A Primer on Litigating the Fix

BY DAVID GELFAND AND LEAH BRANNON

When the U.S. antitrust agencies conclude that proposed transactions are likely to lessen competition, parties often resolve those concerns by way of consent decrees requiring divestitures.[1] In 2015, for example, the FTC brought 22 merger enforcement challenges, and in 17 of those the agency accepted consent orders to resolve its concerns.[2]

The DOJ and the FTC, however, have also shown increasing reluctance to enter into consent decrees when there are doubts about whether proposed divestitures will fully resolve competitive concerns.[3] The agencies have rejected proposed divestitures in a series of high-profile merger cases over the past two years, and several of these matters have resulted in litigation involving the proposed divestiture.[4]

- In *FTC v. Sysco Corp.*,[5] the defendants proposed to divest a collection of regional food distribution facilities to the third-largest distributor in the United States, thereby expanding its national footprint. The court, however, concluded that this proposed remedy was not sufficient to eliminate the anticompetitive effects of the transaction.
- In *FTC v. Staples*,[6] the defendants argued that a proposed assignment of contracts would address the competitive harm alleged. The court declined to consider this argument because the defendants opted not to present a defense at trial.
- In *United States v. Halliburton*,[7] the complaint challenging Halliburton's acquisition of Baker Hughes included allegations preemptively rebutting an anticipated divestiture defense by the defendants.[8] The defendants abandoned the transaction after one month of litigation.
- In *United States v. Aetna*,[9] the defendants stated in their answer that they planned to divest their Medicare Advantage business in all 364 markets in which the DOJ alleges competitive harm.[10] This case is pending.

To date, the government has won most of the cases in which parties have litigated a fix. There are many factors that have likely contributed to the government's high success rate. Among other things, when parties offer fixes that clearly resolve competitive concerns, the agencies are likely to accept those remedies and there will be no need for litigation. Alternatively, when the parties have strong arguments that there are no competitive concerns in the first instance, they are unlikely to offer divestitures. Litigated fixes are thus most likely to arise when both sides recognize that there are significant competitive issues but the proposed remedy does not clearly resolve those concerns to the satisfaction of the agency.

Despite the government's strong track record in these cases, however, litigating a fix is certainly something that should be considered as part of your plan to defend a merger. This article addresses some of the questions that parties may have as they consider this possibility.

Will the court consider my divestiture in assessing the legality of my merger?

If you identify the set of assets to be divested, sign an agreement with a committed buyer before a lawsuit is filed or reasonably early in the litigation, and present these facts as part of your defense, the court will almost certainly consider your proposed divestiture in evaluating the legality of your merger.

In *FTC v. Libbey, Inc.*,[11] the defendants amended their merger agreement one week after the lawsuit was filed in order to exclude a business from the transaction in an attempt to address the anticompetitive effect the merger would have in that market. The FTC argued that the amended agreement was a "sham" and that the party retaining the business did not intend to continue operating it as a competitor in the relevant market.[12] The court noted that it had not found "any precedent that has addressed how an amended merger agreement impacts the original agreement," but went on to conclude that "the amended agreement is properly before the Court for judicial review."[13] The court rejected the FTC's argument that the parties "sought to evade FTC and judicial review by proposing the amended agreement" and held that the amended agreement was a genuine attempt to address the agency's concerns.[14] The court, however, ultimately enjoined the transaction because it found that even as modified the transaction was likely to substantially lessen competition.

In *FTC v. Arch Coal, Inc.*,[15] the district court also considered the parties' proposed remedy. In that case, after receiving a second request, the buyer informed the FTC that it intended to divest one of the two coal mines it was acquir-

David Gelfand and Leah Brannon are partners at Cleary Gottlieb LLP in Washington DC. Mr. Gelfand was the Deputy Assistant Attorney General for Litigation at the DOJ Antitrust Division from August 2013 through June 2016. *The authors would like to thank Grace Kurland and Anna Karass for their assistance with this article.*

ing in the proposed transaction and had executed an agreement with a divestiture buyer. The FTC rejected this proposed remedy and filed suit seeking to enjoin the proposed acquisition. The agency also moved to exclude all evidence and argument related to the divestiture. The court denied this motion, holding that it could not ignore the divestiture because the "Court's task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition . . . requires the Court to review the entire transaction in question."[16] The court declined to enjoin the transaction because it was not persuaded that the FTC had met its burden.

Since *Arch Coal*, the agencies generally have not disputed that courts have authority to consider fixes, and the courts have typically considered parties' proposed remedies. The two exceptions to this are the FTC's challenges to Ardagh's proposed acquisition of Saint-Gobain in 2013 and Staples' proposed acquisition of Office Depot in 2016. In both of these somewhat unusual cases, the courts refused to consider the parties' proposed remedies.

In *FTC v. Ardagh*,[17] the acquirer (Ardagh) waited until after the close of discovery to announce that it would divest four glass-making plants and extend certain existing customers' contracts in an attempt to remedy competition concerns.[18] Ardagh had told the FTC of this plan just one day before the FTC's deposition of Ardagh's chief executive officer.[19] Furthermore, Ardagh had not yet identified a buyer for its divested plants.[20] The court refused to consider evidence of the divestiture plan, explaining that the remedy was not sufficiently concrete and that the FTC had not been given enough time to evaluate it.[21] The court nonetheless encouraged the parties to explore settlement, and the parties did ultimately settle the case with a consent decree requiring Ardagh to sell six manufacturing plants.[22]

In *FTC v. Staples*,[23] the court found itself presented with a highly unusual situation in which the merging parties chose not to present any defense at trial. Accordingly, the court declined to consider the defendants' proposed remedy.[24]

The courts in *Ardagh* and *Staples* did not reject the idea that a serious divestiture involving a signed contract with an identified buyer should be considered in evaluating a merger. Rather, the courts rejected what they seemed to perceive as game-playing by the parties. Reading all of these cases together, the lesson is clear: If you want a court to consider your proposed divestiture, reach an agreement with a committed buyer as early as possible and present the remedy as part of your defense.

What standard will the court apply in considering my proposed divestiture, and who has the burden of proof?

Good question. The relatively small set of published decisions in this area does not provide a clear answer. As the court in *FTC v. Sysco Corp.* put it, there is a "lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger."[25] For example, do defendants who propose a fix have the burden of showing that their proposed remedy will fully restore competition to pre-merger levels, or does the government have the burden of showing that a transaction as modified will substantially lessen competition?

If parties divest an entire business to eliminate any horizontal concentration (or if parties design a transaction in the first instance to avoid creating any horizontal concentration of assets), there is an argument that this precludes any concern under Section 7 of the Clayton Act. In *Libbey*, however, the court took a careful look at the proposed remedy even when the defendants argued that they had eliminated the overlap by carving out the competitive business from the merger. The remedy largely divested the overlap business back to the seller but did not include manufacturing facilities.[26] The defendants argued that this was not particularly meaningful because manufacturing could readily be outsourced.[27] The court, however, concluded that the FTC had shown that the transaction even as modified would substantially lessen competition because outsourced manufacturing would cause the divested business to have higher costs and compete less effectively after the merger.[28]

This approach seems consistent with the court's observation in *Arch Coal* that, in considering whether a merger will substantially lessen competition, a court must "review the entire transaction in question," i.e., the cumulative effect of the original transaction as well as any divestiture.[29] Similarly, in *Sysco*, the court looked at the modified Herfindahl-Hirschman Index (HHI) levels after divestitures in evaluating whether the proposed divestitures would remedy the anticompetitive effects of the transactions. The court noted that, while the divestitures need not "replicate pre-merger HHI levels," Sysco's proposed divestiture was insufficient to maintain the intensity of existing competition between the merging firms.[30]

Finally, in dicta in *Staples*, the court endorsed a pro-government formulation of the standard, stating that "Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger."[31] This formulation obviously places the burden on the defendants and arguably suggests that defendants face a high bar. Although this statement appears in dicta in a footnote, it is nonetheless notable given the limited precedent in this area.

In sum, pending further development of the law on these issues, parties should be prepared to make a strong showing that their specific proposed divestiture will restore lost competition.

What factors will the court consider if I litigate a divestiture fix?

The court will likely look to the same factors that the agencies consider in assessing remedies, including whether: (1) the parties have executed an agreement with a divestiture buyer; (2) the buyer is qualified; (3) the buyer will have all of the assets that it needs to compete on a cost-effective basis, such that the divestiture can fully remedy the competitive

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problem(s) in each relevant market; (4) the buyer will be independent of the merging parties; and (5) the buyer is in fact likely to compete effectively.[32] If you can demonstrate that your proposed divestiture adheres to most or all of the factors set forth in the antitrust agencies' own policy guidelines, this should be highly relevant to the court's assessment.[33] On the other hand, offering a divestiture that fails on a number of these factors can be fatal. The cases confirm this point.

Ardagh, for example, is a good reminder of the importance of having an actual divestiture agreement signed with a qualified buyer. There, the merging parties had not yet identified a buyer for the divested plants and, as noted, the court rejected the remedy as insufficiently concrete.[34] Similarly, in *Staples* the parties did not present the court with a specific buyer much less a signed divestiture agreement.

Libbey is a good example of the importance of divesting the right set of assets. In that case, Libbey sought to acquire Anchor Hocking, a wholly-owned subsidiary of Newell Rubbermaid. Under the amended merger agreement, the merging parties agreed to exclude Anchor's food service glassware business from the proposed merger and transfer it to a different subsidiary of Newell, which would outsource production to a third-party manufacturer.[35] In concluding that the remedy was ineffective, the court noted that outsourcing the production would increase production costs, and found that the divested business "would not be in a position to provide effective competition" against the merged companies.[36]

Sysco illustrates the need to avoid ongoing entanglement between the merged entity and the divestiture buyer.[37] In that case, the merging parties proposed to grant the buyer, Performance Food Group (PFG), access to their private label products at 11 divested distribution centers for a period of three years. In addition, the agreement gave PFG the right to license a key database from the merging parties for five years with a continuing option to license the database for an additional five years after that.[38] Based on these ongoing relationships, the *Sysco* court concluded that PFG would "be dependent on the merged entity for years following the transaction" and thus "will not be a truly independent competitor," which "cut[] against the divestiture as a proposed fix."[39]

United States v. Halliburton illustrates nearly all of these concerns in a single case. There, the parties proposed to divest a substantial package of assets, but the DOJ rejected the proposed remedy as "wholly inadequate to resolve the risks to competition posed by this transaction."[40] The parties had no buyer signed up, much less a well-qualified one, and the DOJ alleged that the proposed divestiture package was a hodgepodge of assets that lacked key elements and would not allow a buyer to compete effectively in the relevant businesses. Further, the DOJ alleged that the proposed remedy would leave the buyer dependent on Halliburton for numerous services crucial to the businesses being divested, thus creating substantial ongoing entanglement.[41]

Apart from the factors related to the design of the remedy, it is also worth considering how the remedy proposal will be presented to the court. Company witnesses, witnesses from the divestiture buyer, company documents, and customer testimony can all be critical. Parties should also be mindful that the agency may have locked in key witness testimony during the investigative phase, as was the case with the proposed divestiture buyer in *Sysco*.[42]

Consideration should also be given to using an industry expert or an expert in business disposals who could opine on how the divestiture assets are likely to perform post-transaction. Past experience in the industry with similar asset sales might be particularly helpful.

So what are my odds of successfully litigating a fix?

It depends on your facts and how good your proposed remedy is, of course, but parties should start from the premise that successfully litigating a fix will be challenging. *Arch Coal* is the rare instance in which merging parties were able to proceed with their transaction after successfully litigating a fix, and the facts there were very favorable to the defense. As the court noted, the FTC had only a borderline case of anticompetitive harm to begin with: there were 14 coal mines in the relevant geographic area, the original proposed transaction would have combined two of them with two others, and the divestiture meant that the transaction would combine two mines with one. As a result, there would be no change in the number of competitors, and there would be only a small increase in concentration (HHI increase of only 49 points), which is "far below [the levels] typical of antitrust challenges brought by the FTC and DOJ."[43]

Moreover, the divestiture itself—transfer of a coal mine—was straightforward and already agreed upon: there was a signed agreement between Arch and the divestiture buyer, and the court noted that the divestiture "will definitely occur."[44] The fix did not involve the sorts of complexities that were present in some of the more recent cases, such as *Halliburton*, in which the parties proposed to divest a mixed package of diverse assets, and there would be ongoing entanglement between the seller and the divestiture buyer. *United States v. Aetna* will be an interesting case for the development of the law in this area and happens to be pending before the same judge who decided *Arch Coal*.

Anything else I should know about litigating a fix?

Yes. By agreeing to a fix, parties run the risk that the court might conclude they have admitted that the transaction as originally proposed would reduce competition. The parties may want to make a record designed to mitigate this risk.

In addition, if you do decide to proceed with a fix, you should think about possible premerger filings that might be required. If proposed divestitures are subject to notifications in other countries, for example, this could create delay and uncertainty about timing, and might even raise questions as to the certainty of closing the divestiture sale. The fix might also be independently subject to a Hart-Scott-Rodino filing. Divestitures pursuant to consent decree do not require such a filing because of the exemption in the HSR regulations for transactions subject to court order.[45] It is possible that a revised transaction (for example, the buyer just leaving some of the assets with the seller) might be within the scope of the original HSR filing and might not require a new filing. But a sale to a divestiture buyer might well require a new notification, and this issue requires careful reflection. Failure to file could introduce a complication into your defense (because you would now need to ask the court to order the divestiture in order to help the parties meet the regulatory exemption to an HSR filing), while making a new HSR filing might introduce delay and a new agency investigation.

So what should I do if I want to litigate a divestiture fix?

First, do a thorough antitrust assessment at the outset of the transaction to see what the competitive issues are and how they might be remedied. Are there divestitures that are specifically tailored to resolving potential antitrust concerns, and are those particular divestitures acceptable to the buyer? It is not sufficient to agree to a dollar value of divestitures without mapping out a more detailed plan. This contingency planning should begin even before the transaction is signed, dovetailing with the negotiation of the merger agreement, including antitrust risk allocation and timing provisions.

Second, recognize that not every potential antitrust concern requires a divestiture. After learning more about the facts, you might decide that the government will have a strong case in certain markets and decide that it makes sense to consider divestitures in those areas. But you might also conclude that the government has a relatively weak case in other markets and decide that it is worth litigating in those areas.

Third, be transparent and work in good faith with the agency. The court will expect the parties to have attempted to resolve issues with the government before presenting a proposed fix to the court.

Fourth, design a divestiture package that will effectively address the competitive issues. This should include as much of the overlap business as necessary to make the divestiture effective in restoring competition and should have as few ongoing entanglements with the merging parties as possible.

Fifth, choose a strong buyer. The buyer will be a key participant in the litigation and will need to show itself to be

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capable and likely to compete effectively with the divestiture assets. Do not assume that the highest bidder is the most qualified from a competitive standpoint.

Sixth, lock in the terms of your divestiture as early as possible. The court is unlikely to force the government to litigate against a moving target.

Seventh, approach your litigation plan for the fix as seriously and thoroughly as you approach every other aspect of the case. You need witnesses and evidence. You need to make sure that you have experts lined up as needed.

Eighth, do not assume that the agencies will accept your proposed divestiture, settle the case, and declare victory. By committing to a fix, you are effectively creating a safety net for the agency: it now can litigate and, at worst, wind up with the divestiture that you are already offering. There are many factors to consider here but, at a minimum, you should not count on settling the case if your proposed remedy does not fully resolve the concerns the government is articulating.

Ninth, just because you have gone down the road of litigating a divestiture fix does not mean that you should rule out any possibility of actually settling the case. This is the flip side of the prior point—while you should not assume that the government will settle, you should also not rule out the possibility that it might. In cases such as *Ardagh*, and *United States v. US Airways Group*,[46] the parties and the agency ultimately reached a settlement agreement after litigation commenced.

Tenth, carefully plan your timeline. If you want to leave open the possibility of presenting a fix to the court, you need to consider your plan very early on and allow time for litigation on both the merits of the merger as well as any additional issues that might be raised by the proposed divestiture. Do not assume that a court will rush the process to meet the parties' desired deadlines. You also need to allow time for foreign notifications of the divestiture and a separate HSR filing, where applicable. There may be a divergence of views between the buyer and seller on timing, and it is important to think these issues through from the beginning and allow sufficient time to maximize your chances of successfully litigating a fix. ■

[1] *See, e.g.*, Bill Baer, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes (Sept. 25, 2013), https://www.justice.gov/atr/ speech /remedies-matter-importance-achieving-effective-antitrust-outcomes.

2 *See* Fed. Trade Comm'n & U.S. Dep't of Justice Hart-Scott-Rodino Annual Report Fiscal Year 2015 at 2, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/160801hsrreport.pdf. The DOJ similarly brought 20 merger challenges in 2015, ten of which involved complaints filed in federal court, and eight of those ten involved settlement papers filed simultaneously with the complaint. In the ten merger challenges in which the DOJ did not file a complaint, the parties either abandoned or restructured their transactions to address the DOJ's concerns. *See id.* at 2–3.

3 *See, e.g.*, *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the S. Subcomm. on Antitrust, Competition Policy, & Consumer Rights and S. Comm. on the Judiciary* 114th Cong. 8–9 (2016) (statement of Bill Baer, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div. ("We will not settle Clayton Act violations unless we have a high degree of confidence that a remedy will fully protect consumers from anticompetitive harm both today and tomorrow.").

4 We focus here on proposed divestitures. On occasion, parties have offered behavioral remedies, such as an agreement to hold pricing at current levels, but there is broad consensus that such remedies rarely address the competitive harm in horizontal mergers. *See, e.g.*, U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 8 (2004), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf.

5 FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015).

6 FTC v. Staples, No. 15-cv-02115 (D.D.C. 2016).

7 United States v. Halliburton, No. 16-cv-00233 (D. Del. 2016).

8 Co-author David Gelfand represented the DOJ in the *Halliburton/Baker Hughes* case. All discussion of the case is based on public information.

9 United States v. Aetna, No. 16-cv-01494 (D.D.C. 2016).

10 Complaint at 4–5, United States v. Aetna, No. 16-cv-01494 (D.D.C. July 21, 2016).

11 FTC v. Libbey, Inc., 211 F. Supp. 2d 34 (D.D.C. 2002).

12 *Id.* at 42–43.

13 *Id.* at 46. Actually, at the time there was at least one recent case dealing with a litigated fix. See United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025, 1035–36 (W.D. Wisc. 2000) (considering defendant's proposed "fix" to license intellectual property to a third party, but holding that it did not cure the anticompetitive effects of a merger between the only two existing manufacturers of the relevant product).

14 *Id.*

15 FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004), *case dismissed*, No. 04-5291, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004).

16 FTC v. Arch Coal, Inc., No. 04-0534, slip op. at 7 (D.D.C. July 7, 2004).

17 FTC v. Ardagh, No. 13-1021 (D.D.C. 2013).

18 Angelike Andrinopoulos Mina & Jim Abell, *The Fix Is (Not) In: Lessons from the* Ardagh *Case*, Federal Trade Comm'n, https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/fix-not-lessons-ardagh-case.

19 *See* Transcript of Pre-Hearing Conference at 22–25, FTC v. Ardagh Grp., No. 13-1021 (D.D.C. Sept. 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/130924ardaghtranscript.pdf.

20 *See* Mina & Abell, *supra* note 18.

21 *See* Transcript of Pre-Hearing Conference at 29, *Ardagh Group*, No. 13-1021 ("I do not believe that [the adequacy of the proposed remedy] can be thoroughly investigated in the three weeks between now and my hearing. I just don't see it. I just don't think the negotiations are far enough along the line, and I don't think it's fair to the other side to ask them to do that.").

22 *See id.* at 37 (encouraging settlement talks); Decision and Order, Ardagh Group, S.A., No. 9356 (FTC June 17, 2014).

23 FTC v. Staples, Inc., No. CV 15-2115 (EGS), 2016 WL 2899222, at *25 n.15 (D.D.C. May 17, 2016).

24 *See id.*

25 FTC v. Sysco, 113 F. Supp. 3d 1, 72 (D.D.C. 2015).

26 FTC v. Libbey, 211 F. Supp. 2d 34, 42 (D.D.C. 2002)

27 *Id.* at 43.

28 *Id.* at 47–48.

29 FTC v. Arch Coal, Inc., No. 04-0534, slip op. at 7 (D.D.C. July 7, 2004).

30 *See Sysco*, 113 F. Supp. 3d at 73–75.

31 *See Staples*, 2016 WL 2899222, at *25 n.15.

32 *See, e.g.*, U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf; Fed. Trade Comm'n, *Negotiating Merger Remedies* (2012), https://www.ftc.gov/system/files/ attachments/negotiating-merger-remedies/merger-remediesstmt.pdf. In *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 852 (6th Cir. 2005), the Sixth Circuit held that the defendants also had the burden of demonstrating that the government's claim against the original agreement was moot. In that case, Dairy Farmers of America, a Kansas milk marketing organization, acquired a 50 percent stake in Southern Belle Dairy Co., the owner of a Kentucky milk processing plant. Both the DOJ and State of Kentucky challenged the acquisition. In July 2004, less than one week prior to filing its motion for summary judgment, Dairy Farmers agreed to swap its voting shares in Southern Belle for non-voting securities. The district court granted summary judgment for Dairy Farmers on the basis of the amended transaction because it concluded that, as revised to cover only non-voting securities, the transaction "has not resulted in [Dairy Farmers] controlling a large portion of the relevant market." United States v. Dairy Farmers of Am., Inc., No. CIV. A. 03-206KSF, 2004 WL 2186215, at *3 (E.D. Ky. Aug. 31, 2004), *rev'd and remanded*, 426 F.3d 850 (6th Cir. 2005). The Sixth Circuit, however, disagreed. The court noted that Dairy Farmers had not presented evidence it would not revert to the original agreement, and held that the plaintiffs' claim "with respect to the original agreement was not mooted by the adoption of the revised agreement." *Id.* at 857.

33 *See, e.g.*, Fed. Trade Comm'n, *Statement on Negotiating Merger Remedies*, https://www.ftc.gov/tips-advice/competition-guidance/merger-remedies (discussing what the FTC staff looks for in evaluating a proposed divestiture).

34 *See* Transcript of Pre-Hearing Conference at 29, FTC v. Ardagh Grp., No. 13-1021 (D.D.C. Sept. 24, 2013).

35 *See* FTC v. Libbey, 211 F. Supp. 2d 34, 42–43 (D.D.C. 2002).

36 *See id.* at 47–48.

37 *See also* FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26 (D.D.C. 2009). In *CCC Holdings*, the FTC sued to enjoin the merger of CCC Holdings and Mitchell International, Inc., two of the three largest automobile insurance software companies. *See id.* at 30. The merging parties proposed revising a license of Mitchell's software to a smaller competitor, Web-Est, to remove virtually all restrictions on Web-Est's rights to sell to insurance companies. *See id.* Nonetheless, the court concluded that Web-Est could not "be considered a truly independent actor because Mitchell will continue to be so involved in its business." *See id.* at 57–59. The court noted that, for a divestiture to be "curative," it "must be made to a new competitor that is in fact a willing, independent competitor capable of effective production in the market." *Id.* (internal citations and quotations omitted).

38 *Sysco*, 113 F. Supp. 3d at 77–78.

39 *See id.* at 77–78.

40 *See* Complaint at 2, United States v. Halliburton, No. 16-cv-00233_UNA (D.D.C. 2016).

41 *Id.*

42 *See Sysco*, 113 F. Supp. 3d at 21–22.

43 *See Arch Coal*, 329 F. Supp. 2d 109, 129 (D.D.C. 2004).

44 *See Arch Coal*, No. 04-0534, slip op. at 5 (D.D.C. July 7, 2004).

45 16 C.F.R. § 802.70 (2016).

46 United States v. US Airways Group, No. 13-cv-01236 (D.D.C. Aug. 13, 2013).