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AN (UN)FIT THEORY: LESSONS FROM THE FTC'S FAILED ATTEMPT TO BLOCK META'S ACQUISITION OF WITHIN'S VR FITNESS APP

By Michael A. Gleason, Ryan C. Thomas, and Ian W. Fraser

Michael Gleason and Ryan Thomas are partners in the Washington, D.C. office of Jones Day. Ian Fraser is an associate in Jones Day's Washington, D.C. office. Contact: magleason@jonesday.com or rcthomas@jonesday.com or ifraser@jonesday.com

In the latest example of aggressive—but unsuccessful—Biden Administration antitrust enforcement, the Federal Trade Commission ("FTC") failed to obtain a preliminary injunction in federal court that would have barred Meta Platforms, Inc. from acquiring virtual reality ("VR") fitness app developer Within Unlimited, Inc., pending the outcome of an administrative hearing on the merits. Following the loss and public speculation that the FTC would continue to pursue the case in its administrative court, the FTC withdrew its administrative complaint, consistent with past practice. Historically, most antitrust M&A challenges involve companies that *currently* compete in the same market. Here, the FTC challenged Meta's acquisition not because it competed with Within, but because it was allegedly a *potential* competitor to Within.

Antitrust enforcers globally, particularly in the U.S., have spilled much ink about challenging deals involving potential competitors. For example, in an early memo to staff, the then-new FTC Chair urged staff to be "forward-looking in anticipating problems . . . especially attentive to next-generation technologies, innovations, and nascent industries across sectors."[1] Likewise, in announcing revisions to their merger guidelines, the DOJ and the FTC called for input on "threats to potential and nascent competition" which "may be key sources of innovation and competition."[2] The enforcers have settled and litigated potential competition cases too.[3] For example, during the Obama Administration, the FTC litigated and lost its challenge to STERIS' acquisition of Synergy Health. During the Trump Administration, the DOJ litigated and lost its effort to block Sabre's acquisition of Farelogix and filed a complaint challenging Visa's acquisition of Plaid, which prompted the parties to abandon the deal.

A common concern that we hear from busi-

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ness about potential competition theories relates to the predictability of enforcement. Setting aside investigations of consummated transactions, which are relatively infrequent, merger enforcement already requires using a crystal ball and predicting likely competitive effects resulting from a transaction. That is hard enough when evaluating deals involving current competitors; it is considerably more challenging when one of the merging parties is not even an active market participant. Potential competition concerns can seem esoteric, random, or unfair, when compared to the guidance, precedent, and economics present in traditional horizontal competition matters. This article summarizes the FTC's challenge and the court's decision to Meta/Within, and provides key lessons from that decision and other recent potential competition cases.

The FTC's Challenge to Meta/Within

In October 2021, technology and social media company Meta, formerly known as Facebook, agreed to acquire VR fitness app developer Within. Within's flagship product is a subscription-based VR fitness service called Supernatural. Supernatural allows users with VR headsets and handheld controllers to participate in a wide range of daily workouts using VR simulations of activities like aerobic boxing and meditation. By acquiring Within, Meta would add Supernatural to the lineup of apps in its Quest Store, the app store for Meta's Quest line of VR headsets and controllers. At the time, Meta did not have a VR fitness app of its own. Meta did, however, have an app called Beat Saber, a rhythm-based VR game where players use virtual swords to slash waves of oncoming blocks in time with music.

In July 2022, the FTC filed a complaint in the U.S. District Court for the Northern District of California seeking a preliminary injunction to block the proposed transaction. The FTC's initial complaint advanced claims in two markets. First, Meta and Within were direct rivals in a market that included both dedicated fitness apps like Within's Supernatural and apps with an incidental fitness benefit like Meta's Beat Saber (the "VR Fitness App" market). Second, the FTC alleged that Meta was a *potential* competitor to Within in a VR *dedicated* fitness app market (the "VR Dedicated Fitness App" market) under two theories of harm, "actual potential competition" and "perceived potential competition." No doubt concerned about reconciling those two markets, the FTC abandoned its "current competition" theory,[4] proceed-

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ing only under its "potential competition" theories in the VR Dedicated Fitness App market.

The FTC alleged that Meta held a leading position and invested heavily in VR equipment and app development, and that it was "reasonably probable" Meta would have entered the VR Dedicated Fitness App market absent the proposed acquisition of Within. As support for that contention, the agency pointed to Meta's "economic characteristics, size, resources, capabilities, advantages, and incentives" to enter, along with assertions that Meta had "seriously considered doing so."[5]

Actual Potential Competition Theory

Under this theory, harm occurs in a concentrated market if a competitor likely would have entered absent an acquisition.[6] A plaintiff must show that (1) it would be feasible for the potential entrant to enter the market, and (2) a "substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."[7]

Perceived Potential Competition

Under this theory, an acquisition harms competition in a concentrated market because the deal eliminates the threat of potential entry in the future, which operates as a current competitive constraint. A plaintiff must show that (1) the potential entrant has "characteristics, capabilities, and economic incentive to render it a perceived potential de novo entrant," and (2) the potential entrant's "premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market."[8]

The Court's Decision

Following a seven-day evidentiary hearing, the court denied the FTC's request for a preliminary injunction. The court agreed with the FTC's relevant market definition, "VR dedicated fitness apps in the United States," but it held that the FTC's evidence failed under both potential competition theories.

Actual Potential Competition

The court examined both objective evidence—whether it was "reasonably probable" that Meta would have entered the VR Dedicated Fitness App market *de novo*—and subjective evidence about Meta's business plans.

With respect to objective evidence, the court evaluated Meta's financial resources, engineering expertise, competence and experience with fitness and workout content, video and studio production capabilities, and Meta's incentives arising from users, growth, hardware integration, and profitability. Despite acknowledging Meta's financial resources and engineering and VR capabilities, the court found that Meta "lack[ed] the capability to create fitness and workout content, a necessity for any fitness product or market."[9]

With respect to subjective evidence, the court referred primarily to Meta's contemporaneous business documents, giving "little weight to subjective evidence and statements provided by Meta employees during the course of the litigation."[10] Notwithstanding that caveat, the court concluded that the evidence failed to show Meta was likely to enter *de novo*, rather than by acquisition. Meta "had consciously considered and appeared doubtful of the proposition to build its own independent VR fitness app."[11] To enter, the documents showed that Meta would have to "build new kinds of expertise at the intersection of software, instructor-led fitness, music, media," but there was a lack of contemporaneous documents evidencing attempts to do so. The court also criticized the FTC's lack of evidence "addressing the *actual* means of entry that Meta considered." It was not sufficient for the FTC to speculate that Meta had the resources of a large company and incentives to overcome its lack of fitness experience or content creation by hiring experts. Where, as here, the objective evidence about entry is "weak or inconclusive," "the FTC must offer *some* feasible and "reasonably probable path to *de novo* entry."[12]

The court found no persuasive evidence in Meta's documents that Meta planned *de novo* entry. The FTC's "main theory" was that Meta could have entered by expanding Beat Saber into a VR Dedicated Fitness App in partnership with Peloton, a company that sells exercise equipment with internet-connected touchscreens, including streaming and on-demand fitness content. Meta's Beat Saber/Peloton partnership documents, however, did not support the FTC's theory because the contours of the partnership were not defined, and the proposal did not have "uniform or even widespread support" among Meta's VR leaders. The court also noted the "dearth of contemporaneous internal discussions" about the partnership, that Meta sought but never hired a contractor to study the partnership, and there were "two months of inactivity" between the last communication about the partnership and Meta's pursuit of Within. All of that suggested that Meta did not have a realistic plan to enter the VR Dedicated Fitness App market via a partnership with Peloton.

Perceived Potential Competition

The court found the same evidence described above to be insufficient to support the FTC's perceived potential competition theory of harm. Although the court's decision is heavily redacted, it concluded that the objective evidence did not support a "reasonable probability" that firms perceived Meta as a potential entrant. The court also concluded that there is "no direct or circumstantial evidence to suggest that Meta's presence did in fact temper oligopolistic behavior or result in any other procompetitive benefits."[13]

Lessons from the FTC's Potential Competition Matters

Below, we catalog the circumstances that prompted the enforcers' recent potential competition challenges. The presence of one or more of those factors does not necessarily mean the DOJ or the FTC will investigate or challenge a transaction. Instead, the lessons are intended to help M&A advisors identify and distinguish which deals involving a potential competitor are more or less likely attract scrutiny from antitrust enforcers. It is often said that antitrust cases are fact specific. That is particularly true of deals involving potential competition.

1. The Parties Operate in Adjacent Markets.

In most potential competition cases, the buyer and the target have operated in adjacent markets. The enforcers have argued that companies in neighboring markets are best positioned to enter, drawing on existing physical and intangible assets such as machinery, plants, technical know-how, customer relationships, and marketplace knowledge, among others. Relatedly, the enforcers might be more likely to identify a potential competition issue if the target's business would fill a gap in the buyer's product portfolio.

2. One of the Parties Has a High Share in a Market with Few Competitors.

Potential competition cases typically involve a "market" in which one party's share is high, there are few other competitors in the market (high market concentration), and the market has remained stable over many years. For example, in the DOJ's challenge to Visa's acquisition of Plaid, the government alleged that Visa's market share was a "durable" 70% and its main rival "neither gained significant share from Visa nor restrained Visa's monopoly."[14]

3. The Potential Competitor Has a "Unique" Asset.

Enforcers often allege that a potential competitor has a specialized asset such as key technology, intellectual property, a uniquely loyal customer base, data, or input or distribution relationships that make it a threat to a dominant incumbent. For example, in its

2013 challenge to Nielsen's acquisition of Arbitron, the FTC alleged that the parties were the "best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because only Nielsen and Arbitron maintain large, representative panels capable of measuring television with the required individual-level demographics, the data source preferred by advertisers and media companies."[15] The FTC also maintained that Nielsen and Arbitron had important audience measurement technologies that other companies lacked.[16]

In *Visa/Plaid*, the DOJ alleged that Visa's "extensive network" of merchants and consumers was hard to duplicate, making de novo entry time-consuming and costly.[17] Without the deal, the government claimed that Plaid planned to leverage connections with 11,000 financial institutions and 200 million consumer bank accounts to overcome purported entry barriers and challenge Visa's "monopoly" in online debit services.[18]

In the DOJ challenge to Sabre's acquisition of Farelogix, it alleged that Sabre was the largest provider of booking services to airlines and used "contractual and technical barriers" to prevent entry.[19] The DOJ alleged that Sabre's contracts prevented airlines from offering special fares through other booking services distributors, among other terms.[20] The DOJ argued that, unlike other firms, Farelogix was successful in overcoming that impediment because its technology allowed airlines to bypass traditional booking services to connect directly to travel agencies.[21]

4. The Company Has Taken Concrete Steps Towards Probable Entry.

The U.S. enforcers have long challenged deals involving potential competition, but the status of the potential competitor's entry has varied from theoretical planning to more concrete and substantial progress toward entry. In the latter type of challenge, in 2013, the FTC challenged (and settled via divestiture) Pinnacle Entertainment's acquisition of Ameristar Casinos because Ameristar had started construction on a casino adjacent to a Pinnacle casino. In another example, the FTC challenged an acquisition of a target battery manufacturer that was preparing to enter several markets by testing its products with and marketing to customers.[22] In one market, the agency claimed that the target had already signed a contract to supply a large customer.

The FTC also has challenged, and often settled via divestiture, many acquisitions in the pharmaceutical industry involving one party with a high share and another party with a product in development. Because of the Food and Drug Administration approval process, R&D in the pharmaceutical industry has a distinct and circumscribed path, and the expiration of intellectual property may further reduce uncertainty about when entry is likely to occur. R&D projects in this sector often have well-defined stages of development, reasonably predictable timelines and risk profiles, and relatively clear go/no-go decisions. Those entry dynamics can reduce the FTC's litigation risk in pharmaceutical cases and often prompt merging parties to settle or abandon transactions when confronted with significant agency concerns.

In contrast, enforcers have less success challenging transactions outside the pharmaceutical sector and which involve less well-developed entry plans. For example, the relative certainty of entry in pharmaceutical deals is absent in the FTC's "VR Dedicated Fitness App market." The FTC failed to persuade the court that Meta planned to enter through a partnership with Peloton, pointing to a lack of "uniform or widespread support among the Meta personnel," doubts about the feasibility of the partnership from Meta leaders, an unexecuted proposal to hire a consultant to analyze the collaboration, and the passage of two months without any activity on the project.[23]

Another illustrative case occurred in 2015, when the FTC lost its bid to block STERIS Corporation's acquisition of Synergy Health plc. The FTC alleged that Synergy was poised to enter and disrupt the duopoly market for contract sterilization of implanted medical devices and other products. According to the FTC, STERIS sought to acquire Synergy to maintain its dominant position and eliminate a future disruptive competitor. The court rejected the FTC's attempt to block the deal, finding that Synergy would not have entered in the absence of the transaction. According to the court, although Synergy's board endorsed the "concept" of launching the new business, the company had not approved a business plan, the company failed to obtain customer commitments to purchase the new services, and the capital investment necessary to enter would have exceeded its budget.[24]

These cases make clear that, while build versus buy decisions can raise potential competition issues, the government faces a high burden in proving its cases. Enforcers may use a company's consideration of *de novo* entry alternatives to challenge an acquisition in the same space. When evaluating build versus buy alternatives, companies should consider ways to clearly document what is brainstorming or even "blue-sky thinking" in contrast with a concrete plan that the company intends to execute. If the company evaluates *de novo* entry and decides it is not a feasible alternative, contemporaneously documenting those reasons—a lack of personnel, physical assets, intellectual property, know-how, experience, internal support; high costs/low return on investment; other priorities for capital; reputational or brand challenges; regulatory impediments; etc.—can help to explain later why the company did not proceed.[25] And, if a project is closed, document that fact.

5. The Transaction Is in the Technology or Health Care Sector.

Although potential competition issues can arise in any sector, in practice, deals involving technology and health care businesses (especially in pharmaceuticals and medical devices) attract heightened scrutiny from antitrust enforcers. Indeed, many of the agencies' potential or nascent competition cases have been in those two sectors, including *Meta/Within* (VR apps), *Visa/Plaid* (fintech), *Sabre/Farelogix* (travel booking technology), *STERIS/Synergy* (medical device sterilization), *ANI Pharmaceuticals/Novitium Pharma* (oral antibiotics and steroids), *Medtronic/Intersect ENT* (ear, nose, and throat medical devices), and *Össur Hf/College Park Industries* (myoelectric prosthetic elbows).

In the technology sector, enforcers have heavily scrutinized allegedly "dominant platforms," which agency officials claim use "abundant cash flow from core lines of business can finance its entry into any number of nascent and emerging markets, enabling it to selectively monetize operations in distinct ways that are not viable for any other participant in those same markets."[26]

Similar developments have occurred in the pharmaceutical industry. In March 2021, the FTC announced an international working group to "update" the agency's analytical approach for pharmaceutical mergers. The then-Acting FTC Chair commented that "[g]iven the high volume of pharmaceutical mergers in recent years, amid skyrocketing drug prices and ongoing concerns about anticompetitive conduct in the industry, it is imperative that we rethink our approach toward pharmaceutical merger review."[27] In June 2022, during a public workshop on pharmaceutical mergers, the FTC Chair commented: "We've also seen empirical reports showing that [k]iller acquisitions, or acquisitions that are made for the purpose of shutting down potential competitors, may be relatively common in the pharmaceutical industry. We've also seen that relatively few leading drugs have been developed within the largest pharmaceutical companies, which are the companies that ultimately enjoy the vast majority of profits. . . . These types of findings underscore for us how much work there is to be done."[28]

6. The Incumbent Competitor Has Responded to Future Competition from the Potential Competitor.

The enforcers often look for "natural experiments" or historical events that inform them about the potential competitive effects of a merger. In traditional horizontal competition cases, for example, the enforcers might assess what happened to prices following a plant shutdown or after competitor has exited or entered the market. In the context of potential competition, the enforcers look for examples of competitive responses from the incumbent competitor. For example, in *Sabre/Farelogix*, DOJ alleged that Sabre launched an initiative to "shut down" Farelogix, including attempting to prevent travel agencies from using Farelogix in conjunction with Sabre's product, pressuring travel agencies, and retaliating against airlines that used Farelogix.[29]

The DOJ's and the FTC's focus on potential and nascent competition arises from their perception that successful companies acquire emerging competitors to immunize themselves from competition in the future. In all reportable merger filings with the U.S. enforcers (and increasingly enforcers outside the United States), companies must submit certain documents that analyze the transaction with respect to competition issues, so called "Item 4(c)" and "Item 4(d)" documents. Colorful or exaggerated language about competition in those documents, whether drafted by the company, bankers, or consultants, have long been a trigger for extended merger reviews.

The DOJ and the FTC are more likely to challenge deal if the primary strategic rationale for the acquisition involves removing a future competitive threat or if the deal is a defensive measure to keep the target from being purchased by a competitor. Likewise, provocative language or puffery such as "protecting the core" or "building a moat" can cause trouble for a deal, as can exaggerations about the target's future standalone potential. In *Visa/Plaid*, for example, a Visa executive compared Plaid to an "island volcano," complete with a drawing, warning that Plaid's capabilities are just the "tip showing above the water" and "[w]hat lies beneath . . . threatens Visa."[30]

7. The Transaction Generates Significant Customer or Competitor Complaints.

A deal that generates complaints from customers or competitors is more likely to attract the enforcers' attention. Complaints can arise in a preliminary investigation during which the DOJ or the FTC contacts third-parties to solicit their views about the likely competitive effects of the transaction. Marketplace participants also sometimes place unprompted calls to the enforcers. In recent years, it has become more common for customers and competitors to lodge complaints, sometimes hiring their own antitrust counsel and economists to substantiate their views about the transaction. For deals that might generate complaints, it is critical for merging parties to develop a robust communications strategy that explains the benefits of the deal for customers and/or consumers.

8. The Target Commands an "Unprecedented" and "Unexplained" Purchase Price.

U.S. antitrust enforcers have occasionally maintained that an "excessive" purchase price can be evidence of anticompetitive intent or harm."[31] That position has received considerable pushback given the practical and economic realities that businesses face when negotiating a purchase price. Various factors influence the final purchase price, including the target's business, industry involved, the type of transaction, the target's financials, access to financing, expected growth, the buyer's strategic direction, the target's need to sell, synergies, efficiencies, and competitive bidding among alternative buyers. The DOJ revived that argument recently in *Visa/Plaid*, alleging that Visa paid an "unprecedented revenue multiple of over 50X" that was unjustified financially.[32] The DOJ maintained that Visa paid a high price to eliminate an "existential risk and protect its monopoly in online debit."[33]

Conclusion

Although potential and nascent competition enforcement is not new, it continues to grow as a focus among global antitrust enforcers. In the United States, despite a number of high-profile losses in court, the enforcers insist that they are not deterred and remain willing to bring tough cases. Regardless, as *Meta/Within*, *STERIS/Synergy*, and other cases show, it can be difficult for the enforcers to meet their factual burdens in potential competition cases. Indeed, although the DOJ and the FTC have obtained settlements in potential competition investigations, no court has enjoined an acquisition under Section 7 of the Clayton Act on a potential competition theory in decades. The lessons above should help dealmakers understand and react—but not overreact—to heightened antitrust scrutiny of acquisitions in this space.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]Memorandum from Lina M. Khan, Chair, to Commission Staff and Commissioners (Sept. 22, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf; *see also, e.g.*, Lina M. Khan, Chair, Remarks at Charles River Associates Conference: Competition & Regulation in Disrupted Times (Mar. 31, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf ("[A] dominant platform's abundant cash flow from core lines of business can finance its entry into any number of nascent and emerging markets, enabling it to selectively monetize operations in distinct ways that are not viable for any other participant in those same markets.").

[2]Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), *available at* https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

[3]"Potential" and "nascent" competitors are not well-defined terms. Generally, a potential competitor refers to a business that has not yet entered a market whereas a nascent competitor has entered recently or is an emerging competitive threat. Depending on the facts of a particular merger, the DOJ or the FTC may attempt to apply similar concepts to both types of cases. For the sake of brevity, we refer only to potential competition throughout this paper.

[4]The FTC's decision to abandon its direct-competition theory likely stemmed from a realization that its two theories were contradictory. If Beat Saber was already competing with Supernatural, then the FTC's extensive arguments about Meta's motivations to develop a VR dedicated fitness app of its own would make little sense. Furthermore, by proffering a product market that included both a rhythm-and-music-based game like Beat Saber and a dedicated fitness app like Supernatural, the FTC's direct-competition theory implied a product market that would include other competing VR apps. That would have undermined the FTC's allegation that Meta's acquisition of Within would lead to a highly concentrated market.

[5]Amend. Complaint at ¶ 57, *FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325-EJD (N.D. Cal. July 27, 2022), CM/ECF No. 101-1.

[6]As the *Meta* court noted, "the Supreme Court has twice declined to resolve the [actual potential competition] doctrine's validity." *FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325-EJD, at *39 (N.D. Cal. Feb. 3, 2023). However, because several federal circuit courts of appeals have applied the doctrine, the court assumed its validity for the purposes of its decision. *Id.*

[7]*Id.* at *39 (quoting *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 633, 94 S. Ct. 2856, 41 L. Ed. 2d 978, 1974-1 Trade Cas. (CCH) ¶ 75125 (1974)) (cleaned up).

[8]*Id.* at *60 (quoting *Marine Bancorporation*, 418 U.S. at 625).

[9]*Meta Platforms*, at *44.

[10]*Id.* at *49.

[11]*Id.* at *52.

[12]*Id.* at *54.

[13]*Id.* at *64.

[14]Complaint at ¶¶ 5, 25, *United States v. Visa Inc.*, No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), CM/ECF No. 1, *available at* https://www.justice.gov/atr/case-document/file/1334736/download.

[15]Complaint at ¶ 10, *In re Nielsen Holdings N.V., and Arbitron Inc.*, No. C-4439 (F.T.C. Feb. 24, 2014), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncmpt.pdf.

[16]*Id.*

[17]Complaint at ¶ 4, *Visa*, No. 3:20-cv-07810.

[18]*Id.*, ¶ 7.

[19]Complaint at ¶ 34, *United States v. Sabre Corp.*, No. 1:19-cv-01548-UNA (D. Del. Aug. 20, 2019), CM/ECF No. 1, *available at* https://www.justice.gov/atr/case-document/file/1196836/download.

[20]*Id.*

[21]*Id.*, ¶ 4.

[22]Complaint, *In re Polypore Int'l, Inc.*, No. 9327 (F.T.C. Sept. 10, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/09/091008cmp9327.pdf.

[23]*Meta Platforms*, at *57-58.

[24]*Federal Trade Com'n v. Steris Corp.*, 133 F. Supp. 3d 962, 964-65, 977-82, 2015-2 Trade Cas. (CCH) ¶ 79303 (N.D. Ohio 2015).

[25]This can include documenting what approvals or hurdles within the company are necessary to enter, and which of them have not been obtained. Those facts in particular can be helpful if the company later changes course.

[26]*See, e.g.*, Khan Speech, *supra* note 1, at 3.

[27]Press Release, Fed. Trade Comm'n, FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers (Mar. 16, 2021), *available at* https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach-pharmaceutical-mergers.

[28]Transcript at 3, Public Workshop, The Future of Pharmaceuticals: Examining the Analysis of Pharmaceutical Mergers (June 14, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Future-of-Pharmaceuticals-Transcript-Tuesday-June-14-2022.pdf.

[29]Complaint at ¶ 33, *Sabre Corp.*, No. 1:19-cv-01548-UNA.

[30]Complaint at ¶ 9, *Visa*, No. 3:20-cv-07810.

[31]Draft Horizontal Merger Guidelines, Released for Public Comment Apr. 20, 2010 (stating that a "high purchase price may indicate that the acquiring firm is paying a premium to reduce competition or that the acquired firm has assets not easily replaced"). The DOJ and the FTC removed that language from the final version of the 2010 Horizontal Merger Guidelines.

[32]*Id.* at ¶ 12 ("Recognizing that the deal 'does not hunt on financial grounds,' Visa's CEO justified the extraordinary purchase price for Plaid as a 'strategic, not financial' move because '[o]ur US debit business i[s] critical and we must always do what it takes to protect this business.").

[33]*Id.*

CHANCERY GRANTS JUDICIAL VALIDATION OF SPACs' POTENTIALLY DEFECTIVE CHARTER AMENDMENTS AND SHARE ISSUANCES EFFECTED WITHOUT A SEPARATE VOTE OF CLASS A COMMON SHARES—*LORDSTOWN*

By Gail Weinstein, Andrew B. Barkan, and Brian Hecht

Gail Weinstein is a senior counsel, and Andrew Barkan and Brian Hecht are partners, in the New York office of Fried, Frank, Harris, Shriver & Jacobson LLP. Contact: gail.weinstein@friedfrank.com or andrew.barkan@friedfrank.com or brian.hecht@friedfrank.com.

Many SPACs, in connection with a de-SPAC merger, have approved charter amendments authorizing an increase in the number of their authorized