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Antitrust Enforcers Worldwide Gather to Discuss "Inflexion Point in Antitrust Enforcement" at "Enforcers Roundtable" of the ABA Antitrust Spring Meeting, Washington, D.C.

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April 7th, 2023 – Last week, numerous antitrust enforcers from leading competition authorities across the globe including FTC Chair Lina Khan, Assistant Attorney General for Antitrust Jonathan Kanter, European Commissioner for Competition Margrethe Vestager, Chair of the National Association of Attorney Generals Antitrust Taskforce Gwendolyn Cooley, and Chief Executive and General Counsel of the Competition and Market Authority (UK) Sarah Cardell, all gathered to discuss recent developments in antitrust enforcement worldwide. The "Enforcers Roundtable" panel concluded the 71st annual ABA Antitrust Spring Meeting in Washington, D.C., an event gathering over 3,700 competition and consumer protection professionals from around the world and the first fully in-person event of its kind since the pandemic began in March 2020.

The panelists at the Enforcers Roundtable uniformly emphasized the agencies' common goal to enforce the antitrust and competition laws more rigorously, as well as a growing effort to improve inter-agency cooperation in both enforcement and policy setting. Assistant Attorney General Kantor declared that this is "an inflection point in antitrust enforcement on par with, a hundred years ago, the trustbuster era." He added that 2022 marked a record-breaking year for antitrust enforcement in the United States on many metrics. The FTC and DOJ issued a total of 65 Second Requests under the HSR premerger notification act, the highest annual number in over a decade. AAG Kantor said that the DOJ also has "more open grand jury investigations than any time since 1989", including the first two criminal enforcement actions against violations of Section 2 of the Sherman Act since the early 1970s.

Chair Khan and AAG Kantor also made clear that the labor sector is now a major area of focus for both their agencies. The DOJ has brought four criminal cases against no-poach and wage-fixing deals to date. Although three of these

cases resulted in a full acquittal after trial and the fourth is currently in trial, AAG Kantor emphasized that the DOJ intends to continue to pursue these cases "where the law and the facts allow" despite its recent setbacks. The FTC also identified two instances where it had found non-compete provisions in employment contracts illegal and had required the employers to void the agreements and notify their employees that the non-competes are no longer in effect. The Commission is also exercising its rule-making authority under Section 6(b) of the FTC Act in proposing a new rule banning non-compete clauses in the US. Chair Khan emphasized that "The use of [non-competes] have dramatically expanded across the economy, and the empirical literature shows that this is having a significantly negative effect on competition. It is impeding business dynamism. It is impeding new business formation. And our economists calculated that eliminating non-competes would result in 300 billion dollars back in the pockets of workers."

Neither Chair Khan nor AAG Kantor showed any willingness to change their new policy of issuing pre-consummation warning letters and their suspension of early terminations in HSR merger reviews. Both practices were in reactions to a surge in deal volume in 2021 as the economy began to recover from the Covid lockdowns. They are expected to remain in place at least until the enforcement agencies implement substantive reform of their merger review procedures. AAG Kantor also confirmed the agencies' recent heightened scrutiny of mergers, stating that "On the merger front, there is no success greater for us than deterrence. . . when we are ready to file a case and a party abandons a merger, that's a success." Both Chair Khan and AAG Kantor indicated that they expect to release new proposed merger guidelines sometime over the next few months.

The Spring Meeting also featured a presentation by HHR senior partner Bill Kolasky on panel on "umbrella damages" on Thursday, March 30. Fellow panelists included Sarah LaFreniere from Hausfeld LLP, Lin Chan from Lieff Cabraser Heimann & Bernstein LLP, Patrick Ashby from Linklaters LLP, and Nancy Rose from MIT's Department of Economics. Umbrella damages are damages suffered by plaintiffs who paid inflated prices caused by a cartel, but who did not purchase directly from a cartel member. There is currently a circuit split on this issue. The Fifth Circuit Court of Appeals and some district courts in the Ninth Circuit have granted antitrust standing to plaintiffs to sue for umbrella damages. By contrast, the Second and Third Circuits denied plaintiffs standing to sue for umbrella damages allegedly resulting from price-fixing conspiracies in several cases. The panel discussed various practical concerns on this issue including administrability and moral hazard. Ultimately, the panel agreed that whether plaintiffs who suffered umbrella damages have antitrust standing to sue should be determined on a case-by-case basis after thorough review of the facts, but what standards should apply remains an issue to be resolved by the courts in future cases.

Another Spring Meeting panel discussed the implications of the Ninth Circuit's en banc opinion in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods,* LLC, 31 F.4th 651 (2022) for class certification in antitrust cases. Attorneys from the plaintiffs' and defense bars, as well as economists, debated the scope of the opinion. One of the key issues was when economic models can satisfy Rule 23's requirement of common proof. The economists pointed out that the Plaintiffs' model in that case did not calculate individual effects, only the average overcharge resulting from price-fixing in the tuna market. The discussion focused on whether *Olean* stands for the proposition that statistical averages can always be used to show class-wide impact of anticompetitive conduct or whether it is another example of where there must be a case-by-case application of a given model to a given set of facts. The panelists sought to either align or distinguish *Olean* from two recent cases on uninjured class members and class certification, *In re Asacol Antitrust Litig.,* 907 F.3d 42 (1st Cir. 2018) and *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019). In those cases, the First Circuit and D.C, Circuit held that classes containing as few as 10% and 12% uninjured members, respectively, did not satisfy the predominance requirement, whereas the percentage of uninjured class members was in dispute in *Olean*, with the plaintiffs' economists arguing that fewer than 5% of class members were not injured and the defendants' economist arguing that as many as 30% of class members may not have been injured.

On another panel entitled "All Bark, No Bite? Antitrust Under Biden", a group of antitrust practitioners discussed the Biden administration's antitrust enforcement record to date. The panelists agreed that Biden's Executive Order on Promoting Competition in the American Economy published on July 09, 2021, has been successful in promoting the "whole of government approach" to antitrust enforcement and has led to increased cooperation between US government agencies to enforce US antitrust laws. The Department of Defense and Department of Transportation both

provided helpful testimony in DOJ antitrust enforcement actions last year. The Department of Labor also signed a memorandum of understanding to increase the level of coordination in information sharing, enforcement activity, and training. One panelist, the General Counsel of JPMorgan Chase, Michael Lee, said that given the increasing scrutiny over non-compete agreements in employment contracts, companies are beginning to prioritize the use of other tools to protect their confidential information and trade secrets, including non-disclosure and non-solicitation agreements. The panelists also agreed that the FTC's recent policy statement regarding Section 5 of the FTC Act has created significant uncertainty over the interpretation of "unfair methods of competition". How this new standard will be applied by the courts remains to be seen, but for now, as one panelist from Latham & Watkins, Ian Conner, stated with some frustration: "The only thing I am certain of is that it has to be a method of competition, and it has to be unfair." Several of the panelists argued that to date the Biden Administration's actual enforcement record has not fully lived up to its rhetoric and that both the DOJ and FTC have suffered multiple losses in court in some of their more aggressive enforcement actions.

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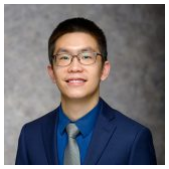

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