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An Analysis of IQVIA/Propel Media and Its Potential Effect on Merger Enforcement

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The court's opinion is quite favorable to government plaintiffs on a number of key fronts, and as a result, likely will be frequently trumpeted by DOJ and FTC in future merger enforcement cases. On January 8, 2024, Judge Edgardo Ramos of the Southern District of New York issued his ruling in the FTC's challenge to the proposed acquisition of DeepIntent by IQVIA.[1] The decision, a victory for the FTC, is one likely to be cited early and often by antitrust plaintiffs in Section 7 cases. **BACKGROUND** FTC alleged that IQVIA's Lasso and Propel Media's DeepIntent were two leading firms providing programmatic advertising to healthcare professionals.[2] Programmatic advertising is an automated way of presenting targeted advertising, in the form of website-based ads, to a specific cohort, in this case, doctors, nurses, and other health practitioners.[3] After investigating the proposed acquisition, after which DeepIntent would become part of the IQVIA portfolio, the FTC filed a lawsuit in federal court to temporarily enjoin the transaction pending an in-house administrative proceeding.[4] As discussed below, the court's opinion reads quite favorably to government plaintiffs on a number of key fronts, and as a result, will likely be frequently trumpeted by DOJ and FTC in future merger enforcement cases. **ANALYSIS** ***The Court Placed Undue Weight on the 30 Percent Market Share Threshold in* Philadelphia National Bank**. Perhaps the most concerning aspect of the IQVIA decision is its seeming reinvigoration of the 30 percent market share presumption in *Philadelphia National Bank*,[5] a case that celebrated its 60th birthday last year. To refresh on *Philadelphia National Bank*, one of the earliest cases applying Section 7 of the Clayton Act, the opinion established the structural presumption—a minimum level of market concentration that creates a rebuttable presumption that a merger is anticompetitive. The decision states that, at least as concerns bank mergers, 30 percent market share held by the combined firm is the threshold above which a merger "threaten[s] undue concentration . . ."[6] The *IQVIA* court had to consider two competing market share calculations. The FTC's expert contended the combined firm would comprise 46 percent of the market, while the Defendants' expert asserted that the combined share would hold 30.6 percent share.[7] Rather than resolving this difference, the court essentially applied *Philadelphia National Bank* to reduce the dispute largely to irrelevance, concluding that even under the Defendants' lower market share figures,[8] the transaction satisfies the presumption. With FTC's *prima facie* case established, the remainder of the exercise became largely academic. Even while the court agreed with Defendants that the market was "dynamic and fast-moving," this nevertheless was an insufficient basis to question whether the "static snapshot of market shares" presented by the FTC was indicative of likely competitive harm.[9] The court disregarded Defendants' evidence of competitive pressure from other firms. It concluded that the FTC was "not required to establish that DeepIntent and Lasso are *exclusive* competitors,"[10]—a facile resolution of an otherwise complex question. Concerns pointed out by Defendants about input data used in the FTC expert's merger simulation were set aside, because per the court, its duty was not to "sift through various models and theories."[11] So, while the court stated in a footnote that "market shares alone are not dispositive,"[12] the opinion reads functionally the opposite. To be clear, this article does not contend that *Philadelphia National Bank* has been overruled or repudiated. Rather, the *IQVIA* opinion seems to apply, uncritically, the 30 percent market share threshold presented in *Philadelphia National Bank* without: 1) considering whether this is appropriate given subsequent Supreme Court precedent in *General Dynamics*[13] and *Marine Bancorporation*,[14] and 2) carefully evaluating whether concentration figures accurately reflect the competitive dynamic in the marketplace. As

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noted in the seminal *Baker Hughes* decision, *General Dynamics* and *Marine Bancorporation*, even while not overruling *Philadelphia National Bank*, caution courts not to impose a practically insurmountable burden on section 7 defendants simply because the government has presented plausible market shares above the threshold.[15] The *IQVIA* decision appears to do just that. ***The Court Applied a More Lenient Preliminary Injunction Standard***. The FTC also benefitted from the court's application of a low bar for obtaining a preliminary injunction. The applicable standard under Section 13(b) of the Clayton Act (which authorizes the FTC to file suit in federal court to seek preliminary injunctive relief pending an administrative hearing) was also a subject of dispute between the parties. The FTC, citing *FTC v. Lancaster Colony Corp*.,[16] contended that it need only show "a fair and tenable chance of ultimate success on the merits."[17] Defendants argued that the FTC must go further and present evidence that "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[18] As it does at other points in the decision, the court declines to resolve the dispute, instead concluding that it doesn't matter, stating "there is no meaningful difference between the two standards."[19] This resolution is at odds with other decisions on the subject. Notably, in *FTC v. Staples*,[20] the court concluded that there *was* a difference (and that fair and tenable was the incorrect benchmark), and cited the Second Circuit decision in *Fruehauf*, which held that "the government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future"[21]—a burden which, however construed, is more onerous than "a fair and tenable chance of ultimate success on the merits." Here too, it appears the court settled the matter in a manner that made the FTC's job far easier than Circuit authority requires. ***Programmatic Advertising Competes in a Broader Advertising Market***. Another key dispute in the *IQVIA* decision concerned product-market definition and the question whether programmatic advertising directed at healthcare professionals competed with other forms of advertising such as social media and digital advertising on medical websites such as WebMD.[22] The court, applying *Brown Shoe* factors, concluded that programmatic advertising qualified as a distinct product market because of some distinct features specific to programmatic advertising such as the availability and granularity of ad performance data.[23] It also highlighted perceived disadvantages of other forms of advertising, such as the limited reach of social media advertising.[24] However, the court seemed reluctant to fully engage with the evidence presented by Defendants showing that the purchasers of advertising often move their dollars among different advertising channels—including channels that the court concluded are not reasonable substitutes for programmatic advertising.[25] The opinion even credits Defendants' evidence in this regard, noting "[t]o be clear, social media companies and endemic websites are competing with DSPs in a broad sense. An agency running an advertising campaign will not have an unlimited budget, so it must make decisions about how to allocate the advertising funds it has."[26] But it is difficult, at best, to square the fact that these channels do compete with the court's conclusion that they nevertheless are out of the market. Ultimately, the opinion applies an eye-of-the-needle product-market definition, concluding that other channels are out of the market mainly because they are not identical and perfect substitutes for programmatic advertising—even though purchasers of these products are allocating their money across both programmatic and non-programmatic advertising. Given this plaintiff-friendly conclusion, we should expect to see parties advocating for ultra-narrow product-market definitions frequently citing *IQVIA*. **CONCLUSIONS AND LOOKING FORWARD** *IQVIA* is, for now, an unmitigated victory for the FTC, and one that, if affirmed or not appealed, will embolden merger enforcement efforts under the Biden Administration. But the court's opinion ignores or unwinds formerly well-settled precedent, which may ultimately confuse rather than clarify the resolution of Section 7 actions for years to come. __________ [1] *FTC v. IQVIA Holdings Inc. and Propel Media, Inc*., No. 23 Civ. 06188, 2024 WL 81232 (S.D.N.Y. Jan. 8, 2024) (hereinafter, "IQVIA"). [2] *Id.* at 1. [3] *Id.* [4] *Id.* [5] *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). [6] *Id.* at 364. [7] *IQVIA*, at 34. [8] *Id.* [9] *Id.* at 43-44. [10] *Id.* at 40. [11] *Id.* at 42. [12] *Id.* at 33 n.24. [13] *United States v. General Dynamics Corp*., 415 U.S. 486 (1974). [14] *United States v. Marine Bancorporation*, 1073 418 U.S. 602 (1974). [15] *United States v. Baker Hughes, Inc*., 908 F.2d 981, 991 (D.C.

Cir. 1990). [16] *FTC v. Lancaster Colony Corp*., 434 F. Supp. 1088 (S.D.N.Y. 1977). [17] *IQVIA*, at 7. [18] *Id.* [19] *Id.* at 8. [20] *See FTC v. Staples, Inc*., 970 F. Supp. 1066, 1072 (D.D.C. 1997). [21] *Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979). [22] *IQVIA*, at 2. [23] *Id.* at 14. [24] *Id.* [25] *Id.* at 17. [26] *Id.*

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition, Mergers and Acquisitions, or Private Equity practice groups, or the following authors and practice leaders: **Antitrust and Competition**: Rachel S. Brass – San Francisco (+1 415.393.8293, rbrass@gibsondunn.com) Svetlana S. Gans – Washington, D.C. (+1 202.955.8657, sgans@gibsondunn.com) Cynthia Richman – Washington, D.C. (+1 202.955.8234, crichman@gibsondunn.com) Stephen Weissman – Washington, D.C. (+1 202.955.8678, sweissman@gibsondunn.com) Chris Wilson – Washington, D.C. (+1 202.955.8520, cwilson@gibsondunn.com) **Mergers and Acquisitions**: Robert B. Little – Dallas (+1 214.698.3260, rlittle@gibsondunn.com) Saee Muzumdar – New York (+1 212.351.3966, smuzumdar@gibsondunn.com) **Private Equity**: Richard J. Birns – New York (+1 212.351.4032, rbirns@gibsondunn.com) Ari Lanin – Los Angeles (+1 310.552.8581, alanin@gibsondunn.com) Michael Piazza – Houston (+1 346.718.6670, mpiazza@gibsondunn.com) John M. Pollack – New York (+1 212.351.3903, jpollack@gibsondunn.com)

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