REINVIGORATING THE PERCEIVED POTENTIAL COMPETITION THEORY: AN ANALYSIS OF THE POTENTIAL COMPETITION DOCTRINE AND *FTC V. STERIS CORP.*

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Basic economic theory states that markets and consumers are usually best served when there is vigorous competition in a free market, with competitors battling over price and quality. For this reason, antitrust law recognizes the preservation of competition as its primary goal.[1] *During the 1960s and 1970s,*[2] *antitrust enforcement agencies responded to an increase in merger activity by challenging many transactions under Section 7 of the Clayton Act.*[3] *The newly recognized potential competition doctrine was an effective legal tool upon which the agencies relied in non-horizontal merger cases before the Supreme Court. It has been forty-three years since the Supreme Court last ruled on a potential competition case, however, and their less-than-clear-precedent on the subject has led to lower courts crafting difficult and inconsistent standards. In* FTC v. Steris*, a district court in Ohio recently rejected the government's potential competition argument, finding that a merger between two of the largest firms in the already concentrated contract sterilization industry*[4] *did not violate Section 7. Despite being the*

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[1] *Mission*, DEP'T OF JUSTICE, https://www.justice.gov/atr/mission (last visited Apr. 10, 2018) ("The goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice. Competition provides businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anticompetitive restraints. Competition also tests and hardens American companies at home, the better to succeed abroad.").

[2] *See generally* Thomas M. Hurley, *The Urge to Merge: Contemporary Theories on the Rise of Conglomerate Mergers in the 1960s*, 1 J. BUS. & TECH. L. 185 (2006).

[3] 15 U.S.C. § 18 (2012). Section 7 of the Clayton Act deems a merger or acquisition unlawful if it may "substantially lessen competition." *Id.* The Federal Trade Commission and Department of Justice are the two main federal agencies who file antitrust challenges.

[4] The contract sterilization industry consists of companies that contract with

only sub-theory under the potential competition doctrine endorsed by the Supreme Court, the FTC did not argue its case under the perceived potential competition theory. Instead, the decision hinged on a single element under the actual competition theory—a sub-theory with higher evidentiary burdens and without explicit Supreme Court approval. Unsurprisingly, the court concluded that the FTC did not carry its evidentiary burden under the actual potential competition theory. It is unclear why the FTC chose not to raise the perceived potential competition doctrine. If agencies continue to forgo this theory, however, the sustained allowance of non-horizontal mergers will pose new threats to U.S. markets.

I. INTRODUCTION

As industries become more concentrated, consumers are increasingly threatened by the prospect of monopolistic behavior due to the reduction of competition.[5] Antitrust enforcement agencies seek to prevent this occurrence by prohibiting certain merger or acquisition transactions that may have this effect; however, these transactions can provide significant procompetitive benefits.[6] A merger, for instance, may benefit consumers and markets by augmenting innovation and efficiencies among the participating firms.[7] But when these transactions occur in concentrated markets, they pose enhanced risks to competition.[8] Congress addressed this concern long ago by enacting the Clayton Act in 1914, as amended by the Celler-Kefauver Act in 1950.[9]

manufacturers to rid their products of unwanted microorganisms. *See* FTC v. Steris Corp., 133 F. Supp. 3d 962, 963–64 (N.D. Ohio 2015).

5 *See generally* Gustavo Grullon, Yelena Larkin, & Roni Michaely, *Are US Industries Becoming More Concentrated?*, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2612047 (last updated Oct. 27, 2018) ("More than 75% of U.S. industries have experienced an increase in concentration levels over the last two decades. . . . Lax enforcement of antitrust regulations and increasing technological barriers to entry appear to be important factors behind this trend. . . . Overall, our findings suggest that the nature of U.S. product markets has undergone a structural shift that has weakened competition.").

6 *Competition Guidance for Antitrust Law*, FEDERAL TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers (last visited Apr. 9, 2018).

7 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 29 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (explaining the benefits that merger transactions can provide) ("Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant economic efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.") [hereinafter 2010 MERGER GUIDELINES].

8 Concentrated markets are harmful for competition and the DOJ recognizes this. *See* 2010 MERGER GUIDELINES, *supra* note 7.

9 The original Clayton Act only prohibited the acquisition of "stock." 15 U.S.C. § 18 (2012). The Celler-Kefauver Act amended the Clayton Act to include horizontal mergers.

Section 7 of the Clayton Act ("Section 7") deems mergers and acquisitions unlawful where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[10] Congress conferred enforcement authority of Section 7 to the Federal Trade Commission (FTC) and Department of Justice (DOJ).[11] Section 7 not only covers mergers between competitors in the same market ("horizontal" mergers), but also those effectuated by non-competitors in different markets ("non-horizontal" mergers).[12] Historically, "potential competition" was a doctrine raised in cases involving non-horizontal mergers.[13] Today, it is also a concept that can be pertinent in horizontal mergers.[14]

Antitrust enforcement agencies, the Supreme Court, and a handful of circuit courts have recognized the role that the potential competition doctrine plays in preserving competition.[15] Agencies often seek to protect competition under the potential competition doctrine—in both the future and present—by respectively employing the actual potential competition and perceived potential competition theories.[16]

The Supreme Court, however, has only adopted the perceived potential competition theory. Still, the country's highest judicial body has not made it easy for the FTC to succeed. It has been over forty years since the Court has

Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified at 15 U.S.C. § 18).

10 15 U.S.C. § 18.

11 Todd N. Hutchison, *Understanding the Differences Between the DOJ and the FTC*, A.B.A, https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/understanding_differences/ ("The DOJ and FTC share authority to enforce the Clayton Act and the Robinson-Patman Act.). *See* 15 U.S.C. § 21 (FTC authority); *id.* § 25 (DOJ authority). Each agency typically takes the lead in reviewing mergers within certain industries to enforce Section 7 of the Clayton Act. *Id.* § 18. Although there may be some overlap, the DOJ and FTC tend to allocate merger reviews according to their respective expertise. For example, the DOJ typically investigates mergers in the Financial Services, Telecommunications, and Agricultural Industries; the FTC typically investigates mergers in the Defense, Pharmaceutical, and Retail Industries.").

12 Note that Non-Horizontal Mergers are now included under the same umbrella as "Horizontal Mergers" pursuant to the newest DOJ guidelines. 2010 MERGER GUIDELINES, *supra* note 7.

13 *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1984), https://www.justice.gov/archives/atr/1984-merger-guidelines (separate designations between "non-horizontal" mergers and "horizontal mergers") [hereinafter 1984 GUIDELINES]; *but see* 2010 MERGER GUIDELINES, *supra* note 7 (where all mergers are viewed under the category of "horizontal mergers.").

14 *See* 2010 MERGER GUIDELINES, *supra* note 7.

15 *See generally* Ernest H. Schopler, Annotation, *Doctrine of Potential Competition as Basis for Finding Violation of § 7 of Clayton Act, 15 U.S.C.A. § 18*, 44 A.L.R. Fed. 412 (1979).

16 *Id.* at 2. The actual potential competition doctrine seeks to prevent the removal of future economic benefits, whereas the perceived potential competition doctrine seeks to preserve present economic benefits. *See also* 1984 GUIDELINES, *supra* note 13.

last ruled on such a case,[17] and antitrust law has since shifted towards a more defendant-friendly agenda.[18] Consequently, lower courts have taken it upon themselves to craft different and often heightened standards under the doctrine.[19] This has substantially detracted from the FTC's ability to prioritize which types of firms deserve the title of "potential competitor."

Part II of this Comment will first attempt to explain the rationale and purpose underlying the potential competition doctrine in a coherent, understandable manner. Part III will then use Supreme Court precedent to show how the potential competition doctrine has developed over time. Part IV will then critique the Supreme Court's approach, asking whether the Court's test truly captures what the potential competition doctrine seeks to accomplish. Parts V & VI will then focus on the *Steris* decision, arguing that the FTC may have increased its chances of success had it relied on the perceived potential competition theory rather than the actual potential competition theory.

II. THE POTENTIAL COMPETITION DOCTRINE: THE PERCEIVED POTENTIAL COMPETITION THEORY AND THE ACTUAL POTENTIAL COMPETITION THEORY

A. *The Potential Competition Doctrine, Generally.*

The potential competition doctrine addresses mergers between non-competitors, which are commonly referred to as "non-horizontal mergers."[20] Although less susceptible to antitrust scrutiny than "horizontal mergers" (those between competitors),[21] government agencies still recognize the

[17] The last Supreme Court ruling on a potential competition case was in United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

[18] *See* E. GELLHORN, ANTITRUST LAW AND ECONOMICS 453 (3d ed. 1986) (stating that antitrust enforcement agencies shifted to loose enforcement after the institution of the merger guidelines in the 1980's).

[19] *See* Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WIS. L. REV. 1035, 1058 (2007) ("It is unsurprising then to find that lower courts have only contributed to the confusion in this area by creating a number of different and conflicting factors to evaluate claims that the acquisition of a potential competitor will violate section 7. Worse still, in some cases, the courts appear to have disregarded what little guidance the Supreme Court has provided them. And, many courts have become very skeptical of such claims entirely.") (footnotes omitted).

[20] *Id.* at 1081 n.355 ("In affirmative cases asserting the potential competitor doctrine, the 1984 Guidelines remain in force. As the DOJ and FTC explained upon the release of the 1992 Guidelines: 'guidance on non-horizontal mergers is provided in Section 4 of the Department's 1984 Merger Guidelines, read in the context of today's revisions to the treatment of horizontal mergers.'") (citations omitted)).

[21] 1984 GUIDELINES, *supra* note 13, at § 4 ("Although non-horizontal mergers are less likely than horizontal mergers to create competitive problems, they are not invariably innocuous.").

negative effects that non-horizontal mergers can pose on competition.[22] Specifically, agencies address the *future* effects a non-horizontal merger may have on competition by employing the actual potential competition theory.[23] Generally, this theory states that the transaction removes the possibility that the two firms would have competed within the same market in the future.[24] When arguing a potential competition case, agencies often also seek to protect the *present* procompetitive effects a non-horizontal merger may have by employing the perceived potential competition theory.[25] This theory states that a given transaction may remove present procompetitive influences that the acquired firm has on the target market, which stems from the target market's *perceptions* of the acquired firm's ability to enter the target market.[26] Thus, the sub-theories' respectively focus on whether the acquired firm had an *actual* or *perceived* ability to enter the acquiring firm's market.

At first glance, these two theories may seem complex and intimidating—especially for those not familiar with antitrust law.[27] In order to alleviate some of this confusion, this Comment will now further explain the basic rationale and frameworks underlying these two theories and specifically, why their convoluted legal substance has broad implications for agencies when bringing a potential competition case.

1. The Actual Potential Competition Theory: An Objective Standard

Consider Outback Steakhouse (Outback), a business that largely competes with other sit-down restaurants within the casual dining market.[28]

[22] *Id.* ("[N]on-horizontal mergers involve firms that do not operate in the same market. It necessarily follows that such mergers produce no immediate change in the level of concentration in any relevant market . . . non-horizontal mergers are less likely than horizontal mergers to create competitive problems . . . . In some circumstances, the non-horizontal merger of a firm already in a market (the 'acquired firm') with a potential entrant to that market . . . may adversely affect competition.") (footnotes omitted).

[23] Bush & Massa, *supra* note 19, at 1046 ("The competitive effect from actual potential competition occurs in the future.").

[24] *Id.*

[25] *Id.* (stating "[w]hen the transaction or conduct is aimed at a potential competitor that is constraining market prices or having some other current, ongoing procompetitive effect, courts apply the perceived potential competition doctrine. For example, courts find that perceived potential competition is present when competitors in a highly concentrated market are aware of the potential competitor and have adjusted their pricing in a more competitive manner to perhaps deter that firm's entry.").

[26] *Id.* *See generally* William E. Dorigan: *The Potential Competition Doctrine: The Justice Department's Antitrust Weapon under Section 7 of the Clayton Act*, 8 J. MARSHALL J. PRAC. & PROC. 415 (1975).

[27] Even for those who are familiar with antitrust law, the theory still tends to garner confusion. *See* Bush & Massa, *supra* note 19, at 1089 (stating "[t]he language of the tests set out in the 1984 Guidelines and the 1992 Guidelines also creates some confusion . . . .").

[28] *See* The Boulder Group, *The Net Lease Casual Dining Market Report (Q1 2018)*,

Outback can therefore be said to reside on the edge of the drive-through fast-food market since such is in close proximity to Outback's casual dining market.[29] Now, imagine that Outback is financially capable of expanding into the fast-food market, and is intent on doing so because of the high prices that fast-food restaurants charge. Executives at McDonald's recognize this probable expansion by Outback and begin to fear that the move will detract from McDonald's own sales by making its market more competitive. In an effort to avoid competing with Outback in the future, McDonald's takes the low-road initiative and successfully executes a merger agreement with Outback.[30] As a result, instead of having a new competitor in the fast-food market (which would likely pressure the fast-food giants to lower prices), the fast-food market ends up with a larger, more powerful McDonald's—a company that can continue to charge high prices. This example attempts to neatly portray why antitrust law and federal agencies have used the actual potential competition theory to challenge certain non-horizontal mergers that seem to remove the possibility of lower prices in the future.

Now apply the previous hypothetical to a more formalized definition: the actual potential competition theory is premised on the notion that the acquired firm (Outback) may produce future procompetitive benefits in the acquiring firm's market (the drive through fast-food industry) if it were not for the merger.[31] In other words, the actual potential competition theory seeks to prevent non-horizontal mergers, where transactions involve an acquired firm that is "likely" to soon enter the acquiring firm's market.[32] Agencies accordingly use the actual potential competition theory to target transactions that involve acquired firms, which have the *actual* ability and

https://bouldergroup.com/media/pdf/2018-Q1-Net-Lease-Casual-Dining-Research-Report.pdf (last visited Oct. 26, 2018) (listing financial statistics about Outback Steakhouse and other restaurants within the "casual dining market," such as Hooters, Chili's, and Red Lobster).

[29] For purposes of this Comment, "close proximity" means that the two markets are somewhat similar. "Market proximity," however, is a legal term that attempts to portray the similarity of markets in objective terms. Joseph F. Brodley, *The Potential Competition Doctrine Under the Merger Guidelines*, 71 CAL. L. REV. 376, 389–401 (1983) ("Proximity is determined by: (1) the similarity between the two markets in terms of critical entry characteristics, such as production, marketing, technology, and transactional relations; and (2) actual observed entry between the two markets, or from the outside market into a market closely similar to the inside market. If according to these criteria the proximity between markets is close, it can be presumed that the acquiring firm has an entry advantage.").

[30] Scienter on the part of McDonald's is not required under the actual potential competition theory; however, for the sake of this example, consider that such is present.

[31] *See* Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1362–86 (1965). This author actually endorses the actual competition theory, but also discusses how many critique the theory as well.

[32] *Id.* This may be done by either "*de novo* entry," where a firm independently enters a market, or by "toe hold acquisition," where a firm acquires a small firm in the market in order to gain entry.

intent to enter the market of the acquiring firm, prior to the merger.[33]

These types of transactions therefore raise red flags for antitrust agencies. In their joint guidelines, the FTC and DOJ state: "[b]y eliminating the possibility of entry by the acquiring firm in a more procompetitive manner, the merger could result in a lost opportunity for improvement in market performance resulting from the addition of a significant competitor."[34]

Make sense? Well, in the context of Section 7, the Supreme Court is unsure. The country's highest judicial body has not adopted the theory[35] and as a result, neither have all federal courts.[36] This widespread absence of approval is largely due to the commonly-held view that the theory is inconsistent with plain-reading interpretations of Section 7.[37] Namely, critics claim that since the language of Section 7 prohibits only mergers that threaten to reduce *present* competition, the law should not bar mergers that take away the potential for increased competition in the *future*.[38] Still, the theory has garnered lower court approval on account that enforcement agencies consistently raise it in the cases they bring.[39] Therefore, many courts adjudicate actual potential competition issues,[40] albeit in the absence

[33] *Id.*

[34] 1984 GUIDELINES, *supra* note 13, at 25.

[35] *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

[36] The Eighth Circuit has approved of the doctrine, as have the Seventh and Tenth Circuits. *See* Yamaha Motor Co. v. FTC, 657 F.2d 971, 977 (8th Cir. 1981); Ekco Products Co. v. Federal Trade Com., 347 F.2d 745, 752–53 (7th Cir. 1965); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 74–79 (10th Cir. 1972). "Other circuits, including the First, Second, Fourth, Fifth, and District of Columbia have not decided the issue. A number of lower courts have utilized the doctrine in hearing Section 7 challenges to mergers." 2 CORPORATE ACQUISITIONS AND MERGERS § 10.02 (2018).

[37] On its face, Section 7 does not require a company to take the action most likely to make a market more competitive; Section 7 simply proscribes certain acts that may substantially decrease competition. Another objection to the actual potential competition theory is that if market forces are to be relied on to create consumer satisfaction, the presumption should be that the decision of a firm to enter a market by merger is the best and most efficient choice. *See* CORPORATE ACQUISITIONS AND MERGERS, *supra* note 36; *see also* Turner, *supra* note 31, at 1362–86.

[38] *See, e.g.*, DOMINICK T. ARMENTANO, THE MYTHS OF ANTITRUST 235 (1972); Stanley D. Robinson, *Recent Developments: 1974*, 75 COLUM. L. REV. 243 (1975); 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, 323–24 (1975). *But see* Turner, *supra* note 31, at 1383 ("[T]here is a rather modest case for prohibiting a merger between a firm that would clearly enter the market by internal expansion and a leading or growing established firm in a tight oligopoly.").

[39] *See generally* FTC v. Steris Corp., 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015) (acknowledging that although the Supreme Court has not endorsed the actual potential competition doctrine, it will be accepted by the Court because the FTC recognizes its validity).

[40] *E.g.*, *id.*

of clear Supreme Court precedent.[41] This is problematic for lower courts that adjudicate actual potential competition issues since these courts are seemingly free to develop their own standards without pushback.

The only potential guidance influencing lower court standards stems from statements the Supreme Court gave in dicta.[42] In *United States v. Marine Bancorporation*, the Supreme Court suggested that the following preconditions must be met if an argument concerning the actual potential competition theory were to prevail:

(i) The target market must be concentrated;
(ii) The acquiring firm must have *feasible means for entering the market* other than by making the challenged acquisition, that is, by *de novo* entry or entry by foothold or toe hold acquisition;[43] and
(iii) Those means must offer a substantial likelihood of ultimately producing deconcentration of that market or other significant precompetitive effects.[44]

Following the Court's holding in *Marine Bancorporation*, many lower courts have remained skeptical of the actual potential competition doctrine since the Supreme Court ultimately failed to explicitly endorse the theory.[45] Other courts, however, have heightened element two— the theory's hallmark element—by requiring the FTC to show by "certain proof" that the acquired firm was likely to enter the acquiring firm's market.[46]

2. The Perceived Potential Competition Theory

In returning to Outback, it is safe to say that companies within the fast-food market are vigilant of companies like Outback, which reside on the edge of the drive-through fast-food industry. And it logically follows that McDonald's, Wendy's, and Burger King want to avoid potential competition with new fast-food chains. In an effort to dissuade Outback from believing that its transition will be profitable, these fast-food chains may be incentivized to constrain the prices of their food. Preserving this pre-emptive, procompetitive behavior of target market firms is the goal of

41 The Supreme Court has addressed the actual potential competition doctrine but has not endorsed it. *See generally*, United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974). Therefore, the Supreme Court has not explicitly approved a framework or analysis for the actual potential competition doctrine.

42 *See Marine Bancorporation*, 418 U.S. at 633.

43 This is the element at issue in *FTC v. Steris*, which will be discussed *infra* Parts V and VI.

44 *Marine Bancorporation*, 418 U.S. at 633.

45 *See supra* note 42 and accompanying text.

46 *See* FTC v. Atlantic Richfield Co., 549 F.2d 289, 293–95 (4th Cir. 1977).

agencies under the perceived potential competition theory.[47]

The perceived potential competition theory recognizes that by simply residing "in the wings" of the fast-food industry, Outback can exert a present-procompetitive influence on the fast-food market without ever entering.[48] Compared to the actual potential competition theory, the benefits on competition the perceived potential competition theory seeks to preserve may exist notwithstanding the possibility that: (1) Outback may not actually intend on ever entering the fast-food market, or (2) Outback may not even be financially capable of entering the target market to begin with.[49] Rather, the beneficial effect the theory seeks to preserve is dependent on: (1) whether firms in the target market (McDonald's, Wendy's, and Burger King) subjectively *perceive* Outback as a company that may enter, and (2) if that perception has a present-procompetitive effect on their behavior in the form of lower prices.[50]

Courts refer to this effect as "the wings effect,"[51] "the fringe effect," and "the edge effect."[52] But unlike the actual potential competition doctrine, the Supreme Court *has* endorsed the perceived potential competition doctrine as a valid legal principle.[53] Still, however, few courts have barred mergers on perceived potential competition grounds.[54]

The 1984 Merger Guidelines include a more formalized explanation of the theory's underlying rationale, in addition to the potential anticompetitive effects of such a transaction:

> By eliminating a significant present competitive threat that constrains the behavior of the firms already in the market, the merger could result in an immediate deterioration in market performance. The Economic theory of limit pricing suggests that

47 *See supra* note 25 and accompanying text.

48 *See Marine Bancorporation*, 418 U.S. at 625.

49 *See* Bush & Massa, *supra* note 19, at 1046 ("[C]ourts find that perceived potential competition is present when competitors in a highly concentrated market are aware of the potential competitor and have adjusted their pricing in a more competitive manner to perhaps deter that firm's entry.").

50 *Id*.

51 *Id*. at 1042–43.

52 *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976).

53 *See* United States v. El Paso, 376 U.S. 651 (1964).

54 *See, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562 (1972); Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972); United States v. First Nat'l State Bancorporation, 499 F. Supp. 793 (D.N.J. 1980); United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1234, 1254–56 (C.D. Cal. 1973), *aff'd mem. sub nom.* Tidewater Oil Co. v. United States, 418 U.S. 906 (1974), *reh'g denied*, 419 U.S. 886 (1974); *In re* Brunswick Corp., 94 F.T.C. 1174, 1273 (1979), *aff'd sub nom.* Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981); *In re* Polypore Int'l, Inc., 2010 FTC LEXIS 97, at *72 n.41 (2010), *concurring opinion at* 2010 FTC LEXIS 96 (2010), *aff'd*, 686 F.3d 1208 (11th Cir. 2012), *cert. denied*, 570 U.S. 917 (2013).

> monopolists and groups of colluding firms may find it profitable to restrain their pricing in order to deter new entry.[55]

Under the *Marine Bancorporation* framework, to successfully invoke the perceived potential competition doctrine, the FTC must show that: (i) the acquired firm has the *"characteristics, capabilities, and economic incentive to render it a perceived potential de novo entrant*," (ii) the target market is substantially concentrated; and (iii) "*the acquiring firm's premerger presence on the fringe of the target market in fact tempted oligopolistic behavior on the part of existing participants in that market*."[56] A fourth prerequisite, given in a later Supreme Court case, requires that there be few other potential entrants.[57]

III. SUPREME COURT PRECEDENT AND THE ENDORSEMENT OF THE PERCEIVED POTENTIAL COMPETITION DOCTRINE

The potential competition doctrine was first recognized as a legitimate legal tool for antitrust enforcement in 1964 with the Supreme Court's rulings in *United States v. El Paso Natural Gas Co*. and *United States v. Penn-Olin Chem. Co*.[58] The historical milieu surrounding antitrust law during this period is significant in that mostly all of the following cases were adjudicated during the 1960s and 1970s—a period marked by enhanced merger activity.[59] Recognizing a spike in merger transactions, antitrust enforcement agencies adopted aggressive anti-merger policies.[60] The rationale applied by the Court in the following two cases therefore portrays an economic perspective that presumed harm to competition when faced with transactions occurring in concentrated markets.[61] Today, however, enforcement policies are reluctant to make such an assumption as the legal landscape surrounding

55 *See* 1984 GUIDELINES, *supra* note 13, at 24.

56 *See* United States v. Marine Bancorporation, Inc., 418 U.S 602, 624–25 (1974) (emphasis added).

57 *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 534 n.13 (1973). This requirement is usually bundled with element three, because if there are many potential entrants, the perceptions of the acquired firm, specifically, will likely not have much of an effect on the target market.

58 United States v. El Paso, 376 U.S. 651 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

59 *See* Hurley, *supra* note 2.

60 *The Development of Antitrust Enforcement*, CONST. RIGHTS FOUND. (Spring 2017), http://www.crf-usa.org/bill-of-rights-in-action/bria-23-1-c-the-development-of-antitrust-enforcement.html.

61 *See* Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22 ANTITRUST 29, 29 (2008), https://pdfs.semanticscholar.org/8461/250e60730e6b78bc077a74073ac0717a1cf4.pdf (arguing that merger enforcement during this time was overly stringent due to inflexible standards which relied on the "structural presumption" of harm to competition from increasing market concentration).

mergers is more defendant-friendly.[62]

United States v. El Paso was the first Supreme Court case to address the perceived potential competition theory.[63] In *El Paso*, the merging firms were both large players who sold gas in different Northwest states.[64] The acquiring firm, El Paso Natural Gas Co. (El Paso), was the only out-of-state supplier in California.[65] El Paso agreed to acquire Pacific Northwest Pipeline (Pacific) after Pacific's tentative plan to deliver oil in California was terminated.[66] Prior to the merger, Pacific Northwest was eager to enter the California market but had not yet been successful.[67]

The Supreme Court ultimately barred the acquisition on potential competition grounds without explicitly mentioning the doctrine by name.[68] Specifically, the Court accepted the DOJ's argument that the merger was capable of substantially lessening competition since Pacific was a potential supplier to the California market.[69] The Court established a vague test for determining whether the transaction harmed competition, stating that "[t]he effect on competition in a particular market through [the] acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on."[70]

Applying this test, the Court determined that Pacific Northwest was a potential competitor that had a present-procompetitive effect on the California market.[71] Although not yet within the California market, the Court determined that Pacific was a potential entrant since El Paso was the only out-of-state supplier to California, and because Pacific Northwest was "the only other important interstate pipeline west of the Rocky Mountains."[72]

62 *See* GELLOHRN, *supra* note 18, at 533–34 (discussing the shift to loosen enforcement after the institution of the merger guidelines in the 1980s).

63 *El Paso*, 376 U.S. at 655.

64 *Id.* at 653.

65 *Id.* at 652, 652 n.2. (stating that El Paso also supplied fifty percent of the state's natural gas).

66 *Id.* at 655.

67 *Id.* at 644–55.

68 *Id.* at 659. The Court did refer to Pacific Northwest as a "potential competitor" once but did not generally speak of the potential competition doctrine as an established rule of law. *Id.*

69 *El Paso*, 376 U.S. at 661.

70 *Id.* at 660. Because of the Court's "and so on" inclusion, its list of factors is not exhaustive. This allowed the possibility of more factors to be considered in later cases.

71 *Id.*

72 *Id.* at 658–59. The Court noted that this was evident after Pacific Northwest lost a bid to enter the California market after El Paso subsequently made significant financial concessions to prevail. *Id.* at 659.

In its reasoning, the Court foreshadowed the driving principles behind the perceived potential competition theory. The Court emphasized that the purpose of Section 7 was "to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger."[73] The Court also noted that the natural gas industry was extremely regulated at the time, meaning that there were high barriers of entry for new entrants.[74] The Court concluded its opinion by stating: "[w]e would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State."[75] Thus, the most influential aspect was the fact that Pacific Northwest had regularly attempted to enter the California market through the submission of bids, which had a consequential effect on El Paso's business decisions—notwithstanding the fact that none of these bids were successful.[76]

In *United States v. Penn-Olin*, the Court expanded the applicability of the potential competition doctrine.[77] Prior to consummating a joint venture, Pennsalt Chemicals Corporation (Pennsalt), did not distribute its sodium-chlorate product in a continually growing southeastern market.[78] Olin Mathieson Chemicals Corporation (Olin), a producer of similar chemicals, agreed to serve as a distributor for Pennsalt's product in the southeastern market after the companies formed a joint venture.[79] There had been no entry into this heavily concentrated market in over a decade, but each company had independently considered entering prior to their agreement.[80]

[73] *Id.* at 659 (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 367 (1963)).

[74] *Id.* at 659–60. High entry barriers are conditions that make it difficult for companies to enter a given market, making their existence a concern for antitrust enforcement agencies. *See* John B. Kirkwood & Richard O. Zerbe, Jr., *The Path to Profitability: Reinvigorating the Neglected Phase of Merger Analysis*, 17 GEO. MASON L. REV. 39 (2009) (discussing agencies' use of "entry barriers" and varying definitions).

[75] *El Paso*, 376 U.S. at 659.

[76] Scholars view this case as concerning perceived potential competition. *See* Bush & Massa, *supra* note 19, at 1047–49. The Court, however, alludes to the notion that Pacific Northwest was an "actual competitor" through its attempts to enter by bidding, stating that "[u]nsuccessful bidders are no less competitors than the successful ones." *Id.* at 1049 (citation omitted).

[77] 378 U.S. 158 (1964). *See* Bush & Massa, *supra* note 19, at 1050 ("The Penn-Olin case also represented a distinct expansion of the doctrine. In *El Paso*, the potential entrant's effect on the market was through an unsuccessful bid. In contrast, Penn-Olin involved a joint venture to produce and sell sodium chlorate between two firms: one firm never served the geographic market that the joint venture would serve; the other never produced the chemical that was the relevant product.").

[78] *Penn-Olin*, 378 U.S. at 161–62.

[79] *Id.* Including the joint venture, the market consisted of only three firms. *Id.* at 163.

[80] *Id.* at 164–66.

The Supreme Court held that the lower court erred in applying the potential competition doctrine by only considering, "as a matter of probability [whether] *both* companies would have entered the market as individual competitors if Penn-Olin had not been formed."[81] The Supreme Court stated that the district court should have gauged whether there would have been a wings effect if only one of the companies had decided to enter the south eastern market.[82] Realizing that this effect was too difficult to gauge, the Court concluded that the agreement did not violate Section 7.[83] The Court, however, still determined that both companies could be considered potential competitors.[84] This conclusion was based on the companies' resources, their diverse product lines, their compelling reasons to enter the market, their respectable reputations, and their "know-how" as established companies of how to effectively enter a new market.[85]

The Court's decision in *Penn-Olin* is important when considering the type of firm that might pose the most anticompetitive risks when analyzing the perceived potential competition theory.[86] Specifically, the Court stated: "[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be substantial incentive to competition which cannot be underestimated."[87]

The previous cases both recognize an important proposition under the perceived potential competition theory. Namely, that: (1) courts should endeavor to gauge the effects a potential competitor has by residing on the wings of a given market, and (2) a showing of the acquiring firm's intent to enter the market of the acquired firm is extremely relevant when gauging if the perceived potential competition theory should apply.[88] The Court's later holding in 1967 demonstrates why actual intent of acquired firms is not dispositive when determining whether present procompetitive benefits exist.

[81] *Id*. at 172–73 (alteration in original).

[82] *Id*. at 173 ("There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter.").

[83] This was because the Court found that gauging the precise competitive effects in this instance was "impossible to demonstrate." *Id*. at 176. *But see* United States v. El Paso, 376 U.S. 651, 659 (1964) (where the court was able to directly show such through El Paso having lowered its prices in response to Pacific Northwest's bid attempts).

[84] *Penn-Olin*, 378 U.S. at 175.

[85] *Id*.

[86] *Id*. at 174.

[87] *Id*.

[88] This inquiry is even more relevant when showing actual potential competition, or the future anticompetitive effects that a transaction may have.

In *FTC v. Procter & Gamble Co.*, the Supreme Court ultimately barred Procter & Gamble's (Procter) acquisition of Clorox on perceived potential competition grounds.[89] Procter was a producer and distributor of a wide variety of household cleaning items, which, prior to the proposed acquisition, did not include bleach.[90] Clorox, the acquired firm, was an exclusive manufacturer of bleach and controlled fifty percent of an extremely concentrated industry.[91]

The lower court found that Procter was not a potential competitor since it had no intent, nor had made any past attempt to enter the bleach market.[92] Despite finding that Procter did not intend to enter the liquid bleach market, the Supreme Court reversed and found that Procter *was* a potential competitor.[93] The Court made this conclusion based largely on Procter's advantageous positioning in the adjacent, household cleaning-product market.[94] Probative to the Court's finding that Procter was the "most likely entrant" to the liquid bleach market were the facts that Procter sold similar goods, was engaged in a program to diversify its product lines, had substantial advantages in advertisement and merchandising, retained experienced managers who marketed similar goods, and could feasibly build an efficient plant at a reasonable cost.[95] The Court also found that Procter had acquired Clorox for the purpose of gaining a greater share of the market than it could have attained had it entered independently.[96]

The Court also placed heightened importance on the plethora of potential anticompetitive effects the merger could have had if effectuated. It stated that: (1) removing Procter from the market would eradicate the present procompetitive effects that Procter had on the liquid bleach market by waiting in the wings;[97] and (2) that the acquisition would deter new entry among smaller firms considering entering the liquid bleach market since they would not want to compete with the larger, newly merged Procter.[98]

89 386 U.S. 568 (1967).

90 *Id*. at 572.

91 *Id.* at 570–71.

92 *Id*. at 580.

93 *See id.*

94 *Id.*

95 *Procter*, 386 U.S. at 581.

96 *Id.*

97 *Id*. The Court determined that Procter, in fact, had an effect on the market behavior of participants in the liquid bleach industry since it viewed Procter as one that might begin producing bleach. *Id.* The Court, however, did not gauge the price effect that would arise from the elimination of Procter as a perceived potential entrant. *Id.*; *see also* United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964) (finding that doing so was impossible).

98 *Procter*, 386 U.S. at 581*; see* Bush & Massa, *supra* note 19, at 1053 (stating "the acquisition might discourage smaller firms considering entering the market, or already on the fringe"). In stating that "[f]ew firms would have the temerity to challenge a firm as solidly

Six years later, the Supreme Court gave a more complete analysis of the perceived potential competition doctrine in *United States v. Falstaff Brewing Corp.*[99] In *Falstaff*, the United States challenged a merger between Falstaff Brewing Company and Narragansett Brewing Company.[100] Prior to the merger, Falstaff was one of the ten largest brewing companies in the U.S.[101] Falstaff had not sold its products in the New England market prior to the merger, but publicly expressed interest in doing so on multiple occasions.[102] Instead of eventually entering *de novo*, however, Falstaff decided to purchase Narragansett—a company that held a twenty percent share of the New England market.[103]

The government employed the potential competition doctrine and argued that the transaction may substantially lessen competition in the New England market because: (1) Falstaff was a "potential entrant"; and (2) the acquisition eliminated competition that would have existed had Falstaff entered the market *de novo*.[104] The district court rejected this contention and permitted the transaction, reasoning that Falstaff could not successfully enter the New England market *de novo* or through a toe-hold acquisition; it had to be by the acquisition of a larger brewery already in the region, such as Narragansett.[105]

In reversing the lower court, the Supreme Court did not rely on the finding that Falstaff lacked the actual capability of successfully entering the market on its own. Rather, the Court reinforced its holding in *Procter*, and stated that the district court had "failed to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market."[106] Specifically, the Supreme Court insisted that such an inquiry should be centered not on the internal decisions

entrenched as Clorox," the Court suggested that smaller firms will have even fewer incentives to enter a market dominated by an established incumbent (Clorox) that is owned by a large conglomerate with significant resources. *Proctor*, 386 U.S. at 581. Thus, the Court reasoned that the transaction would create, or increase, barriers to entry in the bleach market for smaller firms, perhaps significantly limiting the number of perceived potential entrants to only larger firms. *See id.* at 578.

99 United States v. Falstaff Brewing Co., 410 U.S. 526 (1973).

100 *Id*.

101 *Id*. at 551.

102 *Id*.

103 *Id*. at 528 (stating that this twenty percent market share was expected to increase).

104 *Id*. at 529. Note that not all acquisitions raise Section 7 concerns. For instance, if Falstaff decided to purchase a company that held a smaller percentage of the New England market than Narragansett, it is probable that such a transaction would not have raised the same level of antitrust concerns.

105 *Falstaff*, 410 U.S. at 530.

106 *Id.* at 532–33.

of Falstaff executives, but on whether, "given its financial capabilities and conditions in the New England market, it would be reasonable to consider [Falstaff] a potential entrant into that market."[107] The Court ultimately remanded the decision to the lower court to determine whether Falstaff could be said to influence existing competition as a potential competitor on the fringe of a market.[108]

Considering that the lower court already found that Falstaff was incapable of entering independently,[109] this case shows the importance the Supreme Court gives to showings of a wings effect when posed with arguments under the perceived potential competition theory. Thus, in both *Falstaff* and *Procter*, the Court did not narrowly focus on whether a firm is likely to enter a market but for the merger. Instead, in both cases, the Court corrected the lower courts for their failure to consider whether the firm in question had a present procompetitive influence on the target market.[110] In the following case, however, the Court shifts its position under the perceived potential competition theory, and proffers heightened standards under both of the potential competition doctrine's sub-theories.[111]

In *United States v. Marine Bancorporation*, the U.S. challenged a proposed merger between two commercial banks.[112] The Court ultimately prohibited the acquiring firm from engaging in a market it decided not to enter *de novo*.[113] "The acquiring bank, National Bank of Commerce (NBC)," was a large bank based in Seattle and owned a subsidiary of the appellee, Marine Bancorporation.[114] This firm was the second largest bank headquartered in the state, but had not yet been able to compete directly in the Spokane metropolitan area.[115] The acquired firm, Washington Trust Bank (WTB), was a smaller bank in Spokane.[116]

The government argued that the proposed merger violated Section 7, and argued its case under both sub-theories.[117] Under the actual potential competition theory, the government first argued that the merger would eliminate the possibility of market deconcentration in the future since NBC could enter the Spokane market without a merger.[118] Under the perceived

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107 *Id.* at 533.
108 *Id.* at 534.
109 *Id.* at 533.
110 *Id.* at 526; FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).
111 United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).
112 *Id.*
113 *Id.*
114 *Id.* at 606.
115 *Id.* at 606–07.
116 *Id.* at 607.
117 *Marine Bancorporation, Inc.*, 418 U.S. at 614–15.
118 *Id.* at 615.

potential competition doctrine, the government argued that NBC's perceived presence on the fringe of the Spokane market had present procompetitive effects.[119]

Without endorsing the actual potential competition theory,[120] the Court stated in *dicta* that if the government were to succeed under this theory, "[t]wo essential preconditions must exist . . . : (i) that in fact NBC has available feasible means for entering the Spokane market other than by acquiring WTB; and (ii) that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."[121] Under the first prong, the Court found that state law barriers precluded NBC from establishing a branch bank in Spokane *de novo*,[122] and suggested that that the only means that NBC could enter the target market was through merger.[123] Under the second prong, the Court acknowledged that it is conceivable under state law that NBC may have been able to acquire smaller banks within Spokane but determined that state law limitations on NBC's ability to grow those entities rendered any likely procompetitive effects *de minimis*.[124]

Since the Court also rejected the government's perceived potential competition argument,[125] the *Marine Bancorporation* case further highlights the high evidentiary burdens that the FTC faces when arguing potential competition cases. The government attempted to show that NBC was a perceived potential entrant that exerted present-procompetitive effects on the Spokane market by offering subjective evidence in the form of a memorandum written by an NBC officer.[126] The Court, however, dismissed this evidence by stating that the opinions of officers of the acquiring bank, and not the target bank, did not establish a violation of Section 7.[127] The Court instead applied an objective standard when gauging fringe effect, and stated that since rational, "commercial bankers" in Spokane were aware of the regulatory barriers that rendered NBC an unlikely or insignificant entrant

[119] *Id.* The government also proffered a third argument, stating that WTB, as an independent entity, would develop by internal expansion or mergers with other medium-size banks into a regional, or ultimately state-wide, actual competitor of NBC and other large banks. *Id*.

[120] *Id.* at 639 (stating that the Court "express[es] no view on the appropriate resolution of the question reserved in *Falstaff*" regarding the viability and means to resolve the actual potential competition theory).

[121] *Id.* at 633.

[122] *Id.* at 629.

[123] *Marine Bancorporation, Inc.*, 418 U.S. at 630.

[124] *Id.* at 638.

[125] *Id*. at 639–40.

[126] *Id.* at 640. The note stated, "Spokane banks were likely to engage in price competition as NBC approached their market." *Id.*

[127] *Id.*

except by merger, "[i]t is improbable that NBC exerts any meaningful procompetitive influence over Spokane banks by 'standing in the wings.'"[128] After an economic review of the market and concluding that no fringe effect was evident, the Court used objective evidence pertaining to entry barriers in order to make a subjective determination concerning firm perception.[129]

IV. THE PERCEIVED POTENTIAL COMPETITION THEORY POST-*MARINE BANCORPORATION*: A SUBJECTIVE STANDARD?

Admittedly, the FTC's case in *Marine Bancorporation* was not strong. The agency was not able to proffer any legitimate subjective evidence that neatly showed target firm perception, nor was it able to objectively show, through economic data, that NBC had a fringe effect on banks in Spokane.[130] Still, the *Marine Bancorporation* case is important in the Court's shift away from focusing on the future anticompetitive effects of a merger, like in *Procter*[131] and *Falstaff*.[132] Ultimately, however, the Court's use of an objective standard when gauging fringe effect undermines any incentive to use the perceived potential competition doctrine.

Marine Bancorporation essentially requires that acquired firms, such as Outback in the prior hypothetical, be *actually* capable of entering the acquiring firm's market, regardless of whether the company is already exerting procompetitive influences, or whether the target market is overly concentrated.[133] This standard is puzzling, in that the present procompetitive effects—the focus of the *perceived* potential competition doctrine—stem from *subjective* perceptions rather than actual capabilities.

The objective standard the Court sets forth in *Marine Bancorporation* essentially equates the perceived potential competition theory to the actual potential competition theory by requiring that the acquired firm *actually* be able to enter the target market, therefore discounting the possible existence of strong subjective evidence.[134] This issue is noticeable when considering the following example: where evidence shows that firms in the target market perceive the acquired firm as a potential entrant, but where objective evidence of such perception (i.e., through economic data concerning fringe effect) cannot be tied to those perceptions. This risks the possibility that any

[128] *Id*. at 639–40.
[129] *Marine Bancorporation, Inc*., 418 U.S. at 639–40.
[130] *Id.* at 640–41.
[131] *See* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).
[132] *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).
[133] *Marine Bancorporation, Inc.*, 418 U.S at 625 ("[T]he acquiring firm's premerger presence on the fringe of the target market must have in fact tempered oligopolistic behavior . . . .").
[134] *See* Turner, *supra* note 31; *Marine Bancorporation, Inc*., 418 U.S at 625.

present procompetitive effects an acquired firm has on a target market will not be fleshed out or confirmed through objective evidence, despite overwhelming subjective evidence that evinces the contrary.

Naturally, lower courts have struggled in creating consistent standards for determining whether a wings effect exists.[135] The Supreme Court in *Marine Bancorporation* appeared to require direct evidence of such.[136] Lower courts, however, namely those in the Second Circuit, are more lenient.[137] The Second Circuit requires only "at least circumstantial evidence" that the fringe presence "probably directly affected competitive activity in the market," and does not compel plaintiffs to proffer any direct evidence of procompetitive effects in the form of direct economic data.[138] Other lower courts have even assumed that a fringe effect exists based on a showing of certain objective factors.[139] Again, the Second Circuit's more lenient standard under this analysis is more conducive to preserving the economic benefits that may be had under the perceived potential competition theory.[140]

In order to understand why the objective *Marine Bancorporation* standard seems inconsistent with the basic premise of the perceived potential competition doctrine, consider the case of scarecrows. Similar to how these human-shaped objects can deceive birds from eating crops—despite being unable to actually harm those birds—acquired firms can deter target-market firms from raising prices despite not actually being able to enter the market.[141] Thus, simply because an acquired firm is not capable of entering a market does not mean it fails to provide a valuable benefit worth preserving—just like how a scarecrow is worth having, although it may not actually be able to inflict harm on birds. Proponents of the *Marine Bancorporation* standard may say that target-market participants are not as naive as birds and have perfect perceptions regarding the financial

135 *Marine Bancorporation, Inc.*, 418 U.S. at 640.

136 *Id.* at 625.

137 Tenneco, Inc. v. FTC, 689 F.2d 346, 358 (2d Cir. 1982).

138 *Id.*

139 United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1256–57 (C.D. Cal. 1973) ("The objective evidence of record concerning Phillips' capacity and motivation to enter the market unilaterally, Phillips' status as the most likely potential entrant, the small number of other potential entrants, the feasibility of unilateral entry by Phillips, and the concentrated nature of the market are legally sufficient to establish that Phillips' entry into the market through the Tidewater acquisition had substantial anticompetitive effects. It must necessarily be assumed that the entry of an aggressive major company such as Phillips into such a market on a unilateral basis would have conferred substantial competitive benefits which were lost when it was allowed to step into the shoes of an established major factor in the market. The substantiality of the anticompetitive effects of the Tidewater acquisition may be inferred from the objective facts present here.").

140 *Tenneco*, 689 F.2d at 355–56.

141 *See* Bush & Massa, *supra* note 19.

capabilities and intent of acquired firms residing "on the wings." The FTC and DOJ have their doubts as to if these notions are true.[142] If true, however, then a subjective standard can only incentivize target-market firms to do their research to ensure that they have every piece of necessary information.

This anomaly underlies the difficulties courts have with this doctrine. Thus, prior to *Marine Bancorporation*, the Supreme Court recognized the notion that firms do not always set prices in accordance to what the rational market participant knows about potential entrants, by giving weight to subjective evidence under the perceived potential competition theory.[143] In *Marine Bancorporation*, the Court objectified this analysis.[144] The FTC states, however, that firms may have misjudged perceptions about potential entrants.[145] So why would the Court impose a test that assumes target market firms have perfect knowledge? If these firms are adjusting prices in accordance to these misguided perceptions, beneficial effects may exist.[146] Given antitrust law's desire to keep markets competitive and prices low, we should not disrupt target-market firms' misperceptions about potential entrants who are not actually capable of entering. In essence, an objective standard presumes that scarecrows are only useful if they are actually capable of harming the birds that may enter a field of crops. Thus, *Marine Bancorporation*'s objective standard, which requires that acquired firms actually be capable of entering the target market, is not warranted—just like robotic scarecrows capable of injuring daring birds are not needed to preserve crops.

Lower courts have consequently struggled with the objective standard, that is, determining whether an acquired firm has the "characteristics, capabilities and economic incentives to render it a perceived potential entrant *de novo*."[147] This confusion has resulted in different standards across circuits.[148] Straying away from the heightened *Marine Bancorporation* standard, lower courts have given varied degrees of weight to subjective perceptions. This evidence often comes in the form of testimony from executive officials within the target market regarding their perceptions of the acquired firm, specifically to see whether they believe the acquired firm is

142 1984 GUIDELINES, *supra* note 13.

143 United States v. Falstaff Brewing Corp., 410 U.S. 526, 533–36 (1973). Falstaff had, in press releases and company publications, expressed an interest in distributing its product nationally; the Supreme Court stated that these pre-acquisition discussions were relevant in concluding whether Falstaff was a perceived potential entrant.

144 *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 638–40 (1974).

145 1984 GUIDELINES, *supra* note 13 (stating that target-market "firms may misjudge the entry advantages of a particular firm").

146 *See* Bush & Massa, *supra* note 19.

147 *Marine Bancorporation, Inc.*, 418 U.S. at 624–25.

148 See Bush & Massa, *supra* note 19, at 1058.

one they think may enter the target market.[149] The Second Circuit in *Tenneco* found the acquired firm to be a "perceived potential competitor" under element (i) by largely relying on the subjective perceptions of target market participants, notwithstanding a lack of evidence that showed the acquired firm had many of the "characteristics, capabilities, or incentives that" the framework seems to require.[150] Given the difficulty in gauging a wings effect,[151] subjective standards of this type are more desirable if agencies wish to preserve any economic benefits from firm perception which may be had.

The objective standard under *Marine Bancorporation*, however, may speak more to a method of proving proximate causation rather than an unwarranted standard which only serves as a hurdle for the FTC. Other courts, therefore, understandably narrow their focus on objective evidence, no matter how strongly the subjective evidence alludes to the fact that incumbent firms perceive the acquired firm to be a potential entrant.[152]

Thus, this Comment argues that the perceived potential competition theory should not rest on whether the acquired firm is *actually* a "potential competitor." Rather, similar to the Second Circuit's approach, the focus should center on whether the acquired firm is *perceived* by firms in the target market as being a "perceived potential entrant."[153] Thus, whether the acquired firm actually intends to enter the target market should not be controlling like it is under the actual potential competition theory, for the reasons stated above.[154] That being said, actual intent (e.g., public statements

[149] *See, e.g.*, Tenneco, Inc. v. FTC, 689 F.2d 346, 355–56 (2d Cir. 1982) (considering testimony by industry executives as to whether they considered Tenneco, Inc. a potential entrant admitted, along with evidence of negotiations, Tenneco's financial strength, and compatibility of products of the acquiring and acquired firm); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 75–78 (10th Cir. 1972) (upholding FTC finding that Kennecott was a perceived potential entrant based on testimony of competitors and evidence about the company's ability to enter the market).

[150] *Tenneco*, 689 F. 2d at 353–56 (finding that the defendant could be considered a perceived potential entrant because incumbent firms were not aware of its lack of success in past attempts of entering market). *See also* Ginsburg v. InBev, 649 F. Supp. 2d 943, 947–52 (E.D. Mo. 2009) (district court granted defendants' motion for judgment on the pleadings finding that InBev was not a perceived potential entrant based on evidence that it had actively withdrawn from the United States market and had entered into a long-term exclusive distribution agreement by which its products were imported into and distributed within the United States), *aff'd on other grounds*, 623 F.3d 1229 (8th Cir. 2010).

[151] *See* Bush & Massa, *supra* note 19.

[152] *See, e.g.*, Mo. Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 863–64 (2d Cir. 1974).

[153] A "perceived potential entrant" is a firm that is viewed by firms in the target market as one that may enter the target market. *See* Bush & Massa, supra note 19, at 1062.

[154] Whether a firm intends to enter the market of the acquiring firm may not influence the subjective perceptions of the firms in the target market. This element, however, is still relevant in objectively determining whether rational firms in the target market view it as a perceived potential entrant. *See id.*

by the acquired company pre-merger) to enter a market may still be relevant in deciding whether companies in the target market are changing their behavior in response.

V. FTC v. STERIS CORPORATION: AN ECCENTRIC RULING IN THE WAKE OF MARINE BANCORPORATION

This Comment now turns to an analysis of *FTC v. Steris Corp.* to review the court's discussion of the potential competition doctrine.[155] Part V will first present the facts of the case. Thereafter, this Comment will argue that the FTC erred by not raising the perceived potential competition theory even in light of the *Marine Bancorporation* standard. This Comment will then argue that the perceived potential competition doctrine should be adjusted in accordance with prior precedent given the result in *Steris*.

A. *Facts*

In 2015, the FTC sought a temporary restraining order and preliminary injunction against Steris Corp. (Steris) for its proposed merger with another leading sterilization provider, Synergy Health PLC (Synergy).[156] Steris and Synergy were the second and third largest firms in the contract sterilization service market, which consisted of companies that contracted with manufacturers to rid their products of unwanted microorganisms.[157] Sterigenics Corp. (Sterigenics), a third party not involved in the proposed merger, was the largest firm by size and revenue in the relevant market.[158]

At the time of the merger, the U.S. sterilization market consisted of three methods of sterilization: gamma radiation, e-beam radiation, and ethylene oxide (EO) gas.[159] Although Synergy was the largest provider of e-beam services in the U.S., it did not have any competitive presence in the U.S. market for the most well-regarded method of sterilization: gamma radiation.[160] Steris and Sterigenics held eighty-five percent of U.S. gamma facilities and a bulk of the U.S. market share.[161] This fact compelled Synergy founder, Dr. Richard M. Steeves, to develop a plan which could assist

[155] FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015).

[156] *Id.*

[157] *Id.* at 963–64.

[158] *Id.* at 963.

[159] *Id.* at 964. Customers, however, may choose sterilization methods based on their products' physical characteristics. *Id.*

[160] *Id.* ("Gamma sterilization . . . is the most effective and economical option for most healthcare products because of its penetration capabilities. It is the only viable option for dense products (e.g., implantable medical devices) and products packaged in larger quantities."). Synergy did use gamma radiation; however, all of its facilities were located overseas. *Id.*

[161] *Steris*, 133 F. Supp. 3d at 964, 967.

Synergy in attracting gamma-using customers within the U.S.[162] Steeves identified what he believed was an "industry trend" of companies switching from gamma to x-ray sterilization services after a major product manufacturer engaged in this switch.[163] This motivated Steeves to purchase Daniken Corp., a Swiss x-ray sterilization provider.[164] Steeves made the purchase with the ultimate goal of implementing commercialized x-ray sterilization in the U.S. market, which, according to the FTC, was a viable alternative to gamma radiation for its "'possibly superior' depth of penetration and turnaround times."[165]

Following the purchase of Daniken, Steeves presented his plan to the Board of Directors in 2012.[166] Steeves recognized numerous issues Synergy needed to overcome for x-ray sterilization to be successfully implemented in the U.S., which consisted of: (1) building facilities within the U.S. at a cost-effective price; (2) overcoming customer reluctance in switching from gamma to x-ray radiation; and (3) securing customer commitments in the form of financial backing.[167] By the fall of 2014, Synergy was successful in securing non-binding "letters of interest" from a number of large customers.[168] Synergy, however, was unable to secure any financial backing in the form of "take-or-pay contracts," which appeared necessary if the plan were to ultimately be approved.[169]

In October of 2014, Steris publicly announced its plans to merge with Synergy.[170] Despite this development, Synergy's x-ray plan continued "unabated" for a three-month period following the announcement.[171] During this time, Synergy expressed optimism regarding the plan in a few statements that were made public.[172] Specifically, Synergy announced that one of its major customers secured "[Food and Drug Administration ("FDA")] approval of a Class III medical device . . . paving the way for further conversions," and that an exclusive agreement with a manufacturer of x-ray equipment would allow it "to get started with x-ray in the U.S."[173] Synergy's

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162 *Id.* at 966–967.
163 *Id.* at 964, 967.
164 *Id.* at 967.
165 *Id.*
166 *Id.* at 968.
167 *Steris*, 133 F. Supp. 3d at 971.
168 *Id.*
169 *Id.* at 978, 981 (stating that little risk for the project could be tolerated since the plan to implement x-ray sterilization in the United States would take up a significant portion of Synergy's budget, thus forcing it to forgo other investment opportunities).
170 *Id.* at 973.
171 *Id.*
172 *Id.* at 974.
173 *Steris*, 133 F. Supp. 3d at 974.

failure in securing customer commitments via take-or-pay contracts continued, however, and in February of 2015, Synergy informed the FTC that it was cancelling its x-ray plans due to this financial shortcoming.[174]

B. *Arguments and Ruling*

The FTC argued that the merger should be barred under the actual potential competition theory, insisting that but for the transaction, Synergy, a United Kingdom-based company, would not have discontinued its plan to compete directly for customers with Steris by introducing commercialized x-ray sterilization services to the U.S..[175] The FTC contended that the merger barred future procompetitive benefits that would have resulted when Synergy entered the U.S. market—an event that the agency insisted was likely to occur but for the merger taking place.[176]

The district court denied the FTC's motion for preliminary injunction, finding that the FTC "failed to show, by a preponderance of evidence, that [the FTC] is likely to succeed on the merits in the upcoming administrative trial."[177] Crucially, the FTC did not employ the perceived potential competition doctrine when arguing the merger's unlawfulness. Rather, the FTC chose to solely argue under the actual potential competition theory.[178] After preliminary hearings, the court further narrowed the case's focus to only one issue under the actual competition theory, which was, "whether, absent the acquisition, the evidence shows that Synergy probably would have entered the U.S. contract sterilization market by building one or more x-ray facilities within a reasonable period of time."[179]

In addition to noting the technical difficulties companies would have in switching from gamma to x-ray sterilization,[180] the driving factors behind the court's ruling were (1) Synergy's failure to secure financial commitments from customers, and (2) "its inability to lower capital costs" involved with the project.[181] Thus, the district court concluded that future competition between the two firms was unlikely, based largely on the fact that the FTC failed to show that Synergy's plan was financially feasible and capable of

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174 *Id.* at 976.

175 *Id.* at 964, 966.

176 *Id.* at 964 ("Synergy's planned x-ray sterilization facilities would have targeted Steris' and Sterigenics' gamma sterilization customers, providing them with options for contract sterilization and resulting in lower prices and improved quality.").

177 *Id*. at 984.

178 *Id*. at 966.

179 *Steris*, 133 F. Supp. 3d at 966.

180 *Id.* at 982–83 (stating that companies would have to go through many regulatory hurdles, which included conducting studies and tests, seeking FDA approval, and analyzing the costs associated with the switch).

181 *Id.* at 984.

positive implementation in the near future.[182]

VI. ANALYSIS

A. *The Court's Decision*

The court viewed many of the same factors in its analysis that the Supreme Court applied in *Marine Bancorporation* when deciding whether Synergy was likely to enter the U.S. market.[183] Specifically, the *Steris* court focused on objective criteria and emphasized Synergy's financial positioning in deciding whether it had "the available feasible means" of entry.[184] Despite finding against the government, the court seemed to apply a lower standard under the actual potential competition theory by requiring only that the FTC show that Synergy "probably would have entered."[185] This method of analysis may therefore suggest that although the court applied a lenient standard, it still used a heightened test.[186] Again, this is evident in the court's focus on objective evidence regarding Synergy's financial shortcomings, rather than subjective evidence, such as Synergy's public announcements about its equipment manufacturing agreement and customer interest.[187]

The court relied heavily on the FTC in ultimately determining to focus its analysis on the actual potential competition doctrine.[188] Neither the court's opinion nor supplementary documents extend any explanation for why the FTC chose not to bring the claim on perceived potential competition grounds,[189] which begs the question of *why* the FTC decided not to argue its case under this sub-theory.

B. *Analyzing the FTC's Strategy*

The FTC decided not to bring the perceived potential competition doctrine for reasons not stated in the opinion.[190] Therefore, why the agency did not also argue that the merger was unlawful because it potentially removed present procompetitive effects on the U.S. market is unclear.

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182 *Id.*

183 *See id.* at 962.

184 *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 602 (1974) (discussing the actual potential competition doctrine).

185 *But see* FTC v. Atl. Richfield Co., 549 F.2d 289, 300 (4th Cir. 1977) (requiring a showing of "clear proof" of entry under the actual potential competition theory).

186 Thomas N. Dahdouh, *2015: A Year of Big Plaintiff Wins in Antitrust and Privacy Cases*, 25 COMPETITION: J. ANTITRUST, UNFAIR COMPETITION L. SEC. ST. B. CAL. 38, 58–61 (2016).

187 *See Steris*, 133 F. Supp. 3d at 982–84.

188 *Id.* at 966.

189 *See id.*

190 *Id.*

Instead, the FTC's reliance on the actual potential competition theory ultimately forced the agency to argue that Synergy was likely to enter the U.S. market—a burden that it was unable to overcome. Before scrutinizing the FTC for not bringing the perceived potential competition theory, it is important to analyze the framework the FTC uses to decide under which theories to pursue the claims.

1. Was the FTC Justified in Bringing the Claim?

The 1984 Merger Guidelines proscribe the framework agencies should follow when determining whether to bring a claim, as well as what theories they should proffer.[191] When first considering whether a claim is justified, the Merger Guidelines employ a "single structural analysis" when gauging mergers that may present either type of harm.[192] This analysis considers a list of objective factors that direct agencies to evaluate the harmful effects a specific merger may present, and if they are severe enough to justify a challenge to the merger.[193] These factors include: market concentration, conditions of entry generally, the acquiring firm's entry advantage, the market share of the acquired firm, and efficiencies.[194] The Merger Guidelines then consolidate this approach into three requirements: (1) the target market must be concentrated;[195] (2) entry into the target market must not be "generally easy;"[196] and (3) the potential entrant must be uniquely advantaged to enter the target market.[197]

After considering this approach, it is hard to say that the FTC did not have sound reasons to bring a claim. The U.S. market for contract sterilization services was essentially controlled by two firms: Steris and Sterigenics, who together controlled an overwhelming percentage of the market.[198] Thus, the first element (target market concertation) within the FTC's structural analysis is met without question. Since the FTC ultimately did bring the claim, it is presumptively sound to state that it believed elements two (entry barriers) and three (unique advantages to entry) were attainable as well—the contract sterilization certainly contained high entry

191 1984 GUIDELINES, *supra* note 13.

192 *See id.* at § 4.13.

193 *Id.*

194 *See id.* at §§ 4.131–135.

195 Agencies use the Herfindhal Hirschman Index (HHI) when gauging market concentration and are "unlikely" to challenge a merger unless the index exceeds 1800. *Id.* at § 4.131

196 Bush & Massa, *supra* note 19, at 1085 ("As the ease of entry increases, incumbent firms are less likely to raise their price in response to an acquisition involving potential entrants because other firms could easily become producers in the market if prices rose modestly.").

197 1984 GUIDELINES, *supra* note 13.

198 FTC v. Steris Corp., 133 F. Supp. 3d 962, 964 (N.D. Ohio 2015).

barriers, and it can easily be argued that Synergy was uniquely positioned to enter the target market relative to other companies.

2. Should the FTC Have Argued Under the Perceived Potential Competition Theory?

After deciding to ultimately bring a claim, the Merger Guidelines then advise the agencies as to which theory under the potential competition doctrine is most likely implicated.[199] Specifically, the Merger Guidelines recognize that both the actual and perceived potential competition theories serve distinct functions, which become implicated based on the positioning of the firms and the nature of their markets.[200] In describing the relationship between the two theories, the 1984 Merger Guidelines state:

> If it were always profit-maximizing for incumbent firms to set price in such a way that all entry was deterred and if information and coordination were sufficient to implement this strategy, harm to perceived potential competition would be the only competitive problem to address. In practice, however, *actual potential competition has independent importance.* Firms already in the market may not find it optimal to set price low enough to deter all entry; moreover, those firms may misjudge the entry advantages of a particular firm and, therefore, the price necessary to deter its entry.[201]

Thus, the Guidelines state that present procompetitive effects via lower prices are not always present due to the misconstrued perceptions of incumbent firms.[202] This fact, according to the FTC, gives the actual potential competition theory separate and distinct importance.[203]

Given this section of the Guidelines, it is foreseeable that the FTC believed Steris and Sterigenics had misconstrued perceptions of Synergy as a potential competitor, or that they just simply did not "find it optimal to set prices low enough to deter new entry."[204] In other words, the agency may not have argued under the perceived potential competition doctrine because it did not have sufficient data showing that Synergy's position on the edge of the market had a present procompetitive effect on the U.S. sterilization market.

[199] 1984 GUIDELINES, *supra* note 13.
[200] *Id*.
[201] *See id.* at §4.12 (emphasis added).
[202] "Incumbent firms" in the *Steris* case would be Steris and Sterigenics.
[203] 1984 GUIDELINES, *supra* note 13, at 25.
[204] *Id.*

Although the court's opinion does not outline the conditions of the U.S. sterilization market, evidence does show that Synergy's customers were interested in the idea of x-ray sterilization.[205] This could lead to the conclusion that prices in the market were high to begin with.[206] The stronghold that the incumbent firms had on the market, however, along with their ability to continually raise prices, should have been enough to bar the merger—that is, if the FTC were to balance the other factors.

Overall, the strategy of bringing only one potential competition claim is inconsistent with the fact that agencies often employ both the actual and perceived potential competition theories when litigating potential competition cases.[207] In fact, courts have considered instances where only one theory is addressed to be somewhat unusual.[208] Additionally, the Supreme Court has taken the initiative multiple times in cases where only one theory was alleged, and has remanded lower court rulings for further findings under the perceived potential competition theory.[209]

The evidentiary incentives for agencies to bring a claim under both theories are substantial since it may permit a wider range of evidence—specifically, that which concerns both the future and present effects that a given merger has on the target market.[210] Thus, if the FTC litigated the perceived potential competition claim, it would have been able to probe into

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205 FTC v. Steris Corp., 133 F. Supp. 3d 962, 971 (N.D. Ohio 2015).

206 *Id.* at 973 (considering testimony concerning interest for new sterilization method because of high prices with gamma radiation).

207 *See, e.g.*, United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (involving both aspects of the potential entrant theory). As recently as 2010, the FTC found a consummated merger was illegal in one market and that liability could have been premised on either of the two perceived potential competition theories. *In re* Polypore Int'l, Inc., 2010 FTC LEXIS 97, at *72 n.41 (2010).

208 *See* FTC v. Atl. Richfield Co., 549 F.2d 289, 293 n.6 (4th Cir. 1977) ("[The] FTC has not argued that the perceived or fringe effect potential entrant theory is applicable here, most likely due to the long lead time for successful entry. [The] FTC's claim to relief is therefore somewhat unique in that most decisions which have considered the potential entrant theory have usually confronted both aspects of that theory and not solely the actual potential entrant theory. As a consequence, it is difficult to extract from those cases the component that is applicable to the instant case. The task is not lightened by the fact it is the perceived potential entrant theory which has been the accepted one.").

209 *See* United States v. Falstaff Brewing Co., 410 U.S. 526 (1973); *see also* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (where the Court remanded back to the lower court for a finding on perceived potential competition grounds).

210 This may also result in potential spillover during discovery, where evidence pertaining to one theory may assist in showing another. For example, there may be an instance where because only one theory is alleged, only one discovery process pertaining to one theory is less likely. This limits the ability for discovery to mostly matters that concern the acquired firm's financial capabilities and likelihood of entering the target market. It is foreseeable though that if both theories are alleged, perceptions of the acquired firm along with its competitors would be discoverable, and thus able to assist some aspects of the actual potential competition theory even though those inquiries were not initially seen as relevant.

the subjective evidence of firms in the U.S. market to see whether the market perceived Synergy as a likely entrant, and further, if this perception had any present procompetitive effect on the U.S. market. Based on the holdings in *Procter*, *Falstaff*, and *Penn-Olin*, the district court in *Steris* could have, and arguably should have, considered whether Synergy exerted any considerable influence on the wings of the U.S. market. These non-binding guidelines, however, have since served as a replacement for judicial discretion—giving administrative agencies a position of dominance when asserting guideline-based arguments in federal courts.[211]

C. *Could the FTC Have Succeeded Under the Perceived Potential Competition Theory?*

An analysis of the *Steris* facts using the original test given by *El Paso*[212] would likely lead to the conclusion that the merger would have been barred. Again, the Supreme Court in *El Paso* held that Pacific Northwest had a procompetitive impact on competition in the California market because they were on the "wings" of that market, notwithstanding the fact that Pacific Northwest never entered the California market, nor was it able show that it was likely to enter in the future.[213] Synergy was similar to Pacific Northwest in many respects. Like Pacific Northwest, Synergy had financial shortcomings and other barriers which precluded it from immediately entering the market.[214] But, the Ohio court did not take these factors into account since the merger was viewed under the more stringent actual potential competition theory.

The Court's decision in *Penn-Olin* also addressed a multitude of factors that were not given consideration in the *Steris* case due to the district court's failure to apply the perceived potential competition doctrine.[215] Although the Court in *Penn-Olin* did not extend a preference of any one factor over the other, its description of the type of firm that raises antitrust concerns under the perceived potential competition theory seems to resemble a company similar to Synergy. Specifically, the Court in *Penn-Olin* stated, "the existence of an aggressive, well-equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter

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[211] *See generally* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006).

[212] United States v. El Paso, 376 U.S. 651 (1964); *see supra* notes 70–76 and accompanying text.

[213] *El Paso*, 376 U.S. at 657–58 ("[T]he findings that Pacific Northwest, as an independent entity, could not have obtained a contract from the California distributors, could not have received the gas supplies or financing for a pipeline project to California, or could not have put together a project acceptable to the regulatory agencies . . . are irrelevant.").

[214] *Id.*

[215] United States v. Penn-Olin Chem. Co., 378 U.S. 158, 176 (1964).

an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."[216]

The only shortcoming that the Ohio court may have found with this description concerns the court's finding that Synergy was unable to secure customer commitments and ultimately lower its capital costs.[217] But the perceived potential competition doctrine under earlier Supreme Court precedent did not solely rely on whether the firm had the actual financial capability to enter.[218] Synergy was also by no means a struggling firm which should not be considered "well-financed."[219] Synergy had a considerable budget of $40 million for investment purposes,[220] while being situated as the third-largest firm in their market.[221] The finding that Synergy may have not been able to implement a complicated strategy within a short amount of time should not discredit the fact that it is well-financed (being the third largest company and worth over $500 million), aggressive (evidenced by the fact that Steeves even entertained this plan, and coupled with the fact that he purchased Daniken to make it feasible), engaged in a similar market (contract sterilization services), and in an oligopolistic market (competition with Steris and Sterigenics in the U.S. market).[222] Thus, the FTC under the rationale proffered by *Penn-Olin*, could have—at a minimum—pursued a compelling argument that Synergy was a perceived potential entrant.

In further applying the factors that the Court found relevant in *Penn-Olin*, for gauging the precise competitive harm, the nature of the market certainly favors the FTC's approach, had it employed the perceived potential competition argument. The entire contract sterilization market was essentially controlled by three companies: Steris, Sterigenics, and Synergy.[223] Thus, the anticompetitive harm that results from this merger includes that the Court considered in *Procter*, since new entrants will be dissuaded from competing in an even more concentrated U.S. contract sterilization market because of the merger between Steris and Synergy.[224]

In *Falstaff*, the Court alluded to the notion that the public announcements of interest exerted by the acquiring firm made it likely that

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216 *Id.* at 174.

217 *See* FTC v. Steris Corp., 133 F. Supp. 3d 962, 963 (N.D. Ohio 2015).

218 *See El Paso*, 367 U.S. at 657–58 (finding that Pacific Northwest's financial plan to enter the market was irrelevant).

219 *See Steris*, 133 F. Supp. 3d at 962.

220 *Id.* at 981.

221 *Id.*

222 *C.f. id.* at 963.

223 *See id.*

224 *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967) (finding anticompetitive effect in the consequence of new entrants be dissuaded from entering the market if Clorox and Procter Gamble were to merge).

firms in the target market were expecting their entry, thus changing their behavior in the market.[225] In *Steris*, it was easily foreseeable that the plan to enter the U.S. market instituted by Synergy could have influenced Steris' and Sterigenics' market behavior in the U.S. Numerous firms expressed interest in the plan, and Synergy advertised this plan to a large audience while trying to gain customer commitments.[226] Thus, it seems as if subjective evidence regarding firm perceptions in the U.S. market would have strongly favored the FTC, that is, if the FTC gave itself the chance to argue that Synergy was seen as a perceived potential entrant by firms in the U.S. market.

Whether the Court would have found the presence of a fringe effect is unknown. This would depend on: (1) the type of evidence that is revealed in discovery; and (2) whether the Court gives more weight to objective or subjective evidence. Under the *Marine Bancorporation* standard, objective evidence carried the day.[227] The Court in *Marine Bancorporation* used an objective standard regarding what a "rational banker" with perfect information believed.[228] It ultimately came to the conclusion that there was no present competitive effect since the rational banker most likely knew of the barriers to entry, and therefore would not perceive the firm as a potential entrant after considering such.[229] In *Steris*, there were also numerous entry barriers: financing the project, customers gaining FDA approval, getting customers to switch from gamma, and, most crucially, hoping that the equipment manufacturers develop a machine that can support the x-ray radiation.[230] Thus, if the Court applied the *Marine Bancorporation* test to a tee, it most likely would not have found that Steris had a fringe effect on the market, since the prospects of effectuating Steris' plan were ultimately slim, and "rational" firms in the sterilization market would be assumed to be aware of all of this information. An objective test, however, is not always applied, and it is certainly foreseeable based on lower court rulings that the district court could have used a subjective standard.

If there was some showing of subjective evidence that could have revealed that Synergy did, in fact, have an effect on the target market, then subjective evidence could have enabled the court to overlook the objective evidence of Synergy's financial capabilities. Further, if the court applied a standard that assumed fringe effect, Synergy would not have to worry about this element altogether.[231]

[225] United States v. Falstaff Brewing Co., 410 U.S. 526, 532 (1973).
[226] *See Steris*, 133 F. Supp. 3d at 983.
[227] *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).
[228] *See Steris*, 133 F. Supp. 3d at 983.
[229] *Marine Bancorporation, Inc*., 418 U.S. at 639–40.
[230] *Id.*
[231] United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1256–1257 (C.D. Cal.

VII. CONCLUSION

The court's decision in *Steris* has broad implications for the legal community. On its face, the *Steris* decision exemplifies how some of the largest firms in extremely concentrated industries can avoid antitrust enforcement. Specifically, the *Steris* case shows how the Supreme Court's failure to use a subjective test under the perceived potential competition doctrine, like the Second Circuit's, has possibly influenced enforcement agencies to not bring their cases under the theory at all. This phenomenon is not only historically unusual, but also concerning for antitrust agencies who may feel compelled to now bring cases under the more stringent actual potential competition theory. If a trend away from concentration is what antitrust law and its enforcement agencies most desire, then a change in the guidelines should correct for *Marine Bancorporation's* evidentiary hurdles under the potential competition doctrine.

1973) ("The objective evidence of record concerning Phillips' capacity and motivation to enter the market unilaterally, Phillips' status as the most likely potential entrant, the small number of other potential entrants, the feasibility of unilateral entry by Phillips, and the concentrated nature of the market are legally sufficient to establish that Phillips' entry into the market through the Tidewater acquisition had substantial anticompetitive effects. It must necessarily be assumed that the entry of an aggressive major company such as Phillips into such a market on a unilateral basis would have conferred substantial competitive benefits which were lost when it was allowed to step into the shoes of an established major factor in the market. The substantiality of the anticompetitive effects of the Tidewater acquisition may be inferred from the objective facts present here.").