UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC, File No. 2110140
June 13, 2022

The proposed consent order announced today settles the Commission's allegations that the proposed acquisition of SAGE Veterinary Partners, LLC ("SAGE") by JAB Consumer Partners SCA SICAR ("JAB"), the owner of Compassion-First Pet Hospitals and NVA Parent Inc. (collectively, "Compassion-First/NVA"), may substantially lessen competition for individual specialty veterinary services and emergency veterinary services in three local markets: (i) Austin, TX; (ii) in and around San Francisco, CA; and (iii) in and between Oakland, Berkley, and Concord, CA. The proposed divestiture resolves all competitive overlaps between Compassion-First/NVA and SAGE in the alleged relevant markets.

Because it does so, we voted to accept this proposed consent order for public comment. But we write separately to object to the Complaint's invocation of rhetoric unrelated to competition and the order's apparent predication of remedies upon both that rhetoric and the majority's evident distaste for private equity as a business model, instead of the facts uncovered in the investigation.

The Complaint alleges a "growing trend towards consolidation in the emergency and specialty veterinary services markets across the United States in recent years by large chains".[1] That allegation, and Chair Khan's concurrently-released statement regarding private equity as a business model,[2] are the apparent bases for imposing broad prior approval and prior notice requirements on the parties.[3] Even though we found competitive problems in just the three local markets discussed above, we are imposing prior approval requirements across California and Texas, and prior notice requirements across the entire U.S.

The "growing trend" allegation, in isolation, is not an appropriate basis for incremental remedies. *First*, our investigation revealed that the relevant competition occurs at the local level, driven by the distance and time that pet owners are willing to travel to obtain each relevant veterinary service. That is why the Complaint pleads local markets and the divestitures are designed to resolve overlaps in three specific local areas—two across the Bay Bridge from one another. For competition purposes, there is no national antitrust market for emergency and specialty veterinary services. To the extent there is consolidation on a national level, based on what

[1] Complaint, *In re JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC, File No. 2110140,* paragraph 9 (June 2, 2022).

[2] Commissioners Bedoya and Slaughter join the Chair in her statement.

[3] The parties are in the best position to evaluate whether the benefits of a transaction and the certainty of a consent order outweigh the costs. So, we do not necessarily oppose consents on the grounds that they include provisions that are unnecessary, overly broad, and counterproductive.

the Commission pleads in the Complaint, it is irrelevant.[4] It is also not inherently concerning. Our review of the evidence makes clear that the bulk of emergency and specialty veterinary clinics nationwide are independent, with larger "aggregators" like JAB and SAGE collectively controlling a minority of clinics. Post-acquisition, JAB will hold fewer than 100 clinics nationwide, a competitively-meaningless share of the purported national market. *Cf. U.S. v. Von's Grocery Co.* 384 U.S. 270 (1966). *Second*, we have seen no evidence that such a trend, if it exists, is bad for purposes of competition. That is, there are no discernible anticompetitive effects.

While untethered to any impact on competition, the allegation of the purported trend in nationwide consolidation appears to form the sole basis in the Complaint for imposing out-of-market prior approval and prior notice requirements. Chair Khan's statement also argues that the fact that JAB is a private equity firm requires additional remediation, but neither the Complaint nor the Analysis of Agreement Containing Consent Orders to Aid Public Comment—nor, in our view, the evidence uncovered in the investigation—indicate any reason why this fact about JAB makes this or any other private equity transaction more likely to raise competition concerns.[5] Imposing heightened legal obligations on disfavored groups – including private equity – because of who they *are* rather than what they have *done* raises rule of law concerns.

The parties are subject to statewide prior approval in Texas and California and nationwide prior notice. The Commission's Prior Approval Policy Statement ("Prior Approval Policy") contemplates that the Commission might impose a prior approval requirement that covers product or geographic markets beyond the relevant ones affected by the merger.[6] Most of the bases for imposing out-of-market remedies are not met here—for example, if "the *relevant market alleged* is already concentrated or has seen significant consolidation in the previous ten years" (emphasis added).[7] The Complaint does not allege that the three relevant geographic markets here have seen significant consolidation.

The Chair also justifies the broad prior approval provision because JAB previously acquired clinics and entered into a related consent order. In that prior matter, JAB approached the Commission with a proposed acquisition and worked with it to resolve competitive overlaps, small parts of a much larger transaction.[8] That process enabled the FTC to ensure that overlapping assets

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[4] Chair Khan's statement argues that our critique here is belied by "market realities." According to the Complaint and the Analysis of Agreement Containing Consent Orders to Aid Public Comment voted on by this Commission, however, the reality of competition in the markets in question is that it is local.

[5] Chair Khan's statement points to buyouts by private equity firms that "saddle businesses with debt." Public companies also sometimes choose to finance operations and acquisitions with debt. *See e.g.,* Frances Yoon, *The World's Appetite for Debt Is Smashing Records*, Wall St. J. (Nov. 30, 2020), https://www.wsj.com/articles/the-world-is-bingeing-on-debtand-smashing-records-11606732203. *See also* Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and The Theory of Investment*, 48 Am. Econ. Rev 261 (1958).

[6] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf (hereinafter "Prior Approval Policy"). *But see* Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[7] Prior Approval Policy, p. 2.

[8] *See* Press Release*, FTC Requires Veterinary Service Providers Compassion First and National Veterinary Associates*

were divested to an acceptable buyer, which is critical to maintaining competition.[9] The effect of imposing broader prior approval requirements because of such settlements will be to deter not mergers, but settlements. It will deter parties from submitting for agency review the complete set of assets subject to the deal, instead "fixing it first": selling what they want to whom they want. The Commission has traditionally eschewed this approach because it reduces our ability to ensure the robustness of the divestiture and the quality of the buyer and because, without a consent order, there is no accountability should parties fail to meet their obligations. Fix-it-first transactions remove Commission oversight and increase the likelihood that competition will not be preserved and that consumers will be harmed.

As we warned when the Commission (actually, two sitting Commissioners and a zombie vote) issued the ill-advised Prior Approval Policy, the broad and subjective factors enunciated in that policy lack limiting principles and are almost certain to lead to the routine imposition of prior approval provisions on geographic and product markets beyond those at issue in any given merger. We acknowledge that there are cases where the evidence supports the imposition of these more onerous remedies.[10] This does not appear to be one of those cases.

We encourage comments during the public comment period regarding the statewide prior approval and nationwide prior notice provisions that appear in today's consent order. In addition, we encourage comments on the implications of the agency's apparent shift to an approach that incentivizes fix-it-firsts.

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to Divest Assets in Three Local Markets (Feb. 14, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-requires-veterinary-service-providers-compassion-first-national-veterinary-associates-divest (The FTC required divestiture of 3 out of over 70 clinics operated by the parties).

[9] *See e.g., The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[10] Decision, *In re DaVita Inc./Total Rental Care, Inc., File No. 2110013* (Oct. 25, 2021) https://www.ftc.gov/system/files/documents/cases/davita_order_9_24_final.pdf (DaVita was subject to a statewide prior provision, requiring prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah.).