (holding that the Government sustained its burden of proof and affirming the district court's conclusion that the "merger may tend to lessen competition substantially in the retail sale of . . . shoes"), *and* Ford Motor Co. v. United States, 405 U.S. 562, 574–75 (1972) (holding that General Motors' asset acquisition of one of the independent producers of spark plugs adversely affected competition), *with* Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co., 826 F.2d 1235, 1236, 1246–47 (3d Cir. 1987) (holding that a merger between two methanol producers was not illegal because the plaintiff (a rival competitor) failed to allege an antitrust injury and finding that the anticompetitive effects of this merger, the plaintiff's collateral loss of sales to the acquired company resulting from the vertical aspects of the merger, was not a violation of Section 7 of the Clayton Act because it amounted to "only a de minimis foreclosure"), *and AT&T, Inc*., 916 F.3d at 1037 (holding that the Government had not met its burden of persuasion).

140. The district court and the circuit court agreed that it did. *See AT&T, Inc.*, 310 F. Supp. 3d at 226 ("I agree with defendants, for the most part, that the inputs and assumptions of Professor Shapiro's [one of the Government's key experts'] model are not sufficiently grounded in the evidence—a fact that 'undermine[s]' my 'confidence in the reliability and factual credibility' of his projections." (alteration in original) (quoting United States v. Anthem, Inc., 855 F.3d 345, 363 (D.C. Cir. 2017))); *AT&T, Inc.*, 916 F.3d at 1036, 1038–39 (agreeing with the district court's finding that the Government's presentation of Professor Shapiro's expert opinion "on the likely anticompetitive effect of the proposed merger" was not "supported by sufficient real-world evidence" because the "expert opinion and model were subject to deficiencies identified by AT&T's experts").

141. Hovenkamp, *supra* note 1, at 600–01.

142. *See Ford Motor Co.*, 405 U.S. at 562.

143. Hovenkamp, *supra* note 1, at 608.

144. *See Alberta Gas Chems.*, 826 F.2d at 1236.

145. *See* HTI Health Servs., Inc. v. Quorum Health Grp., Inc., 960 F. Supp. 1104, 1107, 1112 (S.D. Miss. 1997).

146. *See* Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039, 2055 n.89 (2015).

burden-shifting framework from horizontal mergers to vertical merger cases.[147] Based on the court's finding that the Government was unable to meet its initial burden and shift the burden to the merging firms,[148] *AT&T, Inc.* indicates a trend in vertical merger caselaw that subsequent vertical merger challenges will result in consistent court approvals of challenged vertical mergers.

This Note's proposals will help clarify vertical merger enforcement by providing two vital pieces that are currently missing from the *Baker Hughes* burden-shifting framework[149]: (1) detailing the specific evidence each party can present to satisfy their respective burdens and (2) establishing a definite articulation of the government's burden of persuasion as satisfied by a preponderance of the evidence standard (instead of described in general terms).

III. EXPLORING BURDEN-SHIFTING PRESUMPTIONS OUTSIDE OF ANTITRUST LAW

Lessons from analogous burden-shifting presumptions outside of antitrust law are examined below to help determine the evidentiary standard that each party should be assigned in an injunctive relief proceeding for vertical mergers.

A. *Title VII Employment Discrimination Suits*

Employment discrimination lawsuits filed under Title VII are analyzed under a three-step production burden-shifting framework.[150] The framework is as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate

147. *See* United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019) ("Neither the government nor the defendants challenge application of the burden-shifting framework in *United States v. Baker Hughes* for horizontal mergers that the district court applied to consider the effect of the proposed vertical merger . . . ." (citation omitted)).

148. *Id.* at 1037, 1047.

149. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 982–83 (D.C. Cir. 1990).

150. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–53 (1981).

> reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[151]

The plaintiff retains the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff."[152] By establishing a prima facie case of discrimination, the plaintiff effectively "creates a presumption that the employer unlawfully discriminated against the employee."[153] "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."[154]

If the burden shifts to the defendant, the objective "is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."[155] By introducing admissible evidence, the defendant clearly sets forth the reasons for the plaintiff's rejection and "raises a genuine issue of fact as to whether it discriminated against the plaintiff . . . . The explanation provided must be legally sufficient to justify a judgment for the defendant."[156] The Court explained:

> If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the . . . plaintiff . . . must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.[157]

B. *Moving for Judgment as a Matter of Law in Jury Trials*

Rule 50 of the Federal Rules of Civil Procedure provides:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law against the party on a claim or defense that,

151. *Id.* (citations omitted) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

152. *Id.* at 253.

153. *Id.* at 254.

154. *Id.*

155. *Id.*

156. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254–55 (1981).

157. *Id.* at 255–56.

> under the controlling law, can be maintained or defeated only with a favorable finding on that issue.[158]

This procedural rule "allows a party to challenge the sufficiency of the evidence prior to submission of the case to the jury, and authorizes the district court to grant such motions at the court's discretion."[159] Although the standard of judgment as a matter of law "mirrors" the standard for granting summary judgment,[160] the court reviews all the evidence in the record.[161] For this motion to be granted after the verdict is rendered, the court must find that there was insufficient evidence for the jury to find as it did or that the evidence was "so compelling that only one result could follow."[162]

The analysis here utilizes a burden-shifting framework involving individual burdens of production assigned to both the moving and nonmoving parties.[163] Although the moving party presents evidence in favor of its argument that the motion should be granted, the court first views the evidence in the light most favorable to the nonmoving party to determine whether there is sufficient evidence to raise an issue to the jury.[164] At the initial stage, the burden has not shifted to the nonmovant, who can rely on the legitimate inferences that may be drawn from the evidence.[165] In most cases, the burden shifts to the nonmovant if the court decides that the moving party's evidence is sufficient or substantial enough that the jury might decide for the nonmovant.[166] After comparing the sufficiency and credibility of both evidentiary presentations, including if the evidence involves the issues of witness credibility, the court makes a decision either to grant or deny the motion.[167]

C. *Moving for a Temporary Restraining Order*

A cause of action for injunctive relief is a forward-looking action.[168] The sole function of an injunction is to "forestall future violations."[169] To make the case for injunctive relief, there must be "a real threat of future violation or a contemporary violation of a nature likely to continue or

158. FED. R. CIV. P. 50(a).
159. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 399 (2006).
160. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting *Anderson*, 477 U.S. at 250).
161. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).
162. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 12.3, at 549 (5th ed. 2015).
163. *Id.* at 554.
164. *Id.* at 555–56.
165. *Id.* at 555.
166. *Id.* at 553.
167. *Id.* at 556.
168. United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952).
169. *Id.*

recur . . . . Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue."[170] Because an injunctive action is unrelated to punishment or past violations, a court's decision to issue an injunction does not prevent injured plaintiffs from seeking future remedy for past violations either by indictment or through an action for damages.[171] Courts are skeptical of a defendant's effort "to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption."[172]

In civil cases, a court "may issue a temporary restraining order . . . if . . . specific facts in an affidavit or verified compliant clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."[173] During a hearing where the party that obtained the temporary restraining order moves the court to issue a preliminary injunction,[174] "the party seeking the injunction would bear the burden of demonstrating" four factors that justify the preliminary injunctive relief.[175] These factors include: (1) that a plaintiff is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.[176] In other words, the party seeking the preliminary injunction has the burden to show that it is entitled to one—the burden is not on the party opposing the injunction to show that the moving party is not entitled to an injunction.[177]

Federal appellate courts have determined that the plaintiff must "clearly carry the burden of persuasion."[178] Notably, Rule 65(b) of the Federal Rules of Civil Procedure "does not place upon the [non-moving] party . . . the burden of coming forward and presenting its case against a preliminary injunction."[179] By implication, the burdens of production and persuasion fall on the shoulders of the party seeking injunctive relief.

170. *Id.*

171. *Id.*

172. *Id.*

173. FED. R. CIV. P. 65(b)(1)(A).

174. *Id.* 65(a)(2), (b)(3).

175. Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 441 (1974).

176. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

177. *See Granny Goose Foods*, 415 U.S. at 443.

178. United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983); *see* Texas v. Seatrain Int'l, S.A., 518 F.2d 175, 179 (5th Cir. 1975).

179. *Granny Goose Foods*, 415 U.S. at 442.

D. *Resolving a Perceived Error in Applying the* Baker Hughes *Framework*

One statement in *AT&T, Inc.* is troubling: the circuit court suggested that the district court, although reaching the correct conclusion to allow the AT&T–Time Warner merger to proceed, applied the *Baker Hughes* framework incorrectly at the first step. Much to the Author's consternation, the district court concluded "that the Government has failed to clear the first hurdle of showing that the proposed merger is likely to increase [the defendant's] bargaining leverage in affiliate negotiations."[180] This statement suggests that the district court in *AT&T, Inc.* mischaracterized the government's initial burden as a burden of proof[181] rather than as a burden of production. *Baker Hughes* is clear that the government's initial burden *is not* one of proof but rather of production.[182] The district court in *AT&T, Inc.* found that the Government's evidence at trial was insufficient to "clear the first hurdle"[183] after it "'balance[d]' whether the Government's asserted harms outweigh the merger's conceded consumer benefits" and the merging entities rebuttal evidence;[184] consequently, it found that the Government's evidence had little to no probative value.[185] Indeed, the court rejected the Government's economic theories and models[186] in support of the "real-world examples" and "real-world testimony" of "various industry witnesses" that contradicted the Government's predicted findings.[187]

180. United States v. AT&T, Inc., 310 F. Supp. 3d 161, 199 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019). The circuit court acknowledged that the district court undoubtably "made some problematic statements" that the court could not ignore. *AT&T, Inc.*, 916 F.3d at 1038.

181. *AT&T, Inc.*, 310 F. Supp. 3d at 189 & n.16; *see also* Blair et al., *supra* note 55, at 821 ("[A]lthough the *AT&T* court applied the *Baker Hughes* burden-shifting framework, it stopped at the first step after finding the plaintiff had failed to prove that the transaction would allow the merging parties to raise rivals' costs.").

182. United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990) (comparing its "production-burden-shifting" framework to the analysis in employment discrimination lawsuits under Title VII from *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253–56 (1981)).

183. *AT&T, Inc.*, 310 F. Supp. 3d at 199.

184. *Id.* at 198.

185. *Id.* at 208, 212, 234, 245 n.53. Probative value is an evidentiary concept, defined as the "degree to which one fact tends to make probable another posited fact." *Probative Value*, BLACK'S LAW DICTIONARY (11th ed. 2019). It is a term that relates to an evidentiary presumption, which is satisfied with sufficient evidence that "at a minimum, shifts the burden of producing evidence" to the opposing party. BROUN ET AL., *supra* note 114, § 342, at 775. In the context of a vertical merger challenge, where the government "proves the basis facts giving rise to a presumption [,e.g., that the merger may substantially lessen competition], it will have satisfied its burden of producing evidence with regard to the presumed fact." *Id.* § 344, at 779.

186. *AT&T, Inc.*, 310 F. Supp. 3d at 199, 206–07, 219–22.

187. *Id.* at 203, 217, 222–26, 234–37, 240–41.

The court's reasoning would be correct if it had applied it at the final step of the *Baker Hughes* framework, *but not at the first step*. A closer analysis suggests that the district court expressed the government's burden of production at the first step in terms of its burden of proof.[188] Clarification in vertical merger caselaw, relating to which burden has (or has not) been met at each stage of the analysis and the reasons why, is needed to avoid further confusion. Ultimately, the sufficiency of the government's evidence that is required to satisfy its initial burden of production *is not* measured against the merging entities' rebuttal evidence for probative value. The district's court's finding that the government's evidence lacked probative value is misplaced at the first step of the *Baker Hughes* framework because probative value is an evidentiary standard describing how a party satisfies its burden of persuasion.[189] All that *Baker Hughes* requires of the government at the first step of the analysis is sufficient evidence to satisfy its burden of production,[190] judged independently from (not in conjunction with) the merging entities' rebuttal evidence.[191] It is only at the third step of the *Baker Hughes* analysis where any court would be allowed to consider the government's "additional evidence" in light of the merging entities rebuttal evidence to determine if the government has satisfied its "ultimate burden of persuasion."[192]

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188. *See id.* at 204–05, 208.

189. The term probative value was adopted within the Uniform Rules of Evidence, which provided that "where the facts upon which the presumption is based have 'probative value' the burden of persuasion is assigned to the adversary; where there is no such probative value, the presumption . . . dies when met by contrary proof." *See* BROUN ET AL., *supra* note 114, § 344, at 784 (quoting UNIF. R. EVID. 14 (1953)). Use of this concept in vertical merger challenges opens the door to confusion and inconsistency because different courts "could give different answers to the question whether a particular presumption has probative value." *Id.* Rather than using of this term, courts reviewing vertical merger challenge should clearly identify that the government's ultimate burden of persuasion is satisfied by the preponderance of the evidence standard.

190. In other words, "To say that a party bears the burden of producing evidence is to say she runs the risk of losing automatically . . . if she does not offer sufficient evidence to enable a reasonable person to find in her favor." 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 3.2, at 415 (4th ed. 2013).

191. BROUN ET AL., *supra* note 114, § 338, at 767, 769. Thus, at the first stage of the *Baker Hughes* framework, like the standard for reviewing a motion for judgment as a matter of law, to determine "whether there is sufficient evidence" the court should "look only to the evidence and reasonable inferences which tend to support the case of" the government and "may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) (quoting Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949)).

192. United States v. Baker Hughes Inc., 908 F.2d 981, 983 (D.C. Cir. 1990). "The *burden of persuasion* becomes a crucial factor only if the parties have sustained their burdens of producing evidence . . . . If there is no jury and the judge is in doubt, the issue must be decided against the party having the burden of persuasion." BROUN ET AL., *supra* note 114, § 336, at 764 (emphasis added). Notably, the district court mentioned the Government failed to meet its burden

IV. A PROPOSAL FOR CONSISTENT VERTICAL MERGER ENFORCEMENT: REFINING *BAKER HUGHES*

Currently, there is no safe harbor for certain vertical mergers where the merging firms have a share of less than 20% of the relevant market[193] and where the related product[194] is used in less than 20% of the relevant market;[195] in sum, there is no presumption of legality.[196] However, this Note advocates for including a presumption that some challenged mergers are procompetitive based on the findings from economic and empirical evidence.[197]

A. *Addition of an Initial Procompetitive Presumption*

Indeed, this initial presumption should apply at the outset of a proceeding in instances where the merging firms can prove (during the Hart-Scott-Rodino review process)[198] that the effect of elimination of

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of persuasion because if failed to prove that the "substantial lessening of competition will be 'sufficiently probable and imminent.'" *AT&T, Inc.*, 310 F. Supp. 3d at 190 (quoting FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 115 (D.D.C. 2004)). The court in *AT&T, Inc.* incorrectly applied the phrase as a standard to judge whether the Government met its burden of proof. This is because the court's use of the phrase in *AT&T, Inc.* expressly suggested that the government satisfies its burden of persuasion in vertical merger challenges by demonstrating "that the substantial lessening of competition will be 'sufficiently probable and imminent' to warrant relief" to the exclusion of all other competition that may be substantially lessened. *Id.* (quoting *Arch Coal*, 329 F. Supp. 2d at 115). However, the phrase "sufficiently probable and imminent" is half of a quote that the court in *AT&T, Inc.* used to describe the type of "loss of competition 'which . . .' is the concern of § 7." United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 n.22 (1974) (quoting United States v. Cont'l Can Co., 378 U.S. 441, 458 (1964)). The full quote reads, "Moreover, the competition with which § 7 deals *includes not only existing competition* but that which is sufficiently probable and imminent." *Cont'l Can Co.*, 378 U.S. at 458 (emphasis added). Thus, in vertical merger challenges, the government satisfies its burden of persuasion by demonstrating that a proposed vertical merger may substantially lessen direct competition *or* competition which is sufficiently probable and imminent, *not* only and exclusively that which is sufficiently probable and imminent.

193. *See supra* note 72.

194. Examples of a related product include an input, a means of distribution, or access to a set of customers. VERTICAL MERGER GUIDELINES, *supra* note 2, at 3.

195. Statement of Joseph Simons, Chairman, Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Regarding Joint Department of Justice and Federal Trade Commission Vertical Merger Guidelines (June 30, 2020) [hereinafter Statement of Simons], https://www.ftc.gov/public-statements/2020/06/statement-chairman-joseph-simons-commissioner-noah-joshua-phillips [https://perma.cc/YGJ2-PBNJ].

196. During its argument in *AT&T, Inc.*, the DOJ stated that "[t]here is no presumption *in the law* that vertical mergers are 'presumed procompetitive,' or 'presumptively efficient.'" Proposed Conclusions of Law of the United States at 10, *AT&T, Inc.*, 310 F. Supp. 3d 161 (No. 1:17-cv-02511-RJL) (emphasis added) (citations omitted), https://www.justice.gov/atr/case-document/ file/1061066/download [https://perma.cc/2P43-482Q].

197. *See* Blair et al., *supra* note 55, at 767, 816; *see also* discussion *supra* Section II.A.

198. *See* 15 U.S.C. § 18a(a)–(b).

double marginalization (EDM)[199] was a result of the challenged merger, so long as the agencies can independently verify that EDM results from the challenged merger.[200]

B. *The* Baker Hughes *Burden-Shifting Framework*

To reiterate, the *Baker Hughes* burden-shifting framework involves three steps. The first step is modified due to the unavailability of market concentration evidence when examining a vertical merger,[201] and the inclusion of a procompetitive presumption when the Agencies can independently verify that EDM's existence is the result of the challenged merger. Thus, the government must satisfy its initial burden of production[202] by identifying the relevant market(s)[203] and then making a sufficient showing that the merger is likely to substantially lessen competition in the relevant market(s),[204] which leads to a presumption of illegality, i.e., the proposed merger's anticompetitive effect.[205]

The second step requires the merging firms to rebut the presumption of illegality by producing evidence that shows that the government's prima facie case "inaccurately predicts the [merger's] probable effects on future competition"[206] or "sufficiently discredit[s] the evidence underlying the initial presumption" in the government's favor.[207] For the third step, if the merging firms successfully rebut the presumption, then the government is required to produce additional evidence showing the merger's probability of producing substantially lessened competition; this burden merges with the ultimate burden of persuasion that remains with the government at all times.[208] This Note proposes that the only burden of proof is on the government at this final stage of the burden-shifting framework and is satisfied by a preponderance of the evidence standard.[209] Ultimately, the government's case hinges on successfully answering one question: "How may a vertical merger create a firm with the ability and incentive to foreclose, in whole or in part, a rival from a relevant market and cause net harm to consumers?"[210]

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199. *See supra* note 66.
200. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 12.
201. *See supra* note 105.
202. *See* BROUN ET AL., *supra* note 114, § 342, at 774.
203. *See supra* note 72.
204. *See* United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017).
205. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).
206. *Anthem*, 855 F.3d at 349 (quoting *Baker Hughes*, 908 F.2d at 991).
207. *Id.*
208. *See Baker Hughes*, 908 F.2d at 983.
209. In effect, this Note argues that the government is not required to make a "*clear showing*" that the challenged merger's anticompetitive effects topple its procompetitive efficiencies, as did the court in *Baker Hughes*. *Id.*
210. Statement of Simons, *supra* note 195, at 1.

C. *The Evidentiary Standards and Types of Evidence that Could Be Presented*

To begin, for the government to satisfy its initial burden of production, it must make a "'fact-specific' showing that that the proposed merger is 'likely to be anticompetitive,'"[211] i.e., the government must present sufficient evidence to a degree of a "reasonable probability," not proof of certain harm.[212] Simply put, the government *cannot* make a theoretical argument[213] that a proposed merger may substantially lessen competition[214] in the relevant market.[215] At this initial stage, a court should find that the government has met its burden of production when it proffers economic evidence that is sufficient, i.e., strong enough that

> a reasonable person could draw from it the inference of the existence of the particular fact to be proved [and is] . . . .
>
> . . .
>
> . . . not merely . . . evidence from which reasonable people could draw the inference of the truth of the fact alleged, but evidence from which (in the absence of evidence from the adversary) reasonable people could not help but draw this inference.[216]

Further, as in Title VII employment discrimination suits like *Burdine*, which *Baker Hughes* is modeled after,[217] the sufficient evidence standard applies to both parties for each to satisfy their respective burdens of production.

There are various ways for the government to support its initial burden of production.[218] First, the government can assert that the proposed merger produces unilateral effects that diminish competition between one

211. United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019).

212. Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39 (1962).

213. *See* Keyte, *supra* note 5, at 21.

214. *See supra* text accompanying notes 127–28.

215. *See* United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017).

216. BROUN ET AL., *supra* note 114, § 338, at 767, 769.

217. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254–56 (1981); *see also supra* note 182.

218. This second step of the *Baker Hughes* framework has been interpreted and expressed as a burden of production. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 982–83 (D.C. Cir. 1990); FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001). *Baker Hughes*'s interpretation is consistent with the U.S. Supreme Court's decision in *Ohio v. American Express*, 138 S. Ct. 2274, 2284 (2018), in the context of the rule of reason analysis under Section 1 of the Sherman Act. Jacobson, *supra* note 71, at 10.

merging firm and its rivals that either trade with or could trade with it.[219] When arguing that a vertical merger creates unilateral effects, the government may present evidence of head-to-head competition between one merging firm and rivals that trade with the other merging firm.[220] The government may also present alternative metrics, such as diversion ratios or upward pricing pressure, to support its allegation of unilateral effects.[221]

Indeed, the government is likely to allege that the challenged vertical merger produces a combination of the three most common types of unilateral effects: input foreclosure, raising rivals' input costs, or acquiring its downstream or upstream rivals' competitively sensitive information.[222] For either of these allegations of anticompetitive harm, the government is likely to allege that the merging firms have both the incentive and ability to engage in these activities.[223] To prove that the merging firms have the ability to engage in input foreclosure or raise rivals' costs, the government may present evidence that the challenged merger makes the merging firms more likely to force rivals out of the

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219. Unilateral effects occur when a merger "eliminates competition between two merging firms but does not alter the manner in which the other firms in the market compete" and "largely depend on the extent of direct competition, or 'diversion,' between the merging firms." Hovenkamp & Shapiro, *supra* note 17, at 2014. Thus, "[a] merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 81 (D.D.C. 2011). In other words, a merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms consumers. HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 24; *see* VERTICAL MERGER GUIDELINES, *supra* note 2, at 10. The focus of any court's unilateral effects analysis is "the relative degree of substitution between the merging firms' output and the predicted impact of the merger on the postmerger firm's own prices." Hovenkamp & Shapiro, *supra* note 17, at 2014 & n.85.

220. VERTICAL MERGER GUIDELINES, *supra* note 2, at 3–5.

221. For commentary on the use of diversion ratios and upward pricing pressure in merger analysis based on unilateral effects, see Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 60–80 (2010). These metrics can be used to complement or supplement the traditional metrics for measuring market shares and the Herfindahl-Hirschman Index (HHI) for measuring market concentration. Hovenkamp & Shapiro, *supra* note 17, at 2000 n.12. HHI is widely used when evaluating the anticompetitive effects of horizontal mergers, "measured as the sum of the squares of the market shares of all firms in the market." *Id.*

222. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 4 & nn.4 & 10. The concern with these effects is that the merging firms could "probably use its supply of an input (the related product) to weaken the competitive constraint it faces from rivals in the downstream market (the relevant market) . . . . [and] raise barriers to entry." *Id.* at 4 n.4. For more explanation on the negative aspects of these effects, see *supra* Section II.B.

223. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 4–5. Perhaps these requirements are a response to the district court's comment in *AT&T, Inc.* about the defendant not having "the 'incentive' or the 'ability' . . . to 'lessen competition substantially.'" United States v. AT&T, Inc., 310 F. Supp. 3d 161, 252 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

relevant market; deter rivals from innovating, entering, expanding, or financing those activities; or pass on higher costs to consumers by charging higher prices.[224] It also may present evidence that the merging firms' rivals can readily switch "purchases to alternatives to the related product," but that the switch will have a meaningful effect on "the price, quality, or availability of products or services in the relevant market."[225] Notably, the types of evidence that may be used to measure the firms' rivals' ability to switch to alternatives of the related product include the types of evidence the Agencies use to evaluate customer switching when implementing the hypothetical monopolist test.[226]

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224. VERTICAL MERGER GUIDELINES, *supra* note 2, at 4–5. Concerns with a merged firm raising rivals' costs are prominent when the firm has "unintegrated downstream customers and when these customers sell products that are close substitutes for the merged firm's own downstream product and have limited comparable alternatives to purchasing inputs from the merged firm." Blair et al., *supra* note 55, at 787.

225. VERTICAL MERGER GUIDELINES, *supra* note 2, at 5.

226. *Id.* The enforcement agencies utilize the hypothetical monopolist test "to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms." HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 9. The test is also used to evaluate "whether groups of products in candidate markets" are broad enough to constitute relevant markets. *Id.* at 8. Specifically, the test requires that

> a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.

Id. at 9. In addressing customers' likely responses to higher prices that result from horizontal (as well as vertical mergers), the Agencies consider a non-exhaustive list of reasonably available and reliable evidence that includes the following:

- how customers have shifted purchases in the past in response to relative changes in price . . . ;
- information from buyers, including surveys, concerning how they would respond to price changes;
- the conduct of industry participants . . . :
    - [including] sellers' business decisions . . . indicating sellers' informed beliefs concerning how customers would substitute among products in response to relative changes in price;
    - . . . .
- objective information about product characteristics and the costs and delays of switching products . . . ;
- . . . .
- evidence from other industry participants, such as sellers of complementary products;
- . . . and

Further, to succeed in alleging that the merging firms have the incentive to foreclose rivals or offer inferior terms for the related product, the government may present evidence that the merging firms would likely find it profitable to, and benefit significantly from, a reduction in actual or potential competition with users of the related product in the relevant market.[227] Overall, the government's presentation of these potential anticompetitive effects must be consistent with the facts and circumstances of the relevant market, linked to future market conditions, and supported by contemporaneous business documents.[228]

Second, the government may allege the vertical merger's "reasonable probability"[229] of raising barriers to market entry,[230] or that new entrants are required to engage in two-level entry.[231] It may also present evidence that the merging firms have an incentive to refuse to supply to a new entrant because the entrant is more efficient than the merging firms.[232] Third, the government can present actual evidence of substantial lessening of competition observed in consummated vertical mergers, direct comparisons based on experience, and evidence about the disruptive role of a merging party.[233] Fourth, the government may present evidence that the merging firms (if the merger was approved) have the incentive to raise rivals' distribution costs due to a large amount of diversion to the firms' related product and a large number of sales potentially lost to rival distributors, which will likely result in large profits.[234] Fifth, to show that the challenged merger may result in the merging firms raising the price of complement goods,[235] the government may present qualitative evidence supporting why the firms would raise

- the influence of downstream competition faced by customers in their output markets.

Id. at 11–12.

227. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 5.

228. *See id.*; Keyte, *supra* note 5, at 20. In other words, the government's "econometric modeling of any sort" must "'fit' with the facts (much like a *Daubert* review)." Keyte, *supra* note 5, at 25.

229. Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39 (1962).

230. This situation occurs in oligopoly markets. Brief for 27 Antitrust Scholars as *Amici Curiae* in Support of Neither Party at 8, United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019) (No. 1:17-cv-2511), 2018 WL 5099063, at *6.

231. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 7–8; United States v. Microsoft Corp., 253 F.3d 34, 82–84 (D.C. Cir. 2001).

232. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 8.

233. *See id.* at 3. The sources of evidence may "include documents and statements of the merging parties, their customers, and other industry participants and observers." *Id.*

234. *See id.* at 8.

235. *See supra* note 74.

the price of its related product for its customers that do not also buy the firms' complements for the related product.[236]

Sixth, the government may present evidence that the merging firms' rivals would avoid doing business with them because the firms (as a result of the consummated merger) would use the rivals' sensitive business information to lower the competitive value of procompetitive actions.[237] Seventh, the government may prove that the proposed vertical merger produces coordinated effects[238] by showing that the relevant market shows signs of vulnerability to coordinated conduct, and that a credible basis exists on which to conclude that the merger may enhance that vulnerability.[239] Specifically, the government's most important presentation at the initial stage will likely be a combination of fact witness testimony[240] and business documents, with sound economic data and mathematical models that complement, not contradict, the substance of the government's argument that the challenged vertical merger may substantially lessen competition.

AT&T, Inc. hinted,[241] and *New York v. Deutsche Telekom AG*[242] affirmed, that courts view contemporaneous business documents and testimony (or the lack thereof) from the key decision-makers of merging firms as one of the most persuasive pieces of evidence in vertical merger

236. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 9.

237. *Id.* at 10.

238. Coordinated effects involve harm to consumers arising from coordination between the merging firms and its remaining rivals. *Id.*; *see* HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 24–27 (explaining how the agencies evaluate post-merger coordinated effects and firm interactions). Antitrust law as it relates to mergers "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels." FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 60 (D.D.C. 2009) (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001)). A non-exhaustive list of evidence of market vulnerability includes failed previous attempts at collusion in the relevant market, which suggests "successful collusion was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely;" if each competitively important firm's "significant competitive initiatives can be promptly and confidently observed by that firm's rivals;" if a firm's "prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals." HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 25–26.

239. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 10; *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 24–27 (explaining that enforcement agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct by looking at various scenarios that signal when a market is more vulnerable to coordinated conduct).

240. *See* United States v. AT&T, Inc., 310 F. Supp. 3d 161, 187 (D.D.C. 2018) (mentioning the Government's twenty fact witnesses in that case), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

241. *AT&T, Inc.*, 916 F.3d at 1036.

242. 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

challenges.[243] Consequently, it is crucial for the government to define the relevant market with precision to strategically limit the relevance of the merging firms rebuttal evidence, which may be likely to rely less on economic data and more on testimony from the merging firms' executives.[244] Industry retrospectives can be presented if "sufficiently tied to the issues at hand."[245] Likewise, the government's economic theories must be linked to the merging firms' business strategies to support a reasonable inference that one post-merger consequence is that objectively reasonable corporate executive and business manager behavior is likely to produce anticompetitive effects.[246]

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243. Keyte, *supra* note 5, at 20; *Deutsche Telekom AG*, 439 F. Supp. 3d at 188–89, 244–45 (highlighting the fact that future vertical merger injunctive proceedings will likely turn on the "weight" of witness testimony as a "guiding principle" for "the judge's own skills and frontline experience in weighing, predicting, and judging complex and often conflicting accounts of human conduct," to ultimately analyze "behavioral drives and motivational forces . . . . [that] can function as a forecasting device, providing the Court substantial guidance about how the corporate officers and companies involved in the case are likely to conduct themselves under particular market conditions prevailing after a merger"). *But see* Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 GEO. WASH. L. REV. 1103, 1113–14 (2001) ("The [U.S. Supreme] Court's continuing focus on motive, combined with its preoccupation with motive in its first eighty years of antitrust decisionmaking, has the effect of forcing lower court judges to consider motive in antitrust cases. Indeed, it tempts them to rely primarily on motive in resolving the many disputes that are extraordinarily difficult to resolve through application of . . . economic models. . . . This institutional characteristic of antitrust courts creates a major obstacle to judicial application of . . . economics. A motive to harm a competitor [or market competition] is irrelevant to the application of any . . . [economic] model. Courts will go astray with great frequency if they become frustrated in their attempts to perform the daunting task of applying a . . . model to a complicated market and instead rely on evidence of motive as the basis to decide a case.").

244. *See, e.g.*, *AT&T, Inc.*, 916 F.3d at 1041, 1045 (recounting that the district court credited the testimonies of Turner Broadcasting's president, Time Warner's CEO, and an AT&T executive categorizing the government's theory of the merged firm's post-merger foreclosure behavior (by engaging in blackouts) as "too costly to risk," a point that "undermine[d] the persuasiveness of the government's proof" (alteration in original) (quoting *AT&T, Inc.*, 310 F. Supp. 3d at 219)); *see also* United States v. Sabre Corp., 452 F. Supp. 3d 97, 148–49 (D. Del.) ("[T]he Court is more persuaded by DOJ than by the Defendants . . . . largely due to the surprising lack of credibility . . . of certain defense witnesses . . . . [I]t is the DOJ which, under the law, has the *obligation* to prove its contention that the Sabre-Farelogix transaction will harm competition in a relevant product and geographic market. DOJ failed. . . . Unlike Defendants' evidentiary failings, DOJ's are dispositive."), *vacated as moot*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020); *Sabre Corp.*, 2020 WL 4915824, at *1 ("We also express no opinion on the merits of the parties' dispute before the District Court. . . . [T]his 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.").

245. Keyte, *supra* note 5, at 20. "Merger retrospectives often measure the performance of merged firms against a set of similarly situated control firms." Blair et al., *supra* note 55, at 772.

246. *Contra Deutsche Telekom AG*, 439 F. Supp. 3d at 246. This inference is very relevant to successfully challenge vertical mergers in dynamic markets. *See id.* at 241–44 (explaining the

For the *Baker Hughes* burden-shifting presumption to be more effective, the government's argument should involve a fact-specific presentation to the court that sufficiently presents the probable anticompetitive effects of a vertical merger. Use of real-world economic data from relevant markets, such as diversion ratios or upward pricing pressure to show the coordinated effects of the challenged merger, will be essential to shift the burden to the merging firms. Indeed, "antitrust theory and speculation cannot trump facts."[247] Further, the government's presentation of the merged firms executives should not be filled with "generic statements that vertical integration 'can' allow an entity to gain an unfair advantage over rivals."[248] By presenting these specific types of evidence, the government will be able to answer the court's implied question to overcome its initial burden: Can the government point to real-world evidence of past vertical mergers that actually resulted in anticompetitive effects so that the court can reasonably infer *this* merger will likely substantially lessen competition in the relevant market?

The government's presentation of real-world data of the proposed vertical merger's "reasonable probability" of anticompetitive effects will avoid the risk of a reviewing court interpreting its argument as speculative. By presenting a direct measure of the *strength* of the government's prima facie case connected to the relevant market, a reviewing court can weigh and determine, at the conclusion of the second step of the *Baker Hughes* framework, whether the evidence offered by the merging firms is enough to rebut the government's prima facie case.[249] The government cannot tread lightly past the significance of its initial showing because it sets the tone for the rest of the case. If the government were to present a purely theoretical argument relating to the challenged merger's potential for anticompetitive harm, as the court perceived the Government's argument in *AT&T, Inc.*,[250] then the

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dynamics of the relevant market and the unique features of dynamic markets in general); *see also AT&T, Inc.*, 310 F. Supp. 3d at 176 n.6 (explaining the importance of industry dynamics in the court's decision).

247. FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116 (D.D.C.), *appeal dismissed*, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004). If a reviewing court finds that the government shows a reasonable likelihood of coordinated effects by a preponderance of the evidence, it is not required to reach the issue of unilateral effects. FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 67 (D.D.C. 2009).

248. *AT&T, Inc.*, 916 F.3d at 1042.

249. *See* FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 286–87, 298–99 (D.D.C. 2020) (critiquing the FTC's failure to define a relevant market in a proposed horizontal merger between two North American suppliers of hydrogen peroxide).

250. *See AT&T, Inc.*, 916 F.3d at 1046 ("[T]he government had not shown at the first level that the merger was likely to lead to any price increases for consumers"); *see also AT&T, Inc.*, 310 F. Supp. 3d at 246 ("[T]he Government has failed to put forth sufficient evidence to show more than a theoretical 'possibility' of coordination.").

government is unlikely to succeed.[251]

For the second step, the merging firms may satisfy their burden of production[252] by either producing evidence that shows that the government's prima facie case "inaccurately predicts the relevant [merger's] probable effect on future competition"[253] or sufficiently "discrediting the [evidence] underlying the initial presumption in the government's favor."[254] The merging firms should satisfy their burden of production under the sufficient evidence standard.[255] Even if some may argue this is unfair to the government because the merging firms stand to profit more from the court's approval, it should be noted that a burden of production based on the sufficient evidence standard in this context is a double-edged sword for the merging firms. Although the firms benefit from the standard because "[c]ertainly less of a showing is required from defendants to rebut a less-than-compelling prima facie case,"[256] "the more compelling the [government's] prima facie case, the more evidence the defendant must present to rebut it successfully."[257] As a result, the merging firms' "evidence should trump the [initial] presumption when the evidence is more reliable than the presumption, and the presumption should rule when the evidence is less reliable."[258] At this step, the reliability of the firms' evidence that is required to rebut the initial presumption in the government's favor "depends on the relative probabilities of error of each."[259]

This Note does not suggest imposing a burden of proof for the merging firms, e.g., a clear and convincing standard,[260] because that is

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251. *RAG-Stiftung*, 436 F. Supp. 3d at 311 ("[E]valuating the persuasiveness of the additional evidence offered by [the merging firms] in rebuttal, and by the [government] in support of its ultimate . . . [burden of persuasion], becomes all but impossible. Some of that evidence might be relevant (and to some degree) . . . and some might not. The Court has little way of sorting all that out . . . .").

252. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).

253. United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017) (quoting *Baker Hughes*, 908 F.2d at 991).

254. *Baker Hughes*, 908 F.2d at 991.

255. *See id.* at 989 (mentioning that the court was "satisfied that the district court required the defendants to produce sufficient evidence").

256. FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 129 (D.D.C.), *appeal dismissed*, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004).

257. *Baker Hughes*, 908 F.2d at 991.

258. Salop, *supra* note 104, at 292. "With a weaker anticompetitive presumption, evidence at trial that the merger is beneficial is more likely to be able to overcome the . . . presumption." *Id.* at 293. Consequently, the "more compelling the [government's] prima facie case, the more evidence the defendant must present to rebut it successfully." FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 311 (D.D.C. 2020) (quoting *Baker Hughes*, 908 F.2d at 991).

259. Salop, *supra* note 104, at 294–95 (providing a mathematical explanation for this proposition).

260. This type of standard relates to evidence "indicating that the thing to be proved is highly probable or reasonably certain." *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

analogous to the "clear[] showing"[261] rebuttal standard that was rejected in *Baker Hughes*[262] and is also legally distinct from what is required to satisfy a burden of production.[263] Requiring a clear and convincing standard on the merging firms would place a burden on them that is "unduly onerous . . . . A defendant required to produce evidence 'clearly' disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case—whether a transaction is likely to lessen competition substantially."[264]

There are various kinds of rebuttal evidence the merging firms can present to meet their burden of production. First, they may present a successful efficiency defense,[265] i.e., that the proposed merger's cognizable efficiencies[266] would likely be sufficient to reverse the merger's potential harm to consumers.[267] Whether the court will credit the merger-induced decrease in downstream prices resulting from EDM as a procompetitive efficiency depends on the merging firms satisfying various fact-specific inquiries.[268] For example, the firms may use economic models that quantify their gains in the relevant market and, by way of comparison, show that any gains are unlikely to outweigh any losses from reduced sales of the related product.[269] Indeed, the merging firms may prove that they are unable to engage in input foreclosure or

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261. United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

262. *Baker Hughes*, 908 F.2d at 989.

263. *See supra* Section III.D.

264. *Baker Hughes*, 908 F.2d at 991. "[W]hen the presumption becomes weaker, the burden of production on the defendant required to rebut the presumption should fall accordingly." Salop, *supra* note 104, at 293.

265. *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) (recognizing that although the U.S. Supreme Court "has not sanctioned the use of the efficiencies defense in a section 7 case, the trend among lower courts is to recognize the defense." (citation omitted)); VERTICAL MERGER GUIDELINES, *supra* note 2, at 11 (stating that efficiency clams will be evaluated using the approach found in § 10 of the Horizontal Merger Guidelines); HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 29–31.

266. For successful efficiency defenses, enforcement agencies will only credit *merger-specific efficiencies*: those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of the proposed merger or another means having comparable anticompetitive effects. HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 30. Within *merger-specific efficiencies* there is a subgroup called *cognizable efficiencies*: verified merger-specific efficiencies that do not arise from anticompetitive reductions in output or service. *Id.*; VERTICAL MERGER GUIDELINES, *supra* note 2, at 11. Enforcement agencies will not challenge a merger "if cognizable efficiencies are of a character and magnitude such that the merger is [not likely] to be anticompetitive in any relevant market." VERTICAL MERGER GUIDELINES, *supra* note 2, at 11; HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 30 & n.14.

267. HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 30. For more information on how enforcement agencies conduct this analysis, see *id.* at 31.

268. VERTICAL MERGER GUIDELINES, *supra* note 2, at 5.

269. *Id.* Or the merging firms may show that its price responses are similar to those of non-merging firms. *Id.* at 6.

raise rivals' costs as a result of the merger by presenting evidence that "rivals could readily switch purchases to alternatives to the related product, including self-supply, without any meaningful effect on the price, quality, or availability of products or services in the relevant market."[270] To accomplish this, the merging firms may produce evidence that non-merging firms in the relevant market are "able to reposition their products to offer close substitutes for the products offered by the merging firms."[271]

Further, to prove that they do not have the incentive to foreclose rivals or offer inferior terms for the related product as a result of the merger, the merging firms may present quantitative evidence that they "would not benefit from a reduction in actual or potential competition with users of the related product in the relevant market."[272] To show the merging firms' lack of incentive to raise the price of a related product for their rivals, the firms may offer evidence that presents an alternative cause for the resulting reduction in competition,[273] e.g., that the reduction is due to the higher quality of the merging firms' related product, not a price increase. Similarly, to show a lack of incentive to raise rivals' costs, the firms may present evidence showing they will not use their leverage to negotiate increased wholesale prices for the firms' supply of the related product from rival retailers.[274]

Second, the firms may present evidence of the absence of significant entry barriers in the relevant market,[275] a lack of a need to require new entrants to go through a two-level entry into the relevant market,[276] or the lack of an incentive to refuse to supply to a new entrant because the entrant is less efficient than the merging firms.[277] Third, the firms may produce evidence that shows either a lack of pre-merger competition or continued intense post-merger market competition.[278] Fourth, to counter

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270. *Id.* at 5.

271. HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 22.

272. VERTICAL MERGER GUIDELINES, *supra* note 2, at 5. In the case of foreclosure, they may also prove that their "gains in the relevant market [will] likely [not] outweigh any losses from reduced sales of the related product." *Id.* Indeed, the merging firms may be able to combat the accusation that they will profit from foreclosing rivals or offering inferior terms for the related product by present quantitative evidence that they will not benefit "significantly in the relevant market when rivals lose sales or alter their behavior in response to the foreclosure or to the inferior terms." *Id.*

273. *See id.* at 6.

274. *See id.* at 7.

275. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 987 (D.C. Cir. 1990) ("The existence and significance of barriers to entry are frequently, of course, crucial considerations in a rebuttal analysis. In the absence of significant barriers, a company probably cannot maintain supra-competitive pricing for any length of time.").

276. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 7–8.

277. *See id.* at 8.

278. *See* Salop, *supra* note 104, at 270.

allegations that the challenged merger may result in the merging firms raising rivals' distribution costs, the firms may present evidence that suggests no incentive to raise the retail price for their product due to a lack of diversion to the firms' related product, as well as a *de minimis* amount of sales lost to rival distributors.[279]

Fifth, to counter allegations that the challenged merger may result in the merging firms raising the price of complement goods, the firms may present qualitative evidence supporting why they would not raise the price of their related product for their customers that do not also buy the firms' complements for the related product.[280] Sixth, to counter allegations that the challenged merger may cause the merging firms to use a rival's competitively sensitive information to moderate its competitive response to that rival's actions, the firms may present evidence of scenarios where they are unlikely to preempt or act quickly in response to a rival's procompetitive business actions.[281] Seventh, to counter allegations that the challenged merger may result in coordinated effects,[282] the merging firms may either present evidence that the market is less vulnerable to coordinated conduct[283] or discredit the credibility of the Agencies' basis to conclude that the vertical merger may enhance that vulnerability.[284] Eighth and finally, the firms can rely on the testimony of credible business managers and corporate executives that the challenged

279. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 8.

280. *See id.* at 9; *supra* note 74.

281. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 10. Or the firm may identify situations where rivals are unlikely to refrain from doing business with it because there is almost no risk that the merging firms will use rivals' competitively sensitive business information. *See id.*

282. The Agencies are more likely "to challenge a [vertical] merger on the basis of coordinated effects when the relevant market shows signs of vulnerability to coordinated conduct, and the Agencies have a credible basis . . . to conclude that the merger may enhance that vulnerability." *Id.*

283. For example, the firms could present evidence that the market is not as vulnerable as the government proffers because the merging firm is or would (as a result of the merger) be the maverick firm that "plays or would play an important role in preventing or limiting anticompetitive coordination in the relevant market." *Id.* A non-exhaustive list of defenses includes a lack of transparency regarding the identities of the firms serving particular customers; irregular monitoring by suppliers of another's prices or customers; if the merged firm's "prospective competitive reward from attracting customers away from its rivals will be significantly [increased] by likely responses of those rivals," e.g., if the firm's rivals produce a substitute good of inferior quality as compared to the firm's related product. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 26.

284. *See* VERTICAL MERGER GUIDELINES, *supra* note 2, at 10. The merging firm may present qualitative or quantitative evidence that it stands less to gain from successful coordination with other rival participants. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 24, at 26.

merger will produce procompetitive benefits and help it to continue a successful business strategy on a greater scale.[285]

For step three, the government should be assigned a preponderance of the evidence standard of proof to satisfy its final burden of producing additional evidence of anticompetitive effects, as an elevated evidentiary standard here would be misguided. Here is where this Note breaks new ground from *Baker Hughes*, which categorized the sufficient evidence standard as satisfying the government's final burden.[286] Although the district court in *AT&T, Inc.* mentioned that the preponderance of the evidence standard will satisfy the government's burden of proof for a violation of Section 7 of the Clayton Act, this Note argues that vertical merger caselaw should affirmatively establish that this is the standard that applies to the government for it to satisfy the burden of persuasion in vertical merger challenges.[287]

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285. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 234, 246 (S.D.N.Y. 2020).

286. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 992 (D.C. Cir. 1990) ("Because the government did not produce sufficient evidence to overcome this successful rebuttal, the district court concluded that 'it is not likely that the acquisition will substantially lessen competition in the United States either immediately or [in the] long-term.' The government has given us no reason to reverse that conclusion." (citation omitted) (quoting United States v. Baker Hughes Inc., 731 F. Supp. 3, 12 (D.D.C. 1990))).

287. *See* United States v. AT&T, Inc., 310 F. Supp. 3d 161, 189 (D.D.C. 2018) ("The Government 'has the ultimate burden of proving a Section 7 violation by a preponderance of the evidence.'" (quoting United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 49 (D.D.C. 2011))), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019). Although for some this may be crystal clear in articulating the standard for the government to meet its burden of persuasion in a vertical merger challenge, consider the distinguishable nature of these precedents. *H & R Block* involved a horizontal merger between H & R Block and TaxACT, the second and third most popular distributors of do-it-yourself tax preparation products, that was enjoined because the defendants were unable to rebut the Government's presentation of the merger's potential anticompetitive effects. 833 F. Supp. 2d at 43–44, 92. In *H & R Block*, the district court cited to another case that mentioned "The United States has the ultimate burden of proving a Section 7 violation by a preponderance of the evidence." *Id.* at 49 (quoting United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 180 (D.D.C. 2001)). That case, *Sungard Data*, involved a horizontal merger challenge between two major computer disaster recovery providers (SunGard, Inc. and Comdisco, Inc.), both of whom offered information technology services that allowed businesses to restore their computer applications if a disaster or power outage caused primary data centers to become unavailable. 172 F. Supp. 2d at 173–75, 177–78. In *Sungard Data*, because the Government failed to prove that there were "a substantial number of customers [among] whom there are no competitive alternatives" in a narrowly defined relevant product market, the court was unable to conclude that, if the challenged merger were approved, a hypothetical monopolist would find it profitable to impose an increase in price. *Id.* at 191–93. Although the court in *Sungard Data* declared that the government satisfies its burden of persuasion by meeting the preponderance burden of proof standard, that rule is unsupported without a citation to any federal caselaw precedent or federal statute. *See id.* at 180. The U.S. Court of Appeals for the Eight Circuit's articulation of the applicable standard in *Concord Boat Corp.* is close, stating that "[a]ntitrust plaintiffs must prove

In terms of degree, a preponderance of the evidence standard would require the government to produce additional evidence of greater reliability than compared to merging firms.[288] This is neither illogical nor irrational: by requiring the government to produce additional evidence that disproves a vertical merger's potential procompetitive effects, it "must essentially persuade the trier of fact on the ultimate issue in the case—whether a transaction is likely to lessen competition substantially."[289] The burden of proof standard should be introduced for the first and only time at this point in the analysis since it equates to what *Baker Hughes* describes as the government's burden of production merging with its ultimate burden of persuasion[290] at this final step. Indeed, the government should conclude its argument by presenting evidence that is more plausible and persuasive than the merging firms'

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an antitrust violation by a preponderance of the evidence." Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1058 (8th Cir. 2000); *cf.* Herman & MacLean v. Huddleston, 459 U.S. 375, 379 & n.7, 390 (1983) (explaining the benefits of using the preponderance of the evidence standard in civil cases, including for private plaintiffs suing for fraudulent misrepresentations and omissions in a registration statement under Section 10(b) of the Exchange Act of 1934). However, again the facts are distinguishable from vertical merger challenges: the plaintiff boat builders in *Concord Boat Corp.* alleged that the market leader in stern drive engine manufacturing established a monopoly in the stern drive engine market, in violation of Section 7 of the Clayton Act. 207 F.3d at 1044–45. Rather than borrow the burden of proof standard from cases that are clearly distinguishable (mostly in fact and somewhat in law), should the courts not clearly establish the standard necessary for the government to meet the ultimate burden of persuasion in a vertical merger challenge?

288. One definition of the *preponderance of the evidence* standard is "that evidence preponderates when it is more convincing to the trier [of fact] than the opposing evidence." BROUN ET AL., *supra* note 114, § 339, at 770. Preponderance is said to

> describe a state of proof in which the "weight of the evidence" favors (or does not favor) the conclusion in question, and preponderance is often said to describe a state of proof that persuades the factfinders that the points in question are "more probably so than not" . . . .
>
> Preponderance is not a comparative standard . . . The question is not whether plaintiff's case is better than defendant's, but whether the evidence makes the points that the plaintiff must prove more probably true than not.

MUELLER & KIRKPATRICK, *supra* note 190, at 425. In other words, proof by a preponderance means "proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence. Thus the preponderance of evidence becomes the trier's belief in the preponderance of probability." BROUN ET AL., *supra* note 114, § 339, at 770; *see also* Steuer, *supra* note 20, at 173 (arguing that the law should encompass harm that is "as likely as not").

289. *Baker Hughes*, 908 F.2d at 991. "[W]hen the presumption becomes weaker, the burden of production on the defendant required to rebut the presumption should fall accordingly." Salop, *supra* note 104, at 293.

290. *Baker Hughes*, 908 F.2d at 983.

rebuttal evidence.[291] At this final step, the government's strategy should consist of three prongs. First, the government should show that the anticompetitive effect of raising rivals' costs likely exceeds (in terms of magnitude) the procompetitive benefit(s) of EDM.[292] In other words, the government should prove that the merger is likely to "produce a *net* unilateral anticompetitive effect[,] . . . specifically, . . . that the anticompetitive effect of RRC [raising rivals' costs] likely exceeds the procompetitive benefit of EDM."[293] Admittedly, there are "few clear answers" for questions related to the best way for the government to conduct its analysis.[294] Merger simulation is one avenue that the government can use to analyze the effect of EDM on the size of raising rivals' costs.[295] That being said, the government should avoid the mistake it made in *AT&T, Inc.* of populating its model with improper inputs and faulty assumptions.[296] Alternatively, the merging firms could be tasked with presenting the magnitude of the challenged merger's procompetitive effects at the rebuttal stage, whereas the government would only be required to measure the magnitude of the merger's harmful effects at this final stage; the court will ultimately weigh them both and decide.[297]

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291. "The burden of proof should generally be given to the party with the claim that is hardest to believe. If the plaintiff's claim is implausible, make him prove it. If a defense seems far-fetched, make the defendant come forward with the evidence supporting it." HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 146 (2005). The defendant's rebuttal evidence may consist of a heavy reliance on the merging firms' executive and officer testimony. *See, e.g.*, *AT&T, Inc.*, 916 F.3d at 1036, 1038.

292. Blair et al., *supra* note 55, at 765, 798. Blair and colleagues refer to this as the "unilateral effects tradeoff" and argue that EDM and raising rivals' costs (RRC) are both "inherent, unilateral competitive effects—two sides of the same coin—even if they do not necessarily share equal magnitude." *Id.* at 762, 764. This tradeoff occurs when the merged firm sells a related product at a lower price than its rivals, causing "some substitution away from competing products—including those made by rival downstream firms—reducing these firms' demand for inputs. . . . Consequently, EDM . . . affects the RRC incentive (by lowering the unintegrated downstream firms' demand for the input) . . . ." *Id.* at 794.

293. *Id.* at 765; *see* VERTICAL MERGER GUIDELINES, *supra* note 2, at 5 (explaining that the enforcement agencies will evaluate "the likely net effect on competition . . . to the merged firm's unilateral incentives"). Although Blair and colleagues argue that this should be proved in the first step of the *Baker Hughes* framework, that is inconsistent with the framework's structure since it is at the third step that the government must satisfy its "ultimate burden of persuasion" that shows the challenged merger's "probability of substantially lessened competition." *Baker Hughes*, 908 F.2d at 983; *see* Blair et al., *supra* note 55, at 815, 817.

294. Blair et al., *supra* note 55, at 796.

295. *Id.*

296. *See* United States v. AT&T, Inc., 310 F. Supp. 3d 161, 199, 234–35, 237–38 (D.D.C. 2018), *aff'd*, 916 F.3d 1029; *AT&T, Inc.*, 916 F.3d at 1036–39, 1046–47.

297. Blair et al., *supra* note 55, at 797. This alternative has the potential to become a legitimate enforcement mechanism if Congress were to amend the HSR Act to require or obligate the merging firms to calculate and present the magnitude of the proposed merger's efficiencies, including EDM, during the Pre-Merger Review process. To combat instances of merging firms'

Second, the government should present fact testimony that shows more than just that the merging firms considered the possibility that the challenged merger "might create opportunities to charge higher prices or otherwise decrease competition."[298] Likewise, the government's evidence should emphasize the unreliability of the merging firms' executive or business manager testimony for arguably being one-sided and self-interested in the outcome of the merger.[299] Third, the government's economic theories and models should be connected to observed "patterns of conduct business managers manifest that could serve as persuasive predictors of whether or not commercial firms are likely to engage in anticompetitive actions . . . under particular market conditions."[300] The list of behaviors includes:

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noncompliance with this new requirement, or scenarios where the reported magnitude of the merger's efficiencies turns out to be false or misleading, this Note proposes that Congress amend the laws currently in place to grant the DOJ and FTC the ability to file a separate cause of action for fraud, similar to § 11(a) lawsuits under the Securities Act of 1933 for "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact." 15 U.S.C. § 77k(a). The addition of this cause of action should correspond to a different civil penalty than the penalties currently in place. *See* 15 U.S.C. § 18a(g). The primary benefit and rationale behind this Note's proposal is that, like in a § 11 securities law antifraud claim, the agencies "need not prove that the [defendant] acted with any intent to deceive or defraud." Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1323 (2015); *see also* STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION 580 (Saul Levmore et al. ed., 5th ed. 2019) (mentioning the other litigation benefits that "scienter, reliance, and causation are not required elements of a § 11 cause of action"). To achieve what this Note proposes here, vertical merger caselaw should adopt the two elements of a § 11 securities law antifraud claim: (1) a showing of a material misstatement or omission and (2) materiality. CHOI & PRITCHARD, *supra*, at 579–80. The standard for materiality could be based on the summary judgment standard for a material fact, e.g., "if it might affect the outcome of the suit under the governing law." Hayes v. District of Columbia, 923 F. Supp. 2d 44, 48 (D.D.C. 2013) (quoting Steele v. Schafer, 535 F.3d 689, 692 (D.C. Cir. 2008)). Or it can be based on other understandings of the concept, e.g., "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation," i.e., for the Agencies to choose to not challenge the merger, or "[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction." Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 2002–03 (2016) (alterations in original) (quoting first 26 R. LORD, WILLISTON ON CONTRACTS § 69:12, at 549 (4th ed. 2003); then RESTATEMENT (SECOND) OF TORTS § 538, at 80 (1976)).

298. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 234 (S.D.N.Y. 2020); *see AT&T, Inc.*, 310 F. Supp. 3d at 210 ("[E]vidence indicating defendants' recognition that it could be possible to act in accordance with the Government's theories of harm is a far cry from evidence that the merged company is likely to do so (much less succeed in generating anticompetitive harms as a result).").

299. *See AT&T, Inc.*, 916 F.3d at 1045 (recounting that the district court "dismissed the suggestion that testimony from the Time Warner executives should be discounted as potentially biased due to self-interest").

300. *Deutsche Telekom AG*, 439 F. Supp. 3d at 244. For an explanation of the promise (and potential disadvantages) of new economic bargaining models to vertical merger analysis, see Joshua D. Wright & John M. Yun, *Use and Abuse of Bargaining Models in Antitrust*, 68 U. KAN. L. REV. 1055, 1069–70, 1092–96 (2020).

> [M]anifested personal and commercial ambition and aggressiveness by company executives in pursuit of business goals; concerns over the individual's and the business's reputation in the industry; responsiveness to professional and corporate peer pressure; strength of character brought to bear upon company policies and operations; level of commitment to business objectives and resourcefulness and creativity in securing and managing the means to carry them out; impulse to prevail in competitive settings and to exercise will power directed to that end; motivation to achieve marketing targets surpassing competitors; inducement to strive harder impelled by the prospect of promotion and rise of standing within a corporation or industry; resort to disruptive or contrarian ways to gain competitive ends and demonstrable success in doing so; and patterns of past conduct and duration and consistency of openly known identification with and adherence to a recognized professional or business culture.[301]

The combination of the government's fact testimony, economic models and theories, and identified behaviors should persuade the court that the merged firms' post-merger pursuit of anticompetitive strategies is not an irrational "commercial about-face,"[302] but rather a "rational" business strategy in the near or long term.[303]

CONCLUSION

This Note raised issues and presented novel proposals that will hopefully lead to further dialogue, more analysis, and less speculation among courts about how to analyze vertical mergers. It is the Author's hope that antitrust law will get closer to the ideal expressed and envisioned by the U.S. Supreme Court in *Philadelphia National Bank*—to satisfy the "congressional objective embodied in § 7, to simplify the test of illegality,"[304] and to allow merging firms to "assess the legal consequences of a merger with some confidence"[305] and without "doing violence" to this stated objective.[306]

301. *Deutsche Telekom AG*, 439 F. Supp. 3d at 244.
302. *Id.* at 245.
303. *Id.* at 246.
304. United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963).
305. *Id.* at 362.
306. *Id.*