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Section 355 of the Internal Revenue Code allows corporations to "spin-off" parent-controlled businesses tax-free. Traditionally an important tool for divestitures and restructurings with U.S. tax consequences, recent trends suggest section 355 is also of interest to firms facing US antitrust consequences. Statements and maneuvering by some such companies indicate firms are considering spinning-off businesses to avert liability and 'break up' on their own terms. Despite widespread renewed interest in using antitrust laws to break up large corporations, the antitrust implications of corporate spin-offs have thus far escaped scholarly notice and scrutiny.

This Note posits that it is a mistake to treat corporate spin-offs as the de facto corollary to government-supervised structural separations. Tax-free spin-offs are not the self-mediated equivalent to structural remedies for at least three reasons: (1) section 355 allows dominant firms to engineer future market conditions and concentrate power in ways government-supervised separations simply do not; (2) parent companies may spin-off fictitious competitors to artificially inflate competition and deflate power in a given market; and (3) the parent-controlled process invites parent firms to structure progeny firms in patently self-serving ways. The harm continues because the parent company never redistributes monopoly power. Section 355's authorization of voluntary tax-free spin-offs without regard to anticompetitive effect is in tension with antitrust policy. Yet, no legal mechanisms

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[a1] In loving memory of my dear friend, Maxwell B. Hartong. Utmost gratitude to John Newman for encouraging me to write this piece and introducing me to modern antitrust theory. Thanks to the University of Miami Business Law Review for insightful comments and careful editing. All errors are my own.

currently exist to stop or prevent firms from using spin-offs to evade antitrust liability.

In response, this Note proposes a doctrinal shift in the way antitrust courts and plaintiffs approach section 355 spin-offs, beginning with the proper test for market power and anticompetitive effect. As to prevention, regulators should adopt strategies to understand, detect, and stop anticompetitive spin-offs. Legislation is needed to align section 355 with the goals for competitive markets. Nonetheless, the path forward must distinguish between anticompetitive spin-offs and competition on the merits.

"*It is a question of proximity and degree*."
– OLIVER WENDELL HOLMES[1]

INTRODUCTION

Does a private restructuring accomplish the same end as a government-supervised breakup? Consider Amazon, indisputably one of the most powerful companies in the world. In light of its power, Amazon has unsurprisingly caught the attention of antitrust enforcement agencies. Amazon has come under increasing pressure from antitrust enforcement agencies, specifically, regarding alleged anticompetitive practices in the digital platforms and e-commerce markets. Interestingly, around the same time, Amazon began positioning itself to spin-off a significant portion of its business. Take Amazon's 2016 Form 10-K: there, for the first time, Amazon lists AWS ("Amazon Web Services") as a separate entity.[2] Listing a wholly owned subsidiary as a separate entity does not necessarily mean a spin-off is on the horizon, but it is a relatively reliable signal among publicly-owned parent companies planning to take a subsidiary public and form a new stand-alone company.[3] And here, officially sequestering its wholly owned subsidiary has the secondary purpose of laying the foundation necessary for Amazon to later allege that the deal with itself when it spun-off AWS occurred at nothing less than arms-length. Turning back to the initial question, is Amazon's deal *actually* at arms-length? Does the spin-off serve the same antitrust goals as any other structural break-up? The answer depends, on one hand, how one conceptualizes the goals of antitrust, and on the other, how spin-offs affect competition.

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1 Schenck v. United States, 249 U.S. 47, 52 (1919).

2 *See* Amazon.com, Inc., Annual Report (Form 10-K) 3 (Jan. 28, 2016).

3 *See* Cathy A. Birkeland et al., *Spin-offs Unraveled*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (Oct. 31, 2019), https://corpgov.law.harvard.edu/2019/10/31/spin-offs-unraveled/ (explaining, "[t]he Form 10 is an opportunity to market SpinCo's growth story" in addition to meeting certain regulatory requirements). *See also* Jim Osman, *IPO's Are Dead. New Companies Via Spinoff Offer Extreme Value in Bear Markets. Here Are 3 Worth Watching*, FORBES, (Sept. 14, 2022), https://www.forbes.com/sites/jimosman/2022/09/14/ipos-are-dead-new-companies-via-spinoff-offer-extreme-value-here-are-3-situations-to-watch/?sh=41c7c5047bd9.

Antitrust has three basic goals: promoting reasonably unrestrained trade,[4] preserving the competitive process,[5] and preventing business combinations that substantially lessen competition.[6] These goals come from the Sherman Act of 1890 and the Clayton Antitrust Act of 1914—the statutory sources of antitrust law in the United States. These Acts are remarkably slim pieces of legislation for the complexity and range of corporate activity they capture. Unsurprisingly, once Congress staked its perimeter, it was for the courts to figure out how to connect the posts and,[7] at times, mend fences with distressed markets and faceless corporate entities.[8] Antitrust law is unique in this characteristic: Modern doctrine evolved from a creature of statute into the "common law of competition[.]"[9] Adversarial proceedings before federal courts are the primary vehicle for formulating the substantive standards of the law and the dominant antitrust institution is the public enforcement body and.[10]

One of the defining turns in antitrust history was the emergence of the Chicago School of Antitrust.[11] The Chicago School emphasized economic analysis in antitrust jurisprudence, which sharpened antitrust's doctrinal focus in several key ways.[12] For one, new understanding about allocative and productive efficiency shaped the way Chicago School advocates, such as Richard Posner and Robert Bork, and eventually courts thought about concentration (market power) and the behavior of competitive markets.[13] Two, the Chicago School took the position that the common law of antitrust should first and foremost maximize "consumer welfare."[14] In the words of then-Professor Bork, "competition" is "a shorthand expression

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4 *See* Sherman Act, 15 U.S.C. § 1 (1890).

5 *See id*. at § 2.

6 *See* Clayton Act, 15 U.S.C. § 7 (1914).

7 Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 269-70.

8 *See* George Bittlingmayer, *Antitrust and Business Activity: The First Quarter Century*, 70 BUS. HIST. REV. 363, 388 (1996) (discussing Congress's reaction to the Supreme Court's rule of reason in passing the Clayton Act of 1914 and the Federal Trade Commission Act of 1914).

9 *Peritz*, *supra* note 7, at 270.

10 ANDREW I. GAVIL, ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 20, 81 (4th ed. 2022).

11 *See id*. at 85-86.

12 Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 283 (1985).

13 *See* GAVIL, ET AL., *supra* note 10, at 85-86. As Gavil and colleagues explain, the Chicago School "sought to apply the insights of price theory to antitrust law."

14 *See id*. at 86. The Chicago School infused distinctly *laissez-faire* principles into modern antitrust theory, positing, consumer welfare is maximized when firms are left to seek profits and markets are unfettered by regulation. *See id*. at 93-98.

for consumer welfare."[15] Maximizing consumer welfare meant rekeying the legal analysis to consumer interests—lower prices, higher output, and greater access to innovations—and abandoning the interests of individual competitors.[16] A necessary premise of the consumer welfare principle was that, in a competitive market, a firm could not forsake consumer interests without forgoing firm profits so most harms would be self-correcting.[17] It followed that consumers are a better 'check' on competition because they naturally eschew the species of control competition law proscribes.[18]

To the extent that the Chicago School started a movement, the effect of that movement was largely *away* from government intervention and toward self-regulation and "reform."[19] The Supreme Court adopted the Chicago School's consumer welfare standard in 1979.[20] Chicago School reform reached its peak with the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*.[21] *Trinko* is largely recognized as taking the wind out of antitrust courts' sails.[22] Even if *Trinko's* actual holding was fairly narrow, Justice Scalia's defendant-friendly tone and dicta encouraged lower courts to cabin the refusal-to-deal doctrine.[23] In fact, *Microsoft*,[24] *LePage's*,[25] *Dentsply*,[26] and *Viamedia*[27] stand alone as some of the few victories of Section 2 plaintiffs

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15 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61 (1978).

16 *See* GAVIL, ET AL., *supra* note 10, at 93-98.

17 *See id*. at 86.

18 *See id*.

19 In 1968, Robert H. Bork (then a professor at Yale Law School) wrote, "[i]f I am correct, reform is needed, but it need not come from Congress. Antitrust policy is determined . . . by the Supreme Court." Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 242 (1967). For an alternative view, see, for example, William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 UNIV. CHI. L. R. 459 (2020).

20 *See* Reiter v. Sonotone, 442 U.S. 300, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting BORK, *supra* note 15, at 66)).

21 Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

22 *See* Spencer Weber Waller, Microsoft *and* Trinko*: A Tale of Two Courts*, 2006 UTAH L. REV. 741, 754 (2006), lawecommons.luc.edu/cgi/viewcontent.cgi?article=1037&context=facpubs.

23 See Frank X. Schoen, *Exclusionary Conduct After* Trinko, 80 N.Y.U. L. REV. 1625, 1638 (2005), for an in-depth analysis of the chilling effect of *Trinko* on Section 2 litigation. *See also* Zephyr Teachout, *Neil Gorsuch Sides with Big Business, Big Donors and Big Bosses*, WASH. POST (Feb. 21, 2017, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2017/02/21/neil-gorsuch-always-sides-with-big-business-big-donors-and-big-bosses/.

24 United States v. Microsoft Corp., 84 F.Supp.2d 9 (D.D.C. 1999), *aff'd in part, rev'd in part*, 253 F. 3d 34, 64-78 (D.C. Cir. 2001).

25 LePage's Inc. v. 3M, 324 F.3d 141, 162-64 (3d Cir. 2003).

26 United States v. Dentsply Int'l, Inc., 399 F.3d 181, 196 (3d Cir. 2005).

27 Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 463 (7th Cir. 2020).

in the twenty-first century. Many more failed. The main take-away is, in the fifty or so years following the Chicago School movement, antitrust became more technical and courts became less willing to entertain antitrust claims.[28]

It is worth pausing here to remark on the renewed interest in prosecuting antitrust claims among enforcement agencies in recent years.[29] In recent years, enforcement agencies have filed many more antitrust suits than they did in the late twentieth century.[30] Along with a renewed interest in enforcement, antitrust agencies have expressed an interest in reviving structural remedies.[31] Structural remedies are generally seen as more drastic by judges and corporations alike, although the reasons differ. For corporations, court-sanctioned structural remedies matter because they entail changes in control and significant drops in shareholder value.[32] For this and other reasons, directors and shareholders have paid close attention to the potential for structural remedies, in some instances

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[28] Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement*, 94 NOTRE DAME L. REV. 583, 585 (2019).

[29] Other political actors, including President Biden, have expressed renewed interest in addressing antitrust concerns too. *See* Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021). During the 2016 and 2020 presidential campaigns, candidates have called for stronger antitrust enforcement. William A. Galston & Clara Hendrickson, *A Policy at Peace with Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, BROOKINGS (Jan. 5, 2018), https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/; Jennifer Huddleston, *Tech Policy and the 2020 Election, Part 3: Antitrust and Big Tech*, AM. ACTION F. (Aug. 26, 2020), https://www.americanactionforum.org/insight/tech-policy-and-the-2020-election-part-3-antitrust-and-big-tech/.

[30] THURMAN ARNOLD PROJECT, *Modern U.S. Antitrust Theory and Evidence amid Rising Concerns of Market Power and Its Effects*, YALE SCH. OF MGMT: MOD. ANTITRUST ENF'T, https://som.yale.edu/centers/thurman-arnold-project-at-yale/antitrust-enforcement-data (June 22, 2020). For additional insight, consult Litigation Analytics on WestLaw, case type, "Antitrust."

[31] *See generally* SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE COM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN THE DIGITAL MARKETPLACE: MAJORITY STAFF REPORT AND RECOMMENDATIONS (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519. See also Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 15 (2001) for an explanation of remedial strategies in antitrust. Behavioral remedies bar a defendant firm from engaging in particular actions that a court has deemed anticompetitive but stop short of redistributing competitive assets in the relevant markets, whereas structural remedies are generally accomplished by breaking a firm into two or more competitive entities, or requiring the sale of some right, input, or facility to extant competitors (i.e., divestiture). *Id.*

[32] *See infra* Part I, Subsection 3.

even suggesting that the corporation spin-off subsidiary businesses to avoid antitrust liability.[33]

Much of what this Note calls into question is whether and under what conditions the privileges under section 355 of the tax code run up against the boundaries of the Sherman Act and frustrate the common law of competition.[34] Part I of this Note examines section 355 of the corporate tax code and its history of being used for voluntary corporate restructuring as well as a mechanism to unlock shareholder value. After reviewing the history and basic mechanics of a section 355 spin-off, this Note turns to the potentially anticompetitive nature of spin-off transactions in Part II.

The bulk of the analysis unfolds in Parts II and III. Part II examines how and under what circumstances completely valid spin-off transactions may be used for anticompetitive ends and Part III analyzes the doctrinal implications of anticompetitive spin-offs. Here, two anchors of modern antitrust theory – power analyses and liability targets – are examined, and the existing theoretical frameworks are adapted to better capture the market effects of section 355 spin-offs. Part III responds to the anticipated objection: Is not some separation better than no separation? In short, separation in form only fails to redistribute control in a meaningful way and risks placing the offending firm outside the reach of judicial remedies.

Having demonstrated several scenarios in which section 355 may be used to subvert market competition and then proposed a method for tracing control and liability, Part IV offers two strategies that lawmakers and antitrust enforcers should adopt to ensure the alignment of self-initiated structural remedies with antitrust goals. Part IV reiterates the delicacy of the current moment: though voluntary corporate 'break ups' should be encouraged, blind acceptance of spin-offs as the proper mechanism risks entrenching monopolies and leaving competitive harms unremedied. To leave room for differences in degree, the proposed strategies rely on fact-specific inquiries, and encourage regulators, lawmakers, courts, and market stakeholders to be alert to tax-free restructurings, particularly when undertaken by companies that are facing antitrust liability.

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[33] *See, e.g.*, Annie Palmer, *Former Amazon Vice President Calls for the Company to Split Its Retail and Cloud Businesses*, CNBC: TECH (July 24, 2020, 1:04 PM), https://www.cnbc.com/2020/07/24/former-amazon-senior-engineer-calls-for-aws-spinoff.html (documenting comments by former Amazon executive suggesting "Amazon might choose to proactively split off AWS from the company as an effort to get ahead of looming antitrust scrutiny."); Will Healy, *Why Antitrust Actions Against Alphabet May Be Good For Investors*, THE MOTLEY FOOL (June 26, 2021, 6:12 AM), https://www.fool.com/investing/2021/06/26/why-antitrust-actions-against-alphabet-may-be-good/ ("[A spin-off] could bring about the 'breakup' antitrust regulators seek, but on terms decided by Alphabet.").

[34] Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-2.

I. SELF-INITIATED BREAKUPS VIS-À-VIS SPIN-OFF TRANSACTIONS

Corporations voluntarily restructure for any number of legitimate business reasons, which certainly include an effort to avoid a variety of undesired outcomes, like the loss of value associated with over-diversification.[35] And amidst the looming threat of a return to structural remedies, another reason corporations may voluntarily restructure – specifically, those facing antitrust scrutiny – is to beat the government to it. That is, corporations may elect to restructure themselves by divesting one or more corporate assets before the government can come in and do it for them. Commentators have thus far ignored the possibility that voluntary restructuring in response to antitrust scrutiny is only part of the picture. Another explanation is that breaking up on one's own terms avoids the loss of control that inheres in structural antitrust remedies.

A corporation may voluntarily divest assets either by sell-off or by spin-off.[36] As the name suggests, a sell-off involves a corporation giving up ownership and control of an asset in exchange for cash or a cash equivalent.[37] A spin-off involves breaking off an asset and forming an independent entity, but ownership remains with the shareholders of the original firm vis-à-vis a stock distribution.[38] Spin-off transactions, codified under section 355 of the Internal Revenue Code, come with the added benefit of being tax-neutral.[39] In other words, no gain or loss is realized at the corporate or shareholder level with the distribution of stock in the newly independent entity.[40] While spin-offs have always been popular because of their tax-free benefit and high returns, lately, corporations and their shareholders are looking to spin-offs as a way to minimize liability of monopolization, while still maximizing control.[41]

This Part will explore section 355 spin-off transactions through the lens of corporations facing antitrust liability, and in particular, how those corporations may use section 355 to divest themselves of powerful

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35 *See* WILLIAM W. BRATTON, CORPORATE FINANCE: CASES AND MATERIALS 993-94 (Saul Levmore et al. eds., 9th ed. 2021)

36 A. Qayyum Khan & Dileep R. Mehta, *Voluntary Divestitures and the Choice Between Sell-Offs and Spin-Offs*, 31 FIN. REV. 885, 885-86 (Nov. 1996).

37 *Id.* at 885.

38 *Id.* at 885-86.

39 I.R.C. § 355.

40 *Id.*

41 *E.g.*., Tom Foremski, *Antitrust Probes, Spinoffs, and Missing Financials: Is a Pre-emptive Breakup Ahead for Google?*, ZD NET (Feb. 7, 2020), https://www.zdnet.com/article/antitrust-probes-and-spinoffs-reasons-for-googs-missing-financial-numbers/ ("Wall Street is rife with reports that Google (Google's parent company is Alphabet Inc.,) is considering selling part of its ad business to appease antitrust regulators and politicians in the US and Europe.").

subsidiaries in order to avoid antitrust liability. The first Section begins with an overview of a spin-off transaction: a brief history of spin-off transactions in the United States, the structure and planning of a typical spin-off, and the statutory and common-law requirements of a tax-free distribution. Then, the next Section will discuss the strategic advantages of spin-off transactions and general separation issues noted by law firms that advise clients in corporate spin-offs.

A. Section 355 Spin-off Transactions

A spin-off usually involves the separation of a company's businesses through the creation of one or more publicly traded companies.[42] At a basic level, a section 355 transaction starts with a parent company owned by shareholders and a subsidiary owned by the parent.[43] The transaction generally results in the shareholders of the parent owning stock in two separate entities.[44] For intuitive convenience, this Note proceeds by referring to the company responsible for distributing stock of the subsidiary as "ParentCo," and the newly formed independent company as "SpinCo," that is, the spun-off subsidiary.[45] Technically, there are two other types of section 355 spin-off transactions, i.e., "split-offs" and "split-ups."[46] Appendix I provides a diagram illustrating each type. This paper deals mainly with the classic spin-off transaction: shareholders of ParentCo retain stock in ParentCo and receive stock in SpinCo, thus continuing beneficial ownership in ParentCo and obtaining beneficial ownership in SpinCo. Upon completion, ParentCo shareholders control two newly separate corporate entities.

1. Historical Overview and Requirements

Tax-free corporate separations have been in U.S. tax law since 1918.[47] As they are known today, however, spin-off transactions were codified in 1954 under section 355 of the Internal Revenue Code.[48] The 1954 version

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42 *See generally* BRATTON, *supra* note 35, at 995.

43 *Id.*

44 *Id.*

45 Elsewhere in the literature, the parent and distributing corporation are also referred to as "Distributing" and the subsidiary corporation is generally referred to as "Controlled." *See* Krishna Veeraraghavan & Bradley S. King, *Considerations in Carve-out Transactions*, 23 M&A LAW. at 1, 8 (2019).

46 See App. I for an illustration of the three types of primary spin-off transactions. *See also* Robert A. Jacobs, *The Anatomy of a Spin-Off*, 1967 DUKE L. J. 1, 2-3 (1967); *see generally* Thomas M. Ward, *Spin-Off Spins in Two Directions*, 43 NOTRE DAME L. REV. 389 (1968).

47 Revenue Act of 1918, Ch. 18, § 202(b), 40 Stat. 1060.

48 *See* Jacobs, *supra* note 46, at 1.

of the Code continues to provide the basic statutory framework for modern tax-free spin-off transactions.[49] And since the Tax Reform Act of 1986, a section 355 spin-off is "the only way a company can distribute appreciated property to its shareholders without incurring a corporate-level tax."[50]

There are four basic statutory requirements of a spin-off transaction: (1) control, (2) non-device, (3) active trade or business, and (4) distribution.[51] Generally, evidence of a device[52] or unrebutted evidence of a plan[53] is enough to disqualify a transaction from favorable tax treatment even though all other affirmative requirements of section 355 are met.[54] As is often the case, common-law courts have added additional requirements in the process of interpreting the statutory law. Courts require (a) a business purpose, (b) continuity of interest, and (c) continuity of business enterprise, before finding tax-free treatment warranted.[55] Though a detailed description of the tests courts apply when evaluating the merits of a spin-off is beyond the scope of this article, two tests – the

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49 *See* I.R.C. § 355.

50 Edward J. Schnee et al., *Corporate Spin-offs: A Well-Planned Prescription for Ailing Companies*, J. ACCT. 47, 47 (1998).

51 *See* I.R.C. § 355 (a)(1).

52 "Device" factors include pro rata distributions, post-distribution sales of ParentCo or SpinCo stock and the existence of substantial non-business assets in ParentCo or SpinCo. "Non-device" factors include (i) a strong business purpose; (ii) a publicly traded and widely held ParentCo; and (iii) corporate shareholders of ParentCo who are entitled to a 100 percent dividends-received deduction. Treas. Reg. § 1.355-2 (d)(2)-(3).

53 "A key factor that tends to show a possible device is a plan or intent at the time of the spin-off to sell ParentCo or SpinCo in a taxable disposition after the spin-off." Birkeland et al., *supra* note 3. A plan is presumed when a third party acquires fifty percent or more of either ParentCo or SpinCo within the two years before or the two years after a separation. *Id.* Like evidence of a device, evidence of a plan disqualifies the distribution from tax-free treatment, "though only at the corporate level". *Id.*

54 *See generally* I.R.C. § 355 (d) & (e); Treas. Reg. §§ 1.355-2(d) & 1.355-7(b).

55 *See, e.g.*, Comm'r v. Wilson, 353 F.2d 184, 187–88 (9th Cir. 1965) (holding "that even if there is no tax avoidance motive, a reorganization having no business reason does not result in the tax advantages which section 355 confers upon those who satisfy the legal requirements for its benefits"); Smothers v. United States, 642 F.2d 894, 899 (5th Cir. 1981) (discussing "the general nonstatutory 'continuity of business enterprise' requirement") (quoting Reef Corp. v. Comm'r, 368 F.2d 125, 132 (5th Cir. 1966)).

Corporate Business Purpose Test[56] and the Distribution of Control Test[57] – are relevant to the central thesis of this Note.

Notwithstanding disqualification under section 355, a spin-off (1) sought for an improper purpose or (2) orchestrated in breach of a duty either side owes its respective corporation may open the boards of directors to post-spin liability.[58] Post-spin liability typically arises from a claim of breach of fiduciary duty, fraudulent conveyance, or unlawful dividend.[59] For example, if a spin-off is not disqualified as a plan or device before the separation is complete, a plaintiff may object to the transaction under a fraudulent conveyance theory, post-spin.[60] While courts are privy to the abuses of corporate control made possible by section 355,[61] to date, no court has evaluated a claim that a corporation abused section 355 as a means to avoid antitrust liability.

2. Timeline and Internal Processes[62]

Successful spin-off transactions require considerable time, planning, and capital. Attorneys specializing in spin-offs generally find that a

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[56] The Corporate Business Purpose looks at whether the spin-off is sufficiently "motivated by a corporate level business purpose (other than the saving of federal taxes) that cannot be efficiently achieved through any other nontaxable transaction. Note that shareholder-level business purposes (*e.g.*, to increase shareholder value) are not sufficient (though they may provide a basis for demonstrating a valid corporate business purpose)." Birkeland et al., *supra* note 3. Acceptable business purposes include "facilitate[ing] access to capital (for either ParentCo or SpinCo)" and "enhance[ing] 'fit and focus' of the ParentCo and SpinCo businesses." *Id.* .

[57] The Distribution of Control test is a basis corporate finance test of whether ParentCo distributed "*at least an 80% interest* in SpinCo to ParentCo shareholders." *Id.* (emphasis added).

[58] *See In re* Tronox Inc., 429 B.R. 73, 93 (Bankr. S.D.N.Y. 2010).

[59] *See, e.g.*, U.S. Bank Nat'l. Ass'n v. Verizon Commc'ns Inc., 817 F. Supp. 2d 934, 941, 943, 944, 945 (D. Tex. 2011) (declining to dismiss complaint where plaintiff pled particular facts tending to establish defendant ParentCo "intended to hinder, delay, or defraud [SpinCo's] creditors"; director of SpinCo "stood on both sides of the spin-off transaction" in breach of his fiduciary duty to SpinCo; ParentCo aided and abetted SpinCo director's breach of fiduciary duty; and the transaction's structure as a spin-off brought ParentCo's distribution of stock in excess of SpinCo's value under the "more expansive view of what constitutes a "dividend" under Delaware's unlawful- dividend statute"). *See also In re* Tronox, Inc., 503 B.R. 239, 276, 280 (Bankr. S.D.N.Y.2013) (holding the parent-defendant corporation could not hide behind the protection of a spin-off transaction where it unilaterally orchestrated a series of deals "to free substantially all of [its] assets . . . from 85 years of environmental and tort liabilities.").

[60] *See In re Tronox, Inc.,* 503 B.R. at 276.

[61] *See, e.g.*, *Verizon Commc'ns Inc.*, 817 F. Supp. 2d at 937-39; Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 361 (4th Cir. 2014); Gada v. United States., 460 F. Supp. 859, 870-71 (D. Conn. 1978); Lippe v. Bairnco Corp., 225 B.R. 846, 861 (Bankr. S.D.N.Y. 1998).

[62] See Spin-off Timeline *infra* App. II.

traditional spin-off takes six to eight months from start to finish.[63] Likewise, practitioners in the area report directors and managers of ParentCo decide nearly (if not) all aspects of the transaction—beginning with the basic decision as to which business(es) will be spun-off, including who will direct and manage SpinCo, and what, if any, services either entity will provide to the other post-spin.[64] In Delaware and most other states, the decision to spin-off a subsidiary rests with the board and the board alone; no shareholder approval is needed.[65] This feature is different from other types of voluntary exchanges of property and sales, where shareholder approval *is* required.[66]

Up until the moment of complete separation of SpinCo from ParentCo, the directors of the parent board may, rather must, make 100% of the decisions related to SpinCo's business.[67] And because SpinCo typically begins as a wholly owned subsidiary of ParentCo, its corporate structure, charter, and bylaws are established by the parent without holding a vote of non-director shareholders.[68]

In general, Delaware courts limit parent directors' fiduciary duties to ParentCo, exclusively; no duties are owed to SpinCo at any point on the transaction timeline.[69] Thus, as a fiduciary matter, the directors of ParentCo are free to consider the interests of ParentCo, exclusively, in establishing the terms of the spin-off and separation arrangements.[70] But

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63 *See* Francis J. Aquila, *Key Issues When Considering a Spin-off*, PRAC. L. J., 20, 26. As the author notes, however, "[t]he timeline and process for a spin-off can vary substantially from one transaction to another, depending on the level of integration between the parent company and the subsidiary and whether the spin-off will be coupled with another transaction, as is often the case." *Id*.

64 WACHTELL, LIPTON, ROSEN & KATZ, SPIN-OFF GUIDE 11 (2021). The parent board generally (i) determines "the scope of the business SpinCo will conduct," (ii) allocates assets and liabilities between itself and SpinCo, (iii) determines the initial capital structure of SpinCo, and (iv) establishes SpinCo's governance structure and board composition. *See also* Birkland et. al., *supra* note 3.

65 The logic is, because a spin-off is technically a distribution of a dividend, and the board of directors has the sole power to declare and pay dividends, no shareholder approval is required. *See* DEL. CODE ANN. tit. 8 §§ 170, 173 (2022).

66 *See* DEL. CODE ANN. tit. 8 § 271(a) (2022); *see also* DEL. CODE ANN. tit. 8, § 251 (c) (requiring board of directors to submit merger plan to stockholders for the purpose of acting in agreement).

67 This conclusion originates in basic principles of corporate governance, see DEL. CODE ANN. tit. 8 § 271(a) (2022).

68 *See generally* WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 64.

69 *See* Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1172 (Del. 1988) (concluding that "prior to the date of distribution the interests held by Anadarko's prospective stockholders were insufficient to impose fiduciary obligations on the parent and the subsidiary's directors.").

70 *See id*.; *see also* VFB LLC v. Campbell Soup Co., 482 F.3d 624, 635 (3d Cir. 2007) ("There is only one substantive interest to be protected [that of the parent], and hence 'no

once ParentCo's shareholders receive SpinCo shares, a director of ParentCo may be in breach of his or her fiduciary duty to ParentCo shareholders if SpinCo was designed to fail or to be severely undercapitalized.[71] As a consequence, if a spin-off transaction *were* to be found in violation of state or federal antitrust laws, the directors of the parent company could face additionally liability under Title 15, Section 24, of the United States Code.[72] As mentioned above, this issue has yet to come before a state or federal court.

With the freedom and ample protection provided by the business judgment rule, the ParentCo board begins the first phase of organizing a spin-off.[73] At the start of Phase I, ParentCo must define the scope of the business SpinCo will conduct.[74] Here, ParentCo has two main goals. The first is financial: ParentCo will want to shape SpinCo so to add value above and beyond that of the stock ParentCo's shareholders otherwise hold.[75] The second is substantive: ParentCo will want to ensure the nature of the business being spun-off, relative to the nature of the business retained, comports with ParentCo's underlying rationale for conducting the spin.[76] ParentCo may consider (1) pre-existing relationships between itself, SpinCo, and third parties; (2) terms in existing contracts with its creditors and those of the subsidiary; and (3) the effect of the spin on its own and SpinCo's product markets.[77]

Assuming the ParentCo board provides initial approval, Phase II begins. Substantially all of the drafting takes place during the second phase—drafting of separation agreements, regulatory forms, financial agreements, as well SpinCo's constitutive documents.[78] ParentCo will

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divided loyalty' of the subsidiary's directors and no need for special scrutiny of their actions.") (quoting Bresnick v. Franklin Cap. Corp., 77 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1950)).

71 U.S. Bank Nat'l. Ass'n v. Verizon Commc'ns Inc., 817 F. Supp. 2d 937, 941-45 (D. Tex. 2011).

72 *See, e.g.*, FTC v. Shkreli, 581 F. Supp. 3d 579, 637-38 (S.D.N.Y. 2022) (although, it is somewhat rare for individual directors to be prosecuted for the anticompetitive conduct of the corporations they direct); *see also* United States v. Wise, 370 U.S. 405, 411-14 (1962) (discussing Act of Oct. 15, 1914, ch. 323, sec. 14, 38 Stat. 730, 736 (codified at 15 U.S.C. § 24); 15 U.S.C. § 24 ("Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation . . . .").

73 *See* timeline *infra* App. II.

74 *See* Birkland et al., *supra* note 3.

75 *Id.*

76 *Id*.

77 *Id.*

78 *Id*. Form 10 will also be filed with the SEC during phase two. *See* WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 64 at 43.

select the jurisdiction of incorporation of the spin-off company and determine the size and composition of its board of directors, including any board committees.[79] In determining board composition, ParentCo may decide to move members of the parent's board to (or place concurrently on) the board of the spin-off company.[80] Phase II concludes with responding to and clearing all SEC comments to ParentCo's Form 10 filing.[81]

Once the SEC declares ParentCo's Form 10 effective, the third and final phase begins. The focus of Phase III is disseminating information and distributing stock.[82] At the end of Phase III, SpinCo is no longer a subsidiary of ParentCo.

3. Advantages and General Separation Issues

Beyond the benefit of tax-free treatment at both the corporate and shareholder level, spin-off transactions offer additional advantages. Perhaps the most significant advantage is the value created by spin-off transactions compared to other forms of reorganization and divestiture.[83] A growing body of empirical research corroborates the assertion that spin-off divestitures create statistically significant and economically material value for all parties to the transaction.[84]

In the 1970s, economists began investigating the relationship between voluntary divestiture of business assets and value creation.[85] In a crude sense, a spin-off is a merger in reverse, without tax. Instead of combining independent businesses into one, the basic goal of a spin-off is to *separate* businesses. So, if the movement of assets alone was the driving force of

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79 WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 64 at 22.

80 Although, overlap between the parent and the spin-off company generally is limited to a minority of each board to preserve the tax-free nature of the spin-off. For a brief discussion of director overboarding in context, *see* Gregory E. Ostling & David K. Lam, *SpinOffs: The Decision to Separate and Considerations for the Board*, 2014 PRAC. L. J. 42, 51-52. *But see* U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc., 817 F.Supp. 2d 937, 941-45 (D. Tex. 2011) (discussing a caveat to the generalizations Ostling and Lam discuss, namely, a cognizable claim for breach of fiduciary duty may be stated when a director of ParentCo also serves as the sole director of SpinCo, and SpinCo becomes severely distressed under the concurrent directorship).

81 *See* WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 64 at 42-43, Annex A at A-7.

82 *See id.* Annex A at A-7—A-9.

83 *See* BRATTON, *supra* note 35, at 994-96.

84 James E. Owers & Bruno S. Sergi, *The Ongoing Contributions of Spin-Off Research and Practice to Understanding Corporate Restructuring and Wealth Creation: $100 Billion In 1 Decade*, 8 NATURE: HUMANS. & SOC. SCIS. COMMC'NS 7 (2021). These advantages come in addition to several governance-related advantages. *See also* Birkeland et al., *supra* note 3.

85 *See, e.g.*, Kenneth J. Boudreaux, *Divestiture and Share Price*, 10 J. FIN. & QUANTITATIVE ANALYSIS, 619, 623 (1975).

value, one might have thought that a voluntary divestiture would produce the opposite effect of what the economists and corporate lawyers observed during historical merger booms.[86] That is, voluntary divestiture would result in a decrease in company value, as reflected by stock prices.

But what researchers found was just the opposite. In 1975, Kenneth J. Boudreaux published an article in *The Journal of Financial and Quantitative Analysis*, which found "announcements of voluntary divestitures are associated with unusually positive price movements in the securities of the divesting firms near the announcement date" based on a study of 138 voluntary and 31 involuntary corporate divestitures between 1965 and 1970.[87] Professor Boudreaux concluded that the market reacted to voluntary divestitures much like voluntary asset acquisition or merger.[88] Importantly, however, Professor Boudreaux's analysis revealed the opposite effect of involuntary divestitures.[89] Attributable in part to the various unique events associated with an involuntary divestiture – e.g., filing an antitrust complaint and rendering a company-adverse judgment – involuntary divestiture announcements were associated with unusually negative price movements.[90]

Eight years later, Gailen L. Hite and James E. Owers replicated Professor Boudreaux's findings, this time comparing court ordered involuntary divestitures with voluntary divestitures of a more narrowly defined sample, 123 voluntary spin-offs between 1963 and 1981.[91] Here again, the researchers found that involuntary divestitures were associated with negative returns, but voluntary spin-offs were associated with a positive return of 7.0% of the original equity from fifty days prior to the announcement through completion of the spin-off.[92] More recently,

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86 *See* RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895-1956 33-35 (1959).

87 *See generally* Boudreaux, *supra* note 85.

88 *Id.* at 621.

89 *Id.* at 624-25. Involuntary divestitures were the result of a proceeding to force divestiture, usually brought by the FTC under Section 7 of the Clayton Act. *Id.*

90 *Id.* at 623 ("The general expectation that the market would react unfavorably to news of forced divestitures seems to be ratified by the data.").

91 *See* Gailen L. Hite & James E. Owers, *Security Price Reactions Around Corporate Spin-Off Announcements*, 12 J. FIN. ECON. 409 (1983).

92 *Id.*; *see also* Robert Parrino. *Spinoffs and Wealth Transfers: The Marriott Case*, 43 J. FIN. ECON. 24 (1997) (finding Marriott substantially increased shareholder wealth following a spin-off distribution representing almost eighty percent of the value of its equity). It is worth noting, however, the Marriott spin-off precipitated considerable losses to bondholders. *Id.* at 263. As Professor Parrino explains, stock price alone may fail to paint an accurate picture of firm value when a spin-off results in significant transaction costs and inefficiencies. *Id*. at 266-68. Efforts by Marriott's bondholders to block the spin-off sapped much value from the transaction, notwithstanding the fact that the indentures contained "no provisions that would prohibit the [spin-off]." *Id.* at 253.

researchers further refined the question of how much value could be garnered vis-à-vis voluntary divestiture. For example, one study found the announcement effects of both voluntary spin-offs and voluntary sell-offs are significantly positive, but those of spin-offs are significantly larger.[93] The same study, however, noted sell-offs seem to have more robust long-term effects.[94] In a retrospective study published in June 2021, Professors Owers and Sergi reported, in the ten years between 2007 and 2017, 249 voluntary spin-offs created almost $100 billion in monetary incremental value to shareholders.[95]

Despite the significant monetary advantages that generally accompany spin-offs, the transactions are not impervious to pitfalls. For one, they can be vehicles for serious mismanagement.[96] In one fell swoop, directors have used spin-offs to shuttle immense amounts of debt off to a soon-to-be-independent subsidiary and reap substantial a windfall in the process.[97] Complications related to intellectual property and post-employment benefits are likewise common sources of friction.[98] At bottom, the issues that arise in an individual situation depend largely on (a) the business goals of the separation transaction, (b) the degree to which the businesses were integrated before the transaction, (c) the extent of the continuing relationships between the businesses after the transaction, (d) the structure of the transaction, and (e) the desire to obtain tax-free treatment of the spin-off.[99]

Where does antitrust fit in? Even among those corporate law firms seen as pushing the spin-off frontier, concerns over potential antitrust liability are acknowledged only in general terms,[100] and often as somewhat of an afterthought. For example, Wachtell, Lipton, Rosen & Katz, a leader in the practice area, advises:

> Any IPO or spin-off involving overlapping ownership structures or boards raises potential U.S. antitrust issues and should be analyzed from this perspective. These

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93 *See* Alexandros P. Prezas, & Karen Simonyan, *Corporate Divestitures: Spin-offs vs. Sell-offs*, 34 J. CORP. FIN. 83, 104 (2015).

94 *Id.*

95 Owers & Sergi, *supra* note 84, at 7.

96 *E.g.*, *In re* Tronox Inc. v. Anadarko Petroleum Corp., 429 B.R. 73, 93 (Bankr. S.D.N.Y. 2010).

97 *Id.*

98 *See, e.g.*, Tatum v. R.J. Reynolds Tobacco Co., No. 02CV00373, 2016 WL 660902, at *25 (M.D.N.C. Feb. 18, 2016) *aff'd sub nom.* Tatum v. RJR Pension Inv. Comm., 855 F.3d 553 (4th Cir. 2017) (exploring issues related to employees' retirement savings and consequences of a spin-off from R.J. Reynolds Tobacco Company).

99 *See generally* WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 64.

100 *See id.* at 32.

> issues could arise under Section 1 of the Sherman Act (which prohibits concerted action among competitors) and Section 8 of the Clayton Act (which prohibits interlocking directors and/or officers in many competing corporations).[101]

Compared to the rest of Wachtell's *Spin-off Guide*, this cautionary flag is weak and denigrates antitrust concern to the narrow space between non-compete agreements and interlocking directorates – two issues that could create trouble for a parent board with or without consideration of effects on competition – and never mentions the possibility of Section 2 liability. As discussed above, courts scrutinize dual directorships in contested spin-off transactions for breach of the duty of loyalty.[102] Similarly, depending on the scope of a non-compete agreement, the terms of the agreement may be enough to disqualify the transaction as a device under section 355.[103] That said, a mere finding of a dual directorship does not create the type of overlapping corporate relationship necessary to state a claim for relief under an antitrust theory.[104] The same is true of continuing agreements between ParentCo and SpinCo after the transaction is complete: a continuing agreement is not enough to sustain an antitrust claim.[105]

Spin-off transactions carried out for legitimate business purposes and in which the ParentCo relinquishes at least eighty percent of the control will not raise antitrust issues under current law.[106] But as the remainder of this Note explores, spin-offs that start from a position of considerable market power may have anticompetitive effects not well-suited for detection under existing doctrines.

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[101] *Id.*

[102] *See* U.S. Bank Nat'l. Ass'n v. Verizon Commc'ns Inc., 817 F.Supp. 2d 934, 941-45 (D. Tex. 2011).

[103] I.R.C. § 355; *see also* S. Tulsa Pathology Lab'y, Inc. v. Comm'r, 118 T.C. 84, 100 (2002) (finding demand for binding and enforceable covenants not to compete does not constitute a corporate business purpose within the meaning of Treas. Reg. § 1.355–2(d)(3)(ii) and, therefore, is insufficient to overcome the substantial evidence of device).

[104] *See* Bankamerica Corp. v. United States, 462 U.S. 122, 129-30 (1983); *but see* Press Release, U.S. Dep't of Just., Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (Oct. 19, 2022), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially.

[105] *See* United States v. Kennecott Copper Corp., 249 F. Supp. 154, 163 (S.D.N.Y. 1965).

[106] As noted above, control is defined as eighty percent of the voting power and eighty percent of each class of non-voting stock. I.R.C. § 368(c); Rev. Rul. 59-259, 1959-2 C.B. 115.

II. COMPETITIVE HARMS RELATED TO SPIN-OFFS

Several features of spin-off transactions make them particularly suited to abuse and give rise to anticompetitive risk at various points on the spin-off timeline.[107] For one, during Phase I, a parent corporation, specifically one starting from a dominant market position, may select like-kind assets to break off in an effort to add competitors (or allies) to markets.[108] Two, as the process moves along, a parent corporation may build terms into the spin-off agreements that would be categorically anticompetitive but for the fact that, when negotiated, ParentCo and SpinCo are still in a parent-subsidiary relationship. Under current antitrust doctrine,[109] a parent corporation could use its pre-spin status (parent-subsidiary) to shield otherwise impermissible agreements from review—a sort of have-your-cake-and-eat-it-too-problem. Three, once the spin-off agreements are executed and shares have been distributed, the issue is explicit collusion masquerading as tacit collusion. And four, a spin-off motivated (even partially) by subverting antitrust liability conflicts with public policy against market monopolization. As the following sections explore, there may be an anticompetitive advantage to breaking up on one's own terms.[110] Perhaps controlling the terms of the break-up translates into controlling the market post-spin.

A. Spinning-off Fictitious Competitors

One way to shoot down a Section 2 claim at the pleadings stage is to change the pool of competitors.[111] Ordinarily, defendants argue they have more competition than meets the eye by broadening the relevant market.[112] Defendants can try to broaden the relevant market two ways. One is to get the judge to include more products in it; the other is to get the judge to draw a wider geographic market that will include more participants. As to

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107 *See supra* Part I, Subsection 2; *see also* timeline *infra* App. II.

108 Below, the Note refers to this strategy as "spinning-off fictitious competitors." *See infra* Part II, Section A. Though, it is worth acknowledging the conceptual difficulty in defining whether a SpinCo, which is purposefully designed to compete *but not too much*, is a "competitor" or an "ally."

109 *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 776 (1984).

110 *See, e.g.*, Healy, *supra* note 33.

111 Sherman Antitrust Act of 1890, 15 U.S.C. § 2.

112 Stepping back, under what's usually called the "indirect" method of proving market or monopoly power, the plaintiff defines the relevant market. That method includes both a "product market" definition and a "geographic market" definition. Because evidence of "the ability 'to control prices or exclude competition' . . . is 'only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power.'" United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005) (first quoting United States v. Grinnell Corp., U.S. 563, 571 (1966); and then quoting United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001)).

the former, the argument goes, with the additional products, come additional competitors, lower market share, and less market power. Sometimes the alternative market definition approach is a hard sell.[113] A more predictable route, however, would be to spin-off a strategically organized business, which could deflate market share and drive the competition calculus away from a finding that monopoly power lies with the parent. Because courts often treat monopoly power as a threshold issue of a Section 2 monopolization claim,[114] and, more to the point, because plaintiffs often have only indirect evidence at their disposal to clear that threshold,[115] the addition of an apparent competitor is extremely likely to have far-reaching consequences.[116]

The litigation between the Federal Trade Commission and Meta (formerly known as Facebook)[117] provides ready illustration of the anticompetitive danger possible when ParentCo defines the scope of SpinCo during Phase I of a spin-off transaction. By way of background, the FTC's amended complaint alleges, "[Meta] holds monopoly power in the market for personal social networking services ('personal social networking' or 'personal social networking services') in the United States, primarily due to its control of two of the largest and most profitable social networks in the world, Facebook and Instagram."[118] The Commission goes on to say, "[Meta]'s course of conduct, as alleged herein, violates Section 2 of the Sherman Act and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a)."[119] In response to the FTC's Amended Complaint, Meta moved to dismiss on the

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[113] *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604 (1985); McWane, Inc. v. FTC., 783 F.3d 814, 828-30 (11th Cir. 2015) (upholding Federal Trade Commission's market definition over defendant's objection on appeal); *Microsoft Corp*., 253 F.3d 34, 51-54 (upholding the district court's relevant market definition). *But see, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287 (2018).

[114] *Grinnell Corp*., 384 U.S. at 570–71 (1966) (identifying "the possession of monopoly power in the relevant market" as an element of the offense of monopoly); *see also infra* Part III.

[115] That is, market definition and assigning market shares, then comparing the defendant's share to a monopoly-level threshold that's often pegged at seventy percent or sometimes a bit lower at approximately sixty percent. *See Dentsply Int'l, Inc*., 399 F.3d at 187 (citing Fineman v. Armstrong World Indus.. 980 F.2d 171, 201 (3d Cir. 1992)).

[116] *See* FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 20 (D.D.C. 2021) (explaining "the existence of market power is at the heart of any monopolization claim"); *see also* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting).

[117] *See generally* FTC v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022) https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_20-cv-03590/pdf/USCOURTS-dcd-1_20-cv-03590-1.pdf.

[118] Substitute Amended Complaint for Injunctive and Other Equitable Relief [Public Redacted Version] at 2, FTC v. Facebook, Inc., No. 20-3590 (D.D.C. Sept. 8, 2021), ECF No. 82.

[119] *Id.* at 79.

grounds that the FTC failed to allege a plausible factual basis that Meta has and had a dominant share of the alleged personal social networking services market.[120] Defendant's motion has since been denied and the parties are proceeding to discovery.[121]

Part and parcel to the survival of the FTC's monopolization claim is its allegation that Meta maintained a dominant share of the relevant market for U.S. personal social networking since 2011.[122] In its amended complaint, the FTC alleges Meta controls a dominant share of the market based on number of users and time-spent per user, although, it necessarily concedes, no perfect metric exists for quantifying the market share of a social networking platform.[123] In any event, the FTC's case would have fallen apart on Meta's renewed motion to dismiss[124] and could still be mooted if Meta were to spin-off Instagram.[125] One can imagine that, if the contours of the FTC's market-share definition flattened, a spin-off would dramatically change pool of personal networking services competing for users' attention.[126] Post-spin, Instagram would be treated as a wholly independent corporation and, thus, competitor of Meta's "Facebook Blue," the social media network commonly known as "Facebook." Because a central theory of the FTC's amended complaint boils down to Meta not having enough competition because it has a practice of acquiring

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120 *See* Memorandum in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint at 7, *Facebook Inc.*, 581 F. Supp. 3d 34 (No. 20-3590).

121 *See Facebook, Inc.*, 581 F. Supp. 3d 34.

122 *Id.* at 14.

123 *See* Substitute Amended Complaint, *supra* note 118, at 63. *See also Facebook, Inc.*, 581 F. Supp. 3d 34. at 46-51. Note, however, in the FTC original Complaint, the FTC estimated market share in conclusory terms, alleging simply "[Meta] has maintained a dominant share of the U.S. personal social networking market (in excess of 60%)." Complaint for Injunctive and Other Equitable Relief at 18-19, *Facebook, Inc.*, No. 20-3590 (D.D.C. Jan. 13, 2021) ECF 51. The district court rejected the FTC's allegation as "too conclusory[.]" FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 18 (D.D.C. 2021).

124 *See generally* Memorandum in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint, No. 20-3590 (D.D.C Oct. 4, 2021).

125 Concededly, though, discovery may reveal that Facebook Blue is big enough to still clear the monopoly-power market-share threshold. *Cf.* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 157 (1978) ("The law can usefully attack this form of predation only when there is evidence of specific intent to drive others from the market by means other than superior efficiency and when the predator has overwhelming market size, perhaps 80 or 90 percent.").

126 The FTC's estimation of uses' attention vis-à-vis daily and month users, and Meta's share of time-spent per user on any personal social network was critical to the district court's acceptance of the FTC's amended complaint. *Cf.* FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 46 (D.D.C. 2022) ("The FTC has now [sufficiently alleged market dominance], adding substantial new allegations about the contours of Facebook's market share.").

would-be competitors, Meta could easily moot the FTC's complaint by spinning-off its choice competitor or competitors.[127]

But would Instagram, in this hypothetical, stand in Meta's way as a legitimate competitor? Probably not. Meta has spent nearly a decade integrating Instagram with Facebook and Meta's other companies, like WhatsApp,[128] Meta Business Suite, [129]and Horizon Worlds.[130] Even if a voluntary spin-off were to happen, Meta would never be forced to completely partition Instagram's functional links to Facebook – not under the tax code and not under *Google LLC v. Oracle America, Inc*.[131] Similarly, a strong argument can be made that integration of Facebook and Instagram is a better product and, therefore, promotes consumer welfare. Lastly, in the unlikely event that an Instagram spin-off were to result in *complete* separation, Meta would still be in the power seat. Meta's directors, which includes the majority shareholder, Mark Zuckerberg, would decide to spin-off Instagram (or another personal social networking service), and Instagram would be released into the market from the top of the food chain, unlike most other insurgents in the tech space.[132] As Mr. Zuckerberg admitted, adding and subtracting competitors in the social networking space acts as a significant barrier to entry for others.

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[127] The complaint alleges that (1) Facebook's share of the market puts it over the monopoly-power threshold; and (2) Facebook's acquisitions of Instagram and WhatsApp, as well as its conditional-dealing policy vis-à-vis app developers, was anticompetitive, exclusionary, and monopolistic conduct. *See* Substitute Amended Complaint, *supra* note 118, at 2.

[128] *See* Announcement, Instagram Bus. Team, Find New Customers with Boosted Posts That Drive to WhatsApp (Sept. 28, 2021), https://business.instagram.com/blog/instagram-boost-ads-whatsapp-find-customers.

[129] *See Connect an Instagram account on Meta Business Suite Mobile App*, META BUS. HELP CTR., https://www.facebook.com/business/help/205428387437406?id=3349108371785391 (last visited Nov. 12, 2022).

[130] Amanda Silberling, *No One Asked for This, But You Can Share Horizon Worlds Videos to Instagram Reels*, TECHCRUNCH, (Oct. 11, 2022, 1:48 PM), https://techcrunch.com/2022/10/11/horizon-worlds-instagram-reels/.

[131] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1204 (2021) ("Copyright on largely functional elements of software that [have] become an industry standard gives a copyright holder anti-competitive power" (quoting Brief of the Am. Antitrust Inst. as Amicus Curiae in Support of Petition for Rehearing En Banc at 7, *Oracle Am., Inc.,* 141 S. Ct. 1183 (No. 18—956))). Invariably, the software that integrates Instagram and Facebook is owned by Facebook. Although, this too, should be fleshed out as discovery proceeds in FTC v. Meta Platforms, Inc., Civil Action No. 20-3590 (D.D.C. Nov. 1, 2022), ECF No. 207.

[132] *See* Jeffrey Goldfarb, *Zuckerberg Motivates supervoting Stock Resistance*, REUTERS, (Oct. 27, 2022, 2:11 PM), https://www.reuters.com/breakingviews/zuckerberg-motivates-supervoting-stock-resistance-2022-10-27/; *see also* Katie Canales, '*The Most Powerful Person Who's Ever Walked the Face Of The Earth': How Mark Zuckerberg's Stranglehold on Facebook Could Put the Company at Risk*, BUS. INSIDER, (Oct. 13, 2021, 7:09 AM), https://www.businessinsider.com/mark-zuckerberg-control-facebook-whistleblower-key-man-risk-2021-10

> [O]ne way of looking at this is that what we're really buying is time. Even if some new competitors spring[] up, buying Instagram, Path, Foursquare, etc now will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products won't get much traction since we'll already have their mechanics deployed at scale.[133]

This rationale is akin to the anticompetitive strategy undertaken by Ski Co. in *Aspen Skiing Company v. Aspen Highlands Skiing Corporation* in the late seventies and early eighties: "[S]acrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[134] *Aspen Ski* suggests courts should be hostile toward the kind of market tinkering contemplated by a hypothetical Meta/Instagram spin-off. In no uncertain terms, the Court explained, an effort to change the character of an entire market without a concomitant efficiency justification "supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival[.]"[135]

The kind of anticompetitive conduct implicated by using spin-offs to add distance between oneself and one's *real* competition—insurgent firms and incipient threats—is particularly insidious because of its potential for long-term effects. For one, section 355 of the Internal Revenue Code severely disincentivizes an acquisition of or merger with a newly spun-off corporation.[136] Two, ParentCo's are unrestrained in their ability to infuse anti-takeover provisions, such as staggered board structures, in SpinCo's charter and bylaws. Anti-takeover provisions double as added layer of protections around an anticompetitive play to entrench parent-favorable provisions in spin-off agreements. Though not for openly anticompetitive purposes, law firms advising parent corporations often suggest adding takeover defenses as a matter of practice.[137] And three, ParentCo may

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133 Substitute Amended Complaint, *supra* note 118, at 23.

134 472 U.S. 585, 610-11 (1985). Herbert Hovenkamp elegantly explains the so-called *Aspen Ski* problem in his article, *Antitrust Policy After Chicago*. *See* Hovenkamp, *supra* note 12, at 280-83.

135 *Aspen Skiing*, 471 U.S. at 608-10. Note, however, the Court later placed *Aspen Ski* to "at or near the outer boundary of § 2 liability[.]" Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

136 *See* I.R.C. § 355 (b), (d); *see also* Birkeland et al., *supra* note 3 (discussing plan presumption and disqualification of property from tax-free treatment).

137 This advice is based on the observation that a newly spun-off company, especially when accompanied by an IPO, is particularly vulnerable to takeover, making antitakeover

specify everything from name to branding and functionality requirements in the governance documents and separation agreements it authors.[138]

Going back to the Meta/Instagram example, in the spin-off documents, Meta could require Instagram to keep the feature, which allows users to automatically share their Instagram content to Facebook.[139] Vice versa, Meta can also require that Instagram allow Facebook users to automatically share their Facebook content to Instagram. While this example may seem superficial, at scale it has important implications for the public's (and market's) perception of Meta, Facebook, and Instagram as truly separate entities. Where functionality overlaps in ways users readily perceive, it is less likely that Instagram will be able to separate itself from Facebook and stand as an independent competitor. Rather, Instagram SpinCo is likely to continue to buttress a protective "moat" around Facebook, and therefore Meta, by virtue of the fact that Facebook has only incentives to tie itself to Instagram by the terms of the spin.[140] The harm to consumers is not only innovation that may never be realized, but more importantly, the cross-sharing feature ensures Meta will never lose sight of Instagram user data. "[L]ack of innovation, decreased privacy and data protection, . . . and general lack of consumer choice" make it more plausible that the conduct is a "harm to the competitive process and thereby harm [to] consumers" than innocent, business-motivated conduct.[141]

The consequences of an allegedly monopolistic corporation, like Meta, devising the competitors *it* wants vitiate settled antitrust principles. In the above hypothetical, when Meta engineers Instagram to be an enemy of its true competitors, it manufactures a friend. Additional trouble arises for the market because the SpinCo's contemplated by large digital platforms are not ordinary SpinCo's. Instagram, AWS, and YouTube would be formidable forces, added from the top of the market, and would have competitive effects strategically directed away from its parent. That the confluence of generally accepted spin-off practices and interrelated markets potentiate long-term effects makes understanding and preventing

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provisions important from the outset. *See* WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 64 at 23-24.

138 *Id.* at 22.

139 More information on "Post to Other Accounts" feature is available on Instagram's help page. *See Linking Accounts*, INSTAGRAM: HELP CENTER, https://help.instagram.com/1094643983940381 (last visited Aug. 30, 2022).

140 *See* Substitute Amended Complaint, *supra* note 118, at 22 ("Facebook's strategy to prevent innovative entrants from gaining scale and benefiting from network effects has consisted of acquiring innovators and—where possible—transforming their products into integral parts of the company's competitive "moat.").

141 *See* FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 55 (D.D.C. 2022) (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001)).

anticompetitive spin-offs even more of a priority. And it may be worth flagging that the issue — i.e., spinning off subsidiaries to diminish monopoly power — arises with spin-offs designed to inflate the pool of competitors as well as those designed to make a parent company appear smaller in a different market, the latter of which this Note takes up in Section IV.

B. Pre-spin Sources of Anticompetitive Conduct

Recall first that ParentCo is absolutely responsible for drafting the spin-off documents. Corporate law requires ParentCo to drive the transaction because a wholly controlled subsidiary lacks the requisite autonomy otherwise needed to break itself off from ParentCo[142] even if future SpinCo directors and officers may participate in the negotiations.[143] Then note, except for rules against devices and plans, parent corporations are virtually unrestrained in defining SpinCo's governance structure, business purpose, capital structure, lender relationships, physical infrastructure, and so forth. This power extends to determining whether a relationship between itself (ParentCo) and SpinCo will be on-going, the products or services to be delivered by SpinCo, and the framework for how SpinCo will relate to other wholly controlled subsidiaries or, in the case of a simultaneous spin-off, other SpinCo's.[144] Importantly, even where relationships and limits are not precisely defined in the spin-off documents, it is safe to assume that they could easily be communicated during the six to eight months of negotiations and planning. Yet, the Court has interpreted the Sherman Act as exempting contracts and combinations agreed upon by a parent and its wholly owned subsidiary from Section 1 liability.[145]

In *Copperweld Corporation v. Independence Tube Corporation*, five justices answered in the negative the question of whether a parent corporation and its wholly owned subsidiary were legally capable of conspiring with each other under Section 1 of the Sherman Act.[146] Writing for the Court, Chief Justice Burger limited the holding, explaining, "[w]e do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own."[147] Though *Copperweld* had the doctrinal effect of repudiating the "intra-enterprise conspiracy doctrine", the decision stopped short of a

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142 *See, e.g.*, Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988).

143 *See* WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 64, at 14.

144 *See generally* Birkeland et al., *supra* at note 3.

145 *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 776 (1984).

146 *Id.* at 767. Justice White took no part in the consideration or decision of the case.

147 *Id.*

blanket exemption from antitrust liability whenever parent and wholly owned subsidiaries are involved.

> Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 18. Thereafter, the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45 . . . . [T]hese statutes are adequate to control dangerous anticompetitive conduct . . . .[148]

A significant reason for the Court's decision to repudiate the intra-enterprise conspiracy doctrine was the observation that it resulted in different treatment for corporations with *un*incorporated divisions and corporations with incorporated separate divisions.[149] As noted by the Court, many corporations choose to incorporate divisions for a variety of business reasons, not the least of which is to avoid taxes.[150] And to five members of the Court, it did not make sense that antitrust liability should turn on the mere form an enterprise took without consideration of its substance.[151]

The necessary premise of the *Copperweld* decision, however, is the fact that the subsidiary is wholly owned. Since the subsidiary is wholly owned, i.e., the parent is the only "shareholder," it follows that the interest of the parent and the wholly-owned subsidiary are always the same.

> A parent and its *wholly owned subsidiary* have a complete unity of interest . . . . With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, *there is no sudden joining of economic resources that had*

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148 *Id.* at 777.
149 *Id.* at 774.
150 *Id.* at 772-73.
151 *Id.* at 773 ("If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions.").

> *previously served different interests*, and there is no justification for § 1 scrutiny.[152]

The Supreme Court reasoned that "[t]he Sherman Act contains a basic distinction between concerted and independent action." [153] Concerted action, the Court tells us, "deprives the marketplace of the independent centers of decision-making that competition assumes and demands."[154] Whereas independent or unilateral action, "does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests[.]"[155] But critics of the *Copperweld* decision have opined that the distinction is far more imagined than real.[156] Professor Mark S. Poposky adds that indistinguishable classes of conduct, marked by inconsistent characterization, are ill-suited for the making of safe harbor rules under Section 1.[157] Instead, Professor Poposky concludes, courts should "ask if the unilateral conduct in question *really* is different from other conduct, *how* it is different, and *whether* those differences justify distinct legal treatment."[158]

So too here. Blindly treating action by one business form (parent-subsidiary) differently than action of another (ParentCo and SpinCo) risks missing the point that a change in form is not necessarily accompanied by a change in substance, i.e., a divergence in interests. As should be clear by now, this Note takes the position that concerted action, pre-spin, is no different in substance than if the same concerted action took place post-spin (assuming the spin-off goes through to completion).[159] Taken to an extreme, concerted pre-spin agreements could go one step beyond the *Copperweld* concern over depriving the market of independent actors. Agreements made pre-spin may very well have the effect of depriving the market of detecting the moment when two interests became one because, well, they were one all along.[160] Here again, consumers are harmed by the

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152 *Id.* at 771 (emphasis added).

153 *Id*. at 767 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) (internal quotation marks omitted)).

154 *Id.* at 769.

155 *Id.* at 771.

156 *See, e.g.*, Mark S. Poposky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265, 1266-67 (2008).

157 *Id.* at 1280 ("To justify a safe harbor for a particular class of conduct requires courts to distinguish that conduct from other conduct.").

158 *Id.* at 1296.

159 If a spin-off were to be abandoned pre-distribution, then pre-spin agreements would fall short of conspiracy under the generous protection of the intraenterprise *immunity* doctrine. *See Copperweld*, 467 U.S. at 776.

160 *Cf.* Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1235-36 (10th Cir. 2017) (finding nothing in *Copperweld* insulates a group of affiliated companies from

fact that pre-spin agreements lock innovation in place. Companies may ignore consumer preferences with the same assurance against loss as existed before the spin-off because the pre-spin agreement removes any threat that SpinCo will improve upon ParentCo's product, and vice-versa.

C. Continued Ties

From a practical standpoint, because a spin-off necessarily requires substantial coordination and agreement between two entities in the lead-up to separation, much of the groundwork for collaboration over market power will have already taken place by the time separation occurs and will be protected from antitrust scrutiny under *Copperweld*.[161] So, by the time papers are executed and shares are distributed, the horse has already left the barn.

Coordinated interaction includes a range of conduct. It may involve the explicit negotiation of a common understanding of how corporations will compete or refrain from competing.[162] Such conduct, if undertaken among formally separate competitors, would typically violate Section 1 of the Sherman Act. But it also might involve more subtle action. As Judge Posner explained, "in some circumstances competing sellers might be able to coordinate their pricing without conspiring in the usual sense of the term—that is, without any overt or detectable acts of communication. This is the phenomenon . . . which I prefer to call 'tacit collusion[.]'"[163] And here—in the realm of tacit collusion—is where the post-spin activity of ParentCo's and SpinCo's is more likely to fall.

The Supreme Court did not contribute to the common law of tacit collusion until 1993, when it decided *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*.[164] *Brooke Group* involved a market struggle between an incumbent generic cigarette producer, Brooke Group Ltd. ("Liggett"), and a new entrant, Brown & Williamson, in the generic cigarette market. Liggett alleged Brown & Williamson cut prices on generic cigarettes below cost and engaged in a price war at the wholesale level, which amounted to price discrimination and a reasonable possibility of injuring competition in violation of Section 2(a) of the Clayton Act.[165]

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antitrust liability when it is alleged the family of companies unlawfully monopolized as a *single* enterprise).

161 *See Copperweld*, 467 U.S. at 776.

162 *See e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 224-25 (1939).

163 RICHARD A. POSNER, ANTITRUST LAW 52-53 (2d ed. 2001).

164 509 U.S. 209 (1993).

165 *Id.* at 216-17. The essence of Liggett's claim was that business rival "priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Id.* at 222. Although Leggitt brought its claims under Section 2(a) of the Clayton Act, as amended by the Robinson–

The tacit collusion portion of the claim came about because Liggett contended Brown & Williamson worked in parallel with other cigarette companies to exert pressure on Liggett to raise its prices.[166] Justice Kennedy, writing for the Court, explained, "tacit collusion . . . describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[167] Justice Kennedy and five other justices, however, were not convinced that firms would adopt a predatory pricing scheme without express coordination.[168] It would be a stretch to believe in the success of such a lofty scheme, the Court said, because "[f]irms that seek to recoup predatory losses through the conscious parallelism of oligopoly must rely on uncertain and ambiguous signals to achieve concerted action."[169]

A parent corporation and its former subsidiary, however, are unlike the insurgent firm and rival oligopolists in *Brooke Group*. Take, for instance, a spin-off involving the App Store from Apple. The App Store will enter the relevant market as a well-established, formidable force. The app store market will be a relatively stable oligopoly.[170] And at the time of this writing, Apple will have spent well over a decade developing, optimizing, and controlling the App Store.[171] Without even touching upon the considerable pre-spin planning certain to occur, the situation, here, shores up all of the weaknesses the Court noted in *Brooke Group*. That is, the App Store would enter the market with a pre-existing and long-standing interdependence with Apple; Apple would continue to produce its proprietary apps;[172] the App Store's entry would be preceded by express agreements defining its future business relationship with Apple; and the

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Patman Act, 49 Stat. 1526, 15 U.S.C. Section 13(a), the Court explained the requirement for a predatory pricing claim are the same whether brought under Section 2 of the Sherman Act or primary-line price discrimination under the Robinson–Patman Act. *See id.*

166 *Id.* at 227.

167 *Id.*

168 *Id.*

169 *Id.* The Court went on to provide several other reasons why it rejected Leggitt's tacit collusion claim, including instability in the relevant market at the time of the events, the depressed power of the allegedly predatory firm, and the lack of supporting price data. *See id*. at 227-39.

170 David Curry, *App Store Data (2022)*, BUSINESS OF APPS (Aug. 31, 2022), https://www.businessofapps.com/data/app-stores/ (reporting "[o]utside of China, Apple and Google control more than 95 percent of the app store market share through iOS and Android, respectively.").

171 *See the App Store turns 10*, APPLE NEWSROOM (Jul. 5, 2018), https://www.apple.com/newsroom/2018/07/app-store-turns-10/.

172 For example, Mail, Contacts, Notes, Calendar, Garage Band, iMovie, Music, Photos, Messages, and Camera are examples of Apple's proprietary apps.

App Store *and* Apple could recoup predatory losses[173] by consciously, though inexplicitly, adhering to pre-spin agreements beyond the lifespan of the agreement. The existence of the pre-spin agreements is what differentiates the App Store hypothetical from *Brooke Group*.

Yet the two-prong test announced in *Brooke Group* is unlikely to detect the kind of tacit collusion argued to flow from the kinds of anticompetitive spin-offs at issue in this Note.[174] As a starting point, *Brooke Group* teaches, in oligopoly markets, proof of expected interdependent behavior (i.e., tacit coordination) is insufficient.[175] There also needs to be a substantial evidence demonstrating the parties' conscious commitment to a common plan or scheme to fix prices.[176] But bringing forth that evidence before discovery is challenging. For one, pre-spin dealings—express and covert—touch upon the whole gamut of secret information, not just cost and supply information.[177] Thus, SpinCo enters the market with a predetermined understanding in place and ParentCo already knows what signals to look for. Second, because the collusive behavior will be preceded by spin-off agreements that are permitted to allocate losses and gains between the firms, post-spin, the "incentive to cheat" is much lower if present at all.[178] And third, that pre-spin agreements are necessary to any spin-off transaction makes courts more likely to treat them as ancillary agreements and creates a barrier to prosecuting post-spin collusion under a theory that there was an impermissible advance understanding. Courts are reluctant to expose

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[173] Predatory loses may be due to underpricing their respective apps and enforcing developer-unfriendly agreements.

[174] *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318–19 (2007) ("'First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.' Second, a plaintiff must demonstrate that 'the competitor had . . . a dangerous probabilit[y] of recouping its investment in below-cost prices.'") (first quoting *Brooke Grp.*, 509 U.S., at 222; and then quoting *Brooke Grp.*, 509 U.S. at 224).

[175] "The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb . . . [and if so] whether it would likely injure competition in the relevant market." *Brooke Grp.*, 509 U.S. at 225.

[176] *See id.* at 233; *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) ("[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980))).

[177] *See* EDWARD J. GREEN ET AL., TACIT COLLUSION IN OLIGOPOLY 21-23 (2013). (acknowledging differences between the legal requirements necessary to sustain a finding of full collusion and economic models of price-setting games.) Different from the Court's contention in *Brooke Group*, Green et al. argue imperfect, ambiguous, or incomplete signals are enough to sustain some level of collusion. *See id.*

[178] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 590 (1986).

defendants to treble damage liability and permit an anticompetitive agreement to be inferred from a natural or normal course of business.[179]

Continued-ties potentiate two new species of competitive harm, increased prices and decreased output. The agreements essentially reduce or eliminate the host of uncertainties that disincentivize firms from engaging in long-term speculative behavior that cannot be enforced. ParentCo is unrestricted in tax law from drafting prices, production restrictions, and tie-outs into spin-off agreements. Even the most flagrant restraints seem to be immune from action under *Copperweld*. It is an anomaly that independent competitors could have "the ability to raise price profitably by restricting output" simply because, as parent and subsidiary, they so agreed.[180]

D. Maintained Control of Markets

The main goal of a structural remedy is to redistribute power in the market to the "baseline condition that would have prevailed in the market but for the defendant's anticompetitive acts."[181] In designing structural remedies, the focus should be on restoring competition without harming consumers.[182] On one hand, spin-off transactions may well serve this end and do so without impacting shareholder value. On the other hand, spin-offs may enable a conglomerate firm to indirectly retain ownership control over the market segment it supposedly spun-off when the majority shareholder of the parent serves on the parent board or exercises *de facto* or *de jure* control of the board.[183]

Recall that in a spin-off transaction, shares of SpinCo are distributed to the shareholders of ParentCo.[184] From there, regular-way trading begins, and interests are further distributed across the market.[185] But in the context of a spin-off conducted by a large conglomerate organization, particularly where founders retain majority shares, ownership interests may not be dispersed in the usual manner and, instead, remain with the majority shareholder(s) of ParentCo.

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179 *See e.g., Monsanto Co.*, 465 U.S. at 763.

180 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288 (2018) (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 5.01 (4th ed. 2017)).

181 John E. Lopatka & William H. Page, *Devising a Microsoft Remedy that Serves Consumers*, 9 GEO. MASON L. REV. 691, 700 (2001).

182 *Id.*

183 ParentCo retains ownership control through a common majority stockholders. *See supra*, Part I. Majority ownership in a parent corporation translates into majority ownership in a newly independent spin-off corporation.

184 *See supra* Part I.

185 Regular-way trading begins assuming the spin-off was accompanied by a SpinCo IPO. *See infra* App. I.

The danger of this outcome hearkens back to the 1911 breakup of Standard Oil. There, the Court ordered the dissolution of the trust by directing the combination to distribute the stock of thirty-seven subsidiaries to its shareholders and created a number of sizable, enduring, independent competitors, today known as Amoco, Chevron, Exxon, and Mobil.[186] The AT&T divestiture followed a similar pattern: In 1984, AT&T was broken up into seven "Baby Bells," which by 2018 had re-agglomerated as the modern-day telecommunications giant, AT&T.[187] The main difference, of course, Standard Oil and AT&T involved some intervention and supervision by the federal government. And even under government supervision, managed to re-conglomerate over the course of several decades.[188] A spin-off pursued by Amazon, Apple, Meta, etc., would occur largely outside of government view, save for mandatory tax and securities filing. One consequence of extra-regulatory divestiture is freedom of the parent to put strategies in place geared toward preserving market power and control.

Consider a hypothetical Amazon/AWS spin-off.[189] Of the relatively little information publicly available about AWS's relationship to Amazon is that "[Amazon] leverage[s] a shared infrastructure that supports both [Amazon's] internal technology requirements and external sales to AWS customers."[190] Elsewhere in Amazon's filing, it becomes clear that the "infrastructure" is a technological infrastructure.[191] So, if AWS supports Amazon's internal technology requirements, a spin-off is unlikely to change the interdependence of AWS and Amazon.[192] To the extent that Amazon is a newly paying customer of AWS with great buying power, much of Amazon's purchase payments will be returned to Amazon's shareholders.[193] Though an AWS spin-off is likely to change the economics of its relationship with Amazon because Amazon will be a

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186 William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1310 (1999).

187 *See generally* Randal C. Picker, *The Arc of Monopoly: A Case Study in Computing*, 87 U. CHI. L. REV. 523, 530 (2020).

188 *See e.g.*, *id.*

189 Beginning with its 2016 annual filing, Amazon began reporting Amazon Web Services ("AWS") as a separate reportable segment. *See* Amazon.com, Inc., Annual Report (Form 10-K) 3 (Jan. 28, 2016).

190 Amazon.com, Inc., Annual Report (Form 10-K) 27 (Feb. 2, 2021).

191 *See id.* at 66 ("Technology infrastructure assets are allocated among the segments based on usage, with the majority allocated to the AWS segment.").

192 *See* App. III.

193 *See generally* Stephen Ayers, *The Next $1 Trillion Company Lies, Surprise, Inside Amazon's Cloud*, SEEKING ALPHA (Aug. 19, 2021, 11:43 AM), https://seekingalpha.com/article/4450657-next-1-trillion-company-lies-surprise-inside-amazons-cloud.

paying customer, nothing in section 355 or the common law requires Amazon to disentangle itself from AWS.

At a high level, the transaction becomes circular: Amazon pays AWS for cloud services, AWS returns value to Amazon shareholders. This circularity perpetuates Amazon and AWS's market share, though, Amazon would still very much control the cloud computing market by virtue of its purchasing power and overlap in majority shareholders. The point is, while an AWS spin-off may not be worse than no spin-off (i.e., where AWS remains a wholly-owned subsidiary of Amazon), an AWS spin-off is likely worse than a court-ordered sell-off because Amazon stockholders would still hold the reigns of AWS.

Of course, inventing the best mousetrap (or cloud service) is not an antitrust violation. But using that invention to perpetuate a dominant position *does* raise antitrust concerns, particularly when it leads to control in two separate but related markets. Inevitably, would-be innovators never enter the market because the cost of failing is so great.[194] The threat that spin-offs ineffectively de-concentrate monopoly power is analogous to the threat posed by agglomerative mergers: it becomes very difficult to unscramble, then re-scramble the eggs a different way.[195]

III. DOCTRINAL IMPLICATIONS FOR ANTITRUST

The Sherman Act prohibits agreements "in restraint of trade,"[196] and "monopoliz[ing]" or "attempt[ing] to monopolize any part of trade or commerce."[197] But the Sherman Act, for as much as it stands for antitrust action in the United States, is little more than a relic of Congress's call to courts to "develop a federal common law of competition."[198] While a detailed analysis of the interplay between antitrust's statutory anchors and common law process is beyond the scope of this paper, the fact that judges are primarily responsible for setting the doctrinal anchors is pertinent.[199]

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194 *See generally* Hovenkamp, *supra* note 12, at 262-67.

195 William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 830 (1997) ("Once a merger takes place and the firms' operations are integrated, it can be very difficult, or impossible, to unscramble the eggs and reconstruct a viable, divestable group of assets."). *But cf.* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1998-2006 (2020). Professor Van Loo suggests several ways to improve the administrability of antitrust remedies.

196 15 U.S.C. § 1.

197 15 U.S.C. § 2.

198 Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 269.

199 *See, e.g.,* Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law:* American Express *and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2064-65 (2020).

The analysis that follows does so in view of the broad objective of modern antitrust policy and the basic elements of any antitrust violation. The overarching objective of antitrust is to protect competition to promote consumer welfare.[200] Antitrust laws forbid only those business practices that tend to restrain competition unreasonably, or that fortify a monopoly or threatened monopoly thereby leaving consumers worse off.[201] "Restraints that are not unreasonable *per se* are judged under the 'rule of reason.'"[202] Given the total absence of case law on spin-off transactions as alleged antitrust violations, this Note looks only at doctrines that arise under a rule of reason standard.[203] Finally, there are two basic elements of an antitrust violation under the rule of reason standard as applied Sherman Act claims: market power and anticompetitive conduct. [204]

An antitrust plaintiff must prove the defendant possessed market power. Under the Sherman Act, "[m]arket power is the ability to raise prices above those that would be charged in a competitive market."[205] Here, courts consider the but-for world caused by the anticompetitive conduct to approximate the potential for genuine adverse effects on competition:[206] but for the leading firm's market power, "competitive forces or the entry of new firms could discipline the conduct of the leading firm[.]"[207] Market power is bounded by the relevant competitive market, which has a geographical component and a product component.[208] Though market share and market power often go together, the finding of one does not always predict the existence of the other. And perhaps for that reason, the trend has been away from the rule in *United States v. Grinnell Corp.*,

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200 "The goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284, (2018) (quoting Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007)).

201 *See id.* at 2283.

202 *Id.* at 2284 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

203 "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972). Given courts' total *lack* of experience with spin-offs under antitrust scrutiny, a court would be hard-pressed to justify applying a *per se* rule and never inquiring into the reasonableness of the transaction. *See also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10, 99 S. Ct. 1551, 1557 (1979).

204 Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018).

205 NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.38 (1984).

206 *See, e.g.*, Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996).

207 *Monopolization Defined*, FED. TRADE. COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined (last visited Oct. 9, 2022).

208 *See* McWane, Inc. v. FTC, 783 F.3d 814, 828 (11th Cir. 2015).

which allowed courts to infer monopoly power on a finding of predominant market share.[209]

Courts define anticompetitive conduct in terms of harm to the competitive *process*, that is, anything other than competition on the merits.[210] "[The] focus is upon the effect of that conduct, not upon the intent behind it."[211] Anticompetitive conduct may be rebutted by presenting evidence that the course of conduct was pursued for a legitimate business purpose or procompetitive end.[212] Although anticompetitive conduct can take several forms (e.g. exclusive dealing, refusal to deal, predatory pricing, etc.), practices generally fall into one of two categories, single-firm conduct and "agreements," which can be either horizontal (among rivals) or vertical (between firms operating at different levels of a supply chain).[213] Because spin-offs straddle the line between single-firm conduct and dealings with competitors, it is of less utility to distinguish by category. For that reason, the following Section examines anticompetitive conduct with respect to the spin-off timeline.

A. Power Analyses

The reason traditional tests inadequately capture power in spin-off transactions relates to the view of a spin-off transaction as a dividend distribution on one hand, and a creation of business (or businesses) on the other. Market power analyses allocate percentages on a firm-by-firm basis.[214] But in a spin-off transaction, the form taken by a firm is a moving target. In other words, the business substance stays constant and the business form changes. Doctrinally, it makes little sense to elevate form over substance. Instead, the proper focus should be on market power and marketplace effects.

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209 384 U.S. 563, 571 (1966).

210 United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) ("[T]o be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers."); *see also* Morgan v. Ponder, 892 F.2d 1355, 1358 (8th Cir. 1989) ("Anticompetitive conduct is conduct without legitimate business purpose that makes sense only because it eliminates competition." (citing Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 804 (8th Cir. 1987))).

211 *Microsoft Corp.*, 253 F.3d at 59.

212 *See id.* at 72; *see also Grinnell Corp*., 384 U.S. at 571 (1966) (explaining "a superior product, business acumen, or historic accident" is distinct from anticompetitive conduct).

213 *See Anticompetitive Practices*, FED. TRADE. COMM'N, https://www.ftc.gov/enforcement/anticompetitive-practices (last visited Oct. 9, 2022).

214 See, for example, United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 49, 71-73 (D.D.C. 2011), in which the court assigned market shares to all the firms participating in the relevant market.

1. Reverse-*Copperweld* Attribution Regime

An oft-quoted line from the *Copperweld* decision likens a parent and its wholly owned subsidiary to "a multiple team of horses drawing a vehicle under the control of a single driver."[215] Lower courts gravitated to this easy-to-understand metaphor in applying what came to be known as the power-to-control test.[216]

Subsequent cases clarify that the power-to-control test cuts both ways. First, in the sense that a unified corporate conscious immunizes two or more actors from conspiring, contracting, or combining in violation of Section 1 of the Sherman Act. And second, enlarging market share by attributing the share of both to the identity of one. For companies, looking to spin-off subsidiaries to (1) make their competition look greater (e.g., Meta) or (2) make themselves look smaller in one or more markets (e.g. Google, Amazon, and Apple), the bidirectional potential of *Copperweld* is a double-edged sword.[217] In other words, if common ownership can exempt collusive conduct on one hand,[218] then common ownership should enlarge market share on the other.

The latter, "reverse" *Copperweld* test, is critical to making sense of the power dynamics that spin-offs exert on markets. Likewise, because most of the hypothetical antitrust situations in this Note are most likely to arise as monopolization cases under Section 2 of the Sherman Act,[219] capturing the market *share* of commonly owned post-spin entities is likely to be outcome determinative on the issue of monopoly power.[220] Section

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[215] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984).

[216] *See, e.g.*, Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1316 (8th Cir. 1986) (finding manufacturer incapable of conspiring with sales agent, despite separate incorporation); Guzowski v. Hartman, 969 F.2d 211, 214 (6th Cir. 1992) (holding the two separately incorporated racetracks, controlled by identical shareholders were incapable of conspiring); Arandell Corp. v. Centerpoint Energy Servs., Inc., 900 F.3d 623, 630 (9th Cir. 2018).

[217] Arguably, these two "alternatives" might be viewed as one in the same. But from a rebuttal standpoint, the evidence a defendant may use to make itself look smaller differs from the evidence a defendant may use to make its competition look greater.

[218] *See* Century Oil Tool, Inc. v. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984) (extending single entity treatment to two companies owned by three different men because "[b]oth corporations were under the common ownership and control of these three men"); *Guzowski*, 969 F.2d at 214; *see also* Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 344 (N.D. Ill. 1997) ("[M]ajority ownership with its centralized power to control, whether or not apparently exercised in detail on a day-to-day basis, presumptively creates a single entity for antirust purposes.") (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1467a (1986)).

[219] 15 U.S.C. § 2.

[220] Judge Learned Hand's decision in *United States v. Aluminum Co. of Am.* is often credited with popularizing the inference of market power from market share. 148 F.2d 416

2 monopolization cases require a greater showing of market power than Section 1 cases. Because market share is generally assumed to be positively correlated with market power (an increase of *share* leads to an increase in *power*), attributing the "separate" share of SpinCo to the share of ParentCo[221] increases the likelihood that ParentCo will be found to have monopoly power.[222]

For example, in the hypothetical Meta/Instagram spin-off contemplated *supra*, Part II, reverse-*Copperweld* would prevent Meta from artificially decreasing its share of the personal social networking market by spinning-off Instagram in a heavily negotiated transaction. To see how reverse-*Copperweld* might work, first consider Meta's pre-spin share of the personal social networking market that is attributable to Facebook and Instagram. The FTC's complaint alleges the combined market share of Facebook and Instagram in the United States is approximately eighty-five percent.[223] Data from another source demonstrates seven out of ten social media users use Facebook daily, six out of ten social media users use Instagram daily, and six out of ten social media users use Snapchat daily.[224] Finally, 15.5% of Instagram users are not also Facebook users, and 15.7% of Snapchat users are not also Facebook users.[225] In absence of a reverse-*Copperweld* test, this data paints the general picture that spinning-off Instagram would be like adding another Snapchat to the market and simultaneously giving up a share comparable to that of Snapchat. Post-spin, if Instagram's share were counted separately from Meta's, then Meta's share would (of course) be lower.

Meta's *effective* share of the market may not be reduced, however, because (1) Facebook and Instagram could remain substantially integrated

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(2d Cir. 1945). There, Judge Hand found that a market share of over ninety percent would be sufficient to support a finding of monopoly. *Id.*

221 Assuming ParentCo is the alleged monopolist.

222 Leading scholars "believe it reasonable to presume the existence of substantial single-firm market power from a showing that the defendant's share of a well-defined market protected by sufficient entry barriers has exceeded 70 or 75 percent for the five years preceding the complaint." 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801a, at 383 (3d ed. 2008).

223 Based on time spent per month on personal social networking services. First Amended Complaint for Injunctive and Other Equitable Relief at ¶ 201, FTC v. Facebook, Inc. 581 F. Supp. 38 34 (D.D.C. 2022) (No. 20-3590). *See also* FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 47–48 (D.D.C. 2022) (concluding "Facebook's market share comfortably exceeds the levels that courts ordinarily find sufficient to establish monopoly power[,]" i.e. greater than 60-65%).

224 Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/.

225 *See id.*

with one another,[226] and (2) shares of Instagram's stock would be distributed to the same majority shareholders of Meta. So under a reverse-*Copperweld* regime, SpinCo-Instagram's market share would revert to Meta at least in proportion to the shares distributed to Meta's shareholders.

A reverse-*Copperweld* regime should be applied because it more accurately captures the post-spin market share and, by consequence, post-spin market power, than the typical entity-specific attribution scheme used by courts today. In essence, the reverse-*Copperweld* regime captures the otherwise ambiguous portion of the market ParentCo shareholder's own post-spin.[227] Professor Hovenkamp explains that, in most cases, the effect of the monopolist's conduct on the market is ambiguous, due in some part to the static market fallacy.[228] "[I]n a real world market a court could not consider whether a monopolist's alleged exclusionary practice increased or decreased total market demand, for the relevant information would not be available."[229] Reverse-*Copperweld* attempts to solve this problem by tracing market share back to pre-spin structures.

2. Barriers to Entry

Up to now, this Note has discussed conduct and market characteristics that occur contemporaneously with a Sherman Act violation. Entry barriers are another equally important factor in finding impermissible anticompetitive conduct. Entry barriers may affect downstream market conditions and, consequently, downstream consumer welfare.[230] As the name suggests, entry barriers are factors, such as certain regulatory requirements, that prevent new rivals from timely responding to an increase in price above the competitive level.[231] While general reputation alone is not an effective barrier to entry, when paired with some limiting principle, such as industrial practice in a specific country, reputation can act as proxy for factors that make new rivals less likely.[232] Other barriers to entry include, "control of essential or superior resources[,]"[233]

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[226] The extent of integration depends on how the spin-off is structured, but a value neutral and, certainly, a value maximizing spin-off would keep existing integration features, like cross-network sharing. See *supra*, Part II.

[227] *Cf.* Hovenkamp, *supra* note 12, at 283.

[228] *Id.*

[229] *Id.* at 283, n.322.

[230] *See generally* HANNO F. KAISER, A PRIMER IN ANTITRUST LAW AND POLICY 14-15 (2009), https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=381.

[231] *See* Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L. J. 1,3 (2006).

[232] Chi. Bridge & Iron Co. N.V. v. F.T.C., 534 F.3d 410, 437 (5th Cir. 2008) (citing Advo Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1202 & n. 11 (3d Cir.1995)).

[233] Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir.1997).

"[e]mployee skill levels required for a firm to be successful[,]"[234] "regulatory requirements, high capital costs, [and] technological obstacles[.]"[235] Like market share, modern courts do not treat barriers to entry as dispositive of monopolization, but rather treat entry barriers as one component of stating a monopolization claim.[236]

Spin-offs add two new wrinkles to the entry barriers calculus. The first relates to the resources of SpinCo: unlike the typical new entrant (e.g., Brown & Williamson in *Brooke Group*), SpinCo can be expected to enter the market well-capitalized, with an established consumer base, and at a relatively high "position" in the market. In Big Tech oligopolies, these advantages create added uncertainty and risk for would-be insurgent firms, which is further compounded by the fast pace of technology markets in general.[237] That is, SpinCo has an easy time entering the market and, because of that ease, insurgent firms have an even harder time entering than when structural separation occurs by court order.

The second wrinkle is a product of the spin-offs hypothesized in Part II. A continuing relationship between SpinCo and ParentCo can create advantages for each when ParentCo is an incumbent firm in one market and SpinCo is an incumbent firm in another market. This is the hypothetical Amazon/AWS problem. Amazon would continue to be a significant player in the e-commerce market and AWS would retain considerable share of the cloud computing market.[238] The two companies' ability to continue to leverage the other's status, post-spin, perpetuates pre-spin reputational barriers. At bottom, a justiciability issue post-spin – i.e., whether standing exists – arises because post-spin brand loyalty might be a product of either the parent or subsidiary.[239] For instance, a plaintiff may

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234 Transamerica Comput. Co. v. Int'l Bus. Machs. Corp., 481 F. Supp. 965, 976 (N.D. Cal.1979).

235 Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007).

236 *Id.* at 317 (citing Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc., 159 F.3d 129, 141 (3d Cir. 1998) ("We have held, in the context of a § 2 claim for attempted monopolization, that a complaint must allege "something more" than mere market share, such as "the strength of competition, probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand.")).

237 This comment refers to principles in corporate finance and firm valuation in efficient markets. *See* BRATTON, *supra* note 35, at 132-42; *see also* Hovenkamp, *supra* note 12, at 265.

238 See *infra* App III and Ayers, *supra* note 193.

239 In *Broadcom Corp. v. Qualcomm Inc.*, the Third Circuit laid out a five-factor balancing test to assess antitrust standing. 501 F.3d at 320 (quoting Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 181 (3d Cir. 1997)). The first factor was "the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm." *Id. But see, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) (explaining plaintiffs in Section 2 cases must prove entry barriers in order to prove monopoly power).

be foreclosed from showing injury by AWS when the reputational barrier is traced back to AWS's former relationship to Amazon.

B. ParentCo Liability

An anticompetitive play[240] made possible by a section 355 spin-off is likely to harm markets and consumers and should be a categorically unreasonable form of competition. Notwithstanding the hypothetical spin-offs discussed above, it is equally possible for a ParentCo or its SpinCo to engage in monopolization or attempted monopolization under Section 2 of the Sherman Act. Settled principles in antitrust allocate liability to the actor, and parent companies are usually not fined for an antitrust infringement of a subsidiary unless they are directly involved in the antitrust infringement.[241] Similarly, the general rule in corporate law is that parent companies are not liable for the actions of subsidiaries unless the plaintiff can prove agency or an alter ego theory.[242]

Because the parent corporation is wholly responsible for the mechanics and terms of a spin-off, it more likely serves as the proper target for antitrust allegations deriving from the decision to spin—up to a certain point.[243] Courts and lawmakers will need to define the outer bounds of ParentCo liability for SpinCo's antitrust infringement, in addition to settling the standing issues that will likely arise.[244] In terms of administrability, a simple statute of limitations is most desirable. However, given the complexity and variability of how spin-off transactions are structured, a standard that incorporates some fact-based analysis is likely necessary. One method might be to look at the distribution of SpinCo voting shares around the conduct in question and build in a look-back period to deter strategic changes stock positions. Another method might be to look to the tax code, and pair ParentCo liability to rules with the timeframes tax regulators scrutinize significant transfers.[245]

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240 *See supra* Part II.

241 Carsten Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, 41 World Competition, 69, 69 (2018). https://kluwerlawonline.com/journalarticle/World+Competition/41.1/WOCO2018004.

242 *See* United States v. Bestfoods, 524 U.S. 51, 61 (1998).

243 To permit ParentCo liability indefinitely runs the risk of chilling any use of spin-off transactions because the risk of treble damages is so great.

244 For example, there is no vicarious liability rule and plaintiff is unlikely to be able to satisfy pleading requirements without intervention from federal rule makers.

245 For example, I.R.C. § 355(b)(2)(B) sets forth a time period of five years.

C. *Anticipated Objection: Some vs. No Separation*

Where this Note attempts to expose anticompetitive uses of section 355 by alleged monopolies, some may be left wondering, well isn't *some* separation better than no separation? The literalist response would almost certainly be "yes." For one, separation might make anticompetitive conduct more detectable, as in the case of spin-off agreements that go beyond defining the terms of separation and venture into the realm of collaborating to wield market power together. Clearly, if a subsidiary remains wholly (or mostly) controlled by its parent, antitrust has no basis to intervene in such collaboration.[246] Second and relatedly, perhaps in the long run, the separation created by spin-offs genuinely leads to two independent firms, innovation, and all the trappings of consumer welfare.[247] Finally, there is the issue of transparency. Traditionally, post-spin, the financial optics of the parent and its former subsidiary become more transparent, and only then can analysts decipher which returns are attributable to what business.[248] But what one gains in financial optics, one loses in governance. As one conglomerate corporation, the whole world knew the subsidiary marched to the beat of the parent corporation's drum. But, post-spin, to whom is the SpinCo board beholden? The shareholders of ParentCo. And when the parent is Amazon, Meta, or Apple, the drum beats loudly.

IV. STRATEGIES FOR ALIGNING SPIN-OFFS WITH ANTITRUST GOALS

Aligning section 355 of the tax code with the goals of antitrust requires addressing competitive harms implicated by certain spin-off transactions. This section proposes two general strategies on how to accomplish such alignment. The first strategy involves a review process similar to that which is currently applied to proposed mergers: A firm planning to spin-off a subsidiary would be required to submit a detailed plan and financial and market data to antitrust enforcement agencies for review and authorization. The second strategy gives courts the power to enjoin an anticompetitive spin-off, like the legislative grant of power under Sections 13(b) and 19 of the Federal Trade Commission Act.

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246 *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 776 (1984).

247 One example of this ideal-case scenario is the eBay/PayPal spin-off in 2015. *See Top 10 Questions About the eBay-PayPal Separation*, EBAY: PRESS ROOM (Feb. 11, 2015), https://www.ebayinc.com/stories/news/top-10-questions-about-the-ebay-paypal-separation/.

248 *See* Owers & Sergi, *supra* note 84, at 3.

A. Review for Anticompetitive Conduct

Agency review of business transactions has served as an important tool for antitrust enforcement. For example, in 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act ("HSR").[249] Under the HSR Act, the FTC and the Department of Justice ("DOJ") receive merger notifications concurrently and, through a clearance process, decide which agency will investigate transactions that potentially raise issues under Section 7 of the Clayton Act.[250] The HSR Act provides both a 'size-of-transaction' test and a 'size-of-person' test for determining whether a pre-merger filing is required.[251]

1. Pre-spin Requirements

The HSR Act[252] does not require any filing for spin-offs, provided SpinCo stock is distributed *pro rata* to ParentCo's stockholders. That said, the HSR Act offers a model for pre-spin reporting legislation designed to help antitrust agencies detect and prevent anticompetitive spin-offs.

Here, government intervention envisions the kind of collaborative opportunity Professor Rory Van Loo discusses in his piece, *In Defense of Breakups: Administering a "Radical" Remedy*.[253] Professor Van Loo argues for antitrust remedies that are seen "less as an adversarial law enforcement procedure and more as collaborative governance."[254] Accordingly, collaborative governance in the pre-spin review context should embrace collaborative governance strategies between the FTC and the companies involved in the transaction, as well as leverage business sector expertise to compensate for personnel and information asymmetries.[255] Emphasis should be placed on creating a comment and response process that is detailed but still comparable to the comment and response process undertaken by the SEC when asked to approve spin-off transactions.

As a starting point and like the HSR Act, the FTC and the DOJ should have concurrent jurisdiction over the hypothetical "Spin Act" notifications. Spin Act would be set up much like HSR to require pre-spin notification and filing, but unlike the HSR Act, Spin Act would dispense

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249 Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94–435, 90 Stat. 1383, 1390–94, 15 U.S.C. § 18a.

250 *Id.*

251 *Id.* at § 18a(2).

252 *Id.*

253 *Supra* note 195.

254 *Id*. at 1960.

255 *See id.* at 1999-2001.

of a *mandatory* waiting period in favor of earlier filing requirements.[256] At least at implementation, the timeframe to provide notice will be paired with the filing deadline for ParentCo's 8-K; ParentCo will file a separate spin notification with the FTC and DOJ after receiving initial approval from the parent Board to proceed with the spin-off. In other words, initial filing will take place approximately six months before distributing SpinCo shares.

The required SEC filings before consummating a spin-off should theoretically prevent corporations from accelerating or deviating from the expected timeline. If, however, a parent corporation provides notice less than ninety days before distribution, it could trigger a wait period.[257] To facilitate a collaborative process between the agencies and corporations planning spin-offs, parties *may* approach the agencies prior to the filing of a Spin Act notification (or, in transactions that are not notifiable but that may raise antitrust concerns, in lieu of filing under the Spin Act), and the agencies can extend confidentiality to any substantive discussions by officially commencing an investigation. For reasons flowing from corporate law, no pre-spin filings are required of the subsidiary to be spun.[258] That said, failure to comply with requested disclosures will result in additional wait time or tolling of an existing wait period.

It is worth noting that the HSR Act treats control similarly to section 355, finding control when interest exceeds fifty percent – fifty percent economic interest for noncorporate entities or a fifty percent ownership of the voting securities in a corporate entity.[259] Similar treatment by tax and antitrust regulatory review regimes is important to improving administrability and managing expectations in the business community.

2. Post-spin Right of Action

The intention is for pre-spin review to create a practice like the process that evolved under the HSR Act. That is, since Congress established pre-merger notification in 1976, most mergers are challenged prior to their

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256 The waiting period for merger consummation under HSR is 30 days. *See* 15 U.S.C. § 18a.

257 The wait period provision should be long enough to afford government intervention but not so long as to cause unnecessary delay, for example 60 days.

258 *See supra* Part I.

259 *Compare* 16 C.F.R. § 801.1(b) (defining "control" of a corporation as owning 50 percent of the voting securities or having the right to appoint 50% of the directors, or in the case of an unincorporated entity, control is having a 50% economic interest) *with* I.R.C. § 355(a) (adopting the definition of "control" in Section 368(c) of the Code, i.e., the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation).

occurrence.[260] As a result, there is often no "post-acquisition" evidence to consider. Nevertheless, the HSR Act condemns anticompetitive, completed acquisitions, and empowers both the government and private plaintiffs to pursue mergers that have already been consummated.

So too here. The Spin Act should create a post-spin right of action to pursue separations that have already taken place. A post-spin right of action may be of particular importance in the context of simultaneous and serial spin-offs. If, for instance, a parent company spins off two or more businesses in the same transaction, i.e., a simultaneous spin-off, a competitive relationship must exist among SpinCo's *and* between each SpinCo and ParentCo. A post-spin right of action should be tailored to detecting and prosecuting simultaneous spin-offs that do not result in mutually competitive relationships. Likewise, a post-spin right of action should enable regulatory agencies to investigate anticompetitive market effects produced by consecutively ordered, i.e., serial, spin-offs. Serial spin-offs potentiate anticompetitive harm when they are structured in ways that avoid redistributing market power in the short-term and reserve opportunities to reabsorb spun businesses in the long-term.[261]

In discussing the utility of a post-spin right of action it becomes obvious that in both cases – simultaneous spins and serial spins – a right of action must be coupled with a "look-back" power to guard against *over* enforcement. Because some spin-offs promote, or at least do not dampen, competition, regulators should have the opportunity to look back at consummated transactions. In other words, effective enforcement requires guidelines designed to target only those consecutive spin-offs that are anticompetitive. Much like the process the DOJ and FTC undertook to develop *Antitrust Guidelines for the Licensing of Intellectual Property*,[262] here, too, the DOJ and FTC should engage practitioners to develop agency guidelines for spin-off transactions. In process and substance, the *IP Guidelines* serve as an ideal model because they provide concrete examples of competitive and anticompetitive licensing arrangements, and harmonize antitrust and the legal right to exclude (the antithesis of non-restraint) around a common goal of promoting innovation.[263] Here, drafters might find a common goal around promoting shareholder value.[264]

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[260] Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding & Antitrust Policy*, 127 YALE L.J. 2026, 2044 (2018).

[261] *Cf.* Kovacic, *supra* note 186, at 1310.

[262] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTIRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (June 12, 2017), https://www.justice.gov/atr/IP guidelines/download.

[263] *See* GAVIL, ET AL., *supra* note 10, at 1176-81.

[264] On this point, Professor Van Loo discusses how maximizing shareholder value requires co-administration and reducing regulatory burden. *See* Van Loo, *supra* note 195,

Coupling a post-spin right of action with an investigative power has practical implications, too. Attorneys will have a better sense of how enforcement agencies distinguish between competitive and anticompetitive spin-offs when advising clients who wish to undertake basic spin-offs as well as complex simultaneous or serial spin-offs. In the words of Justice Oliver Wendell Holmes, "apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[265] Where the consequences of being wrong implicate costly litigation and the possibility of treble damages and imprisonment, clear standards and due investigation serve the interests of all parties.

Building on the idea of guidelines, lawmakers should also consider adopting a mandatory post-spin reporting period for transactions that are "flagged" during pre-spin review and tied to limitations on ParentCo liability. The process of flagging should be designed to incentivize former parent companies to cure sources of anticompetitive conduct and alert the progeny of the flagged spin-off to additional reporting requirements. For example, if ParentCo liability for SpinCo antitrust violations extends as long as its shareholders hold the majority of SpinCo voting shares, additional reporting duties might require that, each year during the reporting period, ParentCo *and* SpinCo must make certain filings with the FTC and DOJ. These filings should require parent and progeny companies to disclose of metrics related to market share, market power, on-going relationships between the businesses, and on-going relationships the businesses have with common third parties.

Before closing, additional research authorized by Section 6(b) of the FTC Act bears mention. Under Section 6(b), the FTC may require a company to file "reports or answers in writing to specific questions" about its business practices.[266] Because little-to-no empirical study has been done on the market effects of spin-offs like those hypothecated by this Note, 6(b) Studies add obvious value. For example, some number of spun companies retain very close ties with the parent, giving up little in terms of business plan control in the intermediate term, even the long term.[267] In such a case, the spin is a transparency or earnings-per-share play geared to the stock market with some fine tuning of internal incentive arrangements.

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at 1961. Antitrust guidelines for simultaneous and serial spin-offs might unlock opportunities for co-administration by characterizing enforcement agencies as partners, rather than adversaries, in the regulatory process. It is in all parties' interests to facilitate competitive spin-offs, stepping in only when clear anticompetitive harm arises.

265 Nash v. United States, 229 U.S. 373, 377 (1913).

266 15 U.S.C. § 46(b).

267 *See generally* WACHTELL, LIPTON, ROSEN & KATZ, *supra*, note 64.

Intuitively, these spins do little if anything to promote competition, which is problematic only if the continuing ties exacerbate entry barriers or effectively sequester market share. But whether intuition bears out in practice, is once again, a question of degree and merits empirical study.

B. Legislative Grant of Power to Enjoin Anticompetitive Spin-offs

For the reasons discussed in relation to the *Copperweld* decision, current doctrine relegates antitrust plaintiffs to the sidelines until the spin-off transaction is complete, and once complete, exists on an exclusively go-forward basis. There is a need to create an earlier point of intervention. Some of the machinery proposed under the Spin Act above addresses this problem.[268] Under the Spin Act, enforcement agencies may intervene insofar as ParentCo follows the proposed guidelines and collaborates with the enforcement agency. Additional enforcement power is needed in the event the administrative mechanisms fail.

Section 13(b) of the FTC Act "is prospective, not retrospective," and authorizes suit only when a defendant "is violating or is about to violate" the antitrust laws.[269] Even assuming an antitrust plaintiff can use evidence of pre-spin conduct,[270] the claim faces the significant uphill battle of getting around the defense that such threats are purely speculative. That said, if a corporation is actively engaged or about to be engaged in antitrust litigation, that fact should create a basis for enjoining a spin-off transaction. Similarly, blatantly anticompetitive conduct during pre-spin negotiations, such as discriminatory clauses in spin-off agreements, should be vulnerable to temporary, if not permanent, injunction. A legislative grant of power should give enforcement agencies the power to preempt anticompetitive and suspected anticompetitive spin-off transactions.

CONCLUSION

There is a reason why large agglomerative corporations, like Alphabet, Amazon, or Meta, would voluntarily break off valuable parts of their businesses—and it isn't to be helpful. Even if control is surrendered on paper, control is maintained by common owners. Setting aside the sheer

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[268] See *supra* Part IV, at Section A, Subsection 1.

[269] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1348 (2021) (internal quotation marks omitted); *see also* 15 U.S.C. § 53(b).

[270] Because *Copperweld* specifically declared a parent could not collude with a subsidiary, 467 U.S. 752, 776 (1984), a suit sought for a violation alleged to occur *pre*-spin is out of the question.

economic advantage,[271] spin-offs offer a degree of power and control court-ordered separations do not. The pressures created by the corporate tax code are geared toward preventing transactions like that which was undertaken by Kerr-McGee in *In re Tronox*, which are designed to prevent a corporation from sequestering its assets by spinning-off its debt.[272] Nor should a corporation be able to avoid taxes by cloaking a sale in spin-off garb. But short of spinning-off a device or freeing-up assets it later plans to sell, corporations are practically unrestrained from deciding what goes, what stays, and what the SpinCo can and cannot do.

To be sure, a corporation may elect to spin-off a wholly owned subsidiary for valid management and business purposes. Not all spin-offs raise competitive concerns. In fact, section 355 spin-offs frequently have pro-competitive effects and are still an important alternative for antitrust regulators.[273] But sanctification under the federal tax code proves no more of post-spin coordination than corporate law statutes proved of impermissible restraints of trade.[274] That spin-offs are not inherently anticompetitive should not shield aberrant uses from antitrust scrutiny. If anything, the potential for anticompetitive spin-offs to erode the goals of the Corporate Tax Code urges legislative intervention and judicial review. The goal should be co-administration.[275] Time is of the essence.

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271 *See* Owers & Sergi, *supra* note 84, at 7; *see also* Boudreaux, *supra* note 85, at 623 (finding significantly better returns when divestiture was voluntary than court-ordered under the Clayton Act).

272 *Cf. In re* Tronox Inc., 429 B.R. 73, 93 (Bankr. S.D.N.Y. 2010).

273 In 2015, eBay made headlines by announcing its plan to spin-off PayPal, the digital payment company it acquired in 2002. eBay's decision to spin-off PayPal was justified in part by eBay's plans to develop its own digital payment system. *See* EBAY, *supra* note 236. And indeed, three years later, eBay was managing the end-to-end payments process on its platform in the United States. *See eBay Begins Intermediating Payments on its Marketplace Platform in the US*, EBAY: PRESS ROOM (Sep. 25, 2018), https://www.ebayinc.com/stories/news/ebay-begins-intermediating-payments-on-its-marketplace-platform-in-the-us/. By the end of 2020, eBay expanded its payment system to more than one million sellers worldwide. *eBay Begins Managing Payments in France, Italy and Spain*, EBAY: PRESS ROOM (Mar. 3, 2021), https://www.ebayinc.com/stories/news/ebay-begins-managing-payments-in-france-italy-and-spain/. Accordingly, the eBay case evidences the potential of spin-offs to drive innovation and promote competition.

274 *See* Nicholas Walter, *Antitrust and Corporate Law: Revisiting the Market for Corporate Control*, 15 U. PA. J. BUS. L. 755, 770-72, 775 (2013).

275 *See* Van Loo, *supra* note 195, at 1961.

APPENDIX

I. Structures of Three Primary Types of Section 355 Transactions[276]

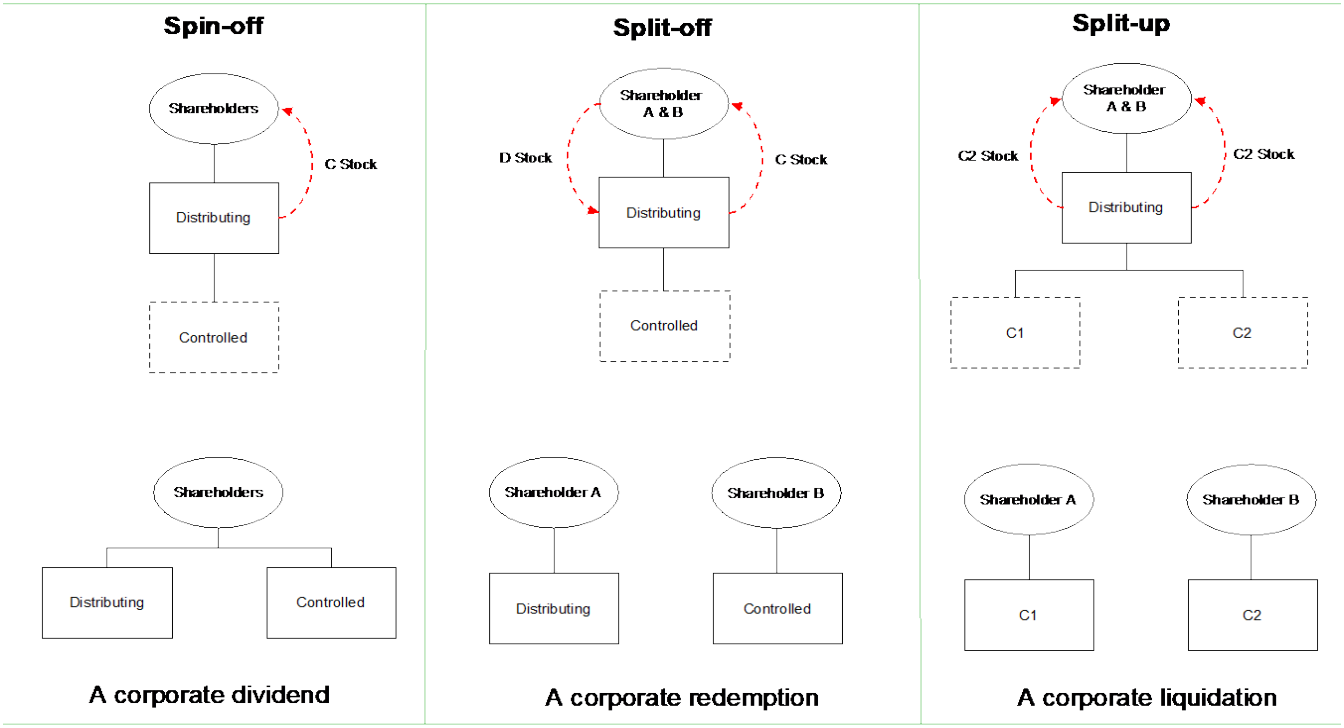

Figure. The focus of the Note is a simple "Spin-off" (far left). ParentCo ("Distributing," in figure), relinquishes control of SpinCo ("Controlled," in figure), and distributes stock in SpinCo ("C Stock") to ParentCo shareholders. The end result is that shareholders of ParentCo stock retain their pre-spin holdings in ParentCo and newly own stock in SpinCo. That is, ParentCo shareholders receive a *pro rata* distribution of SpinCo stock. In this sense, a spin-off is similar to a corporate dividend.

A Split-off (center) is identical to a spin-off except that some shareholders of ParentCo surrender a portion of their ParentCo stock in exchange for stock in SpinCo, while a different group of shareholders continue to hold stock in ParentCo. There is no requirement of a *pro rata* redemption in a split-off transaction. And finally, in a Split-up (far right), ParentCo distributes the stock of two or more of its subsidiaries to its shareholders as a part of a plan of complete liquidation. The resultant

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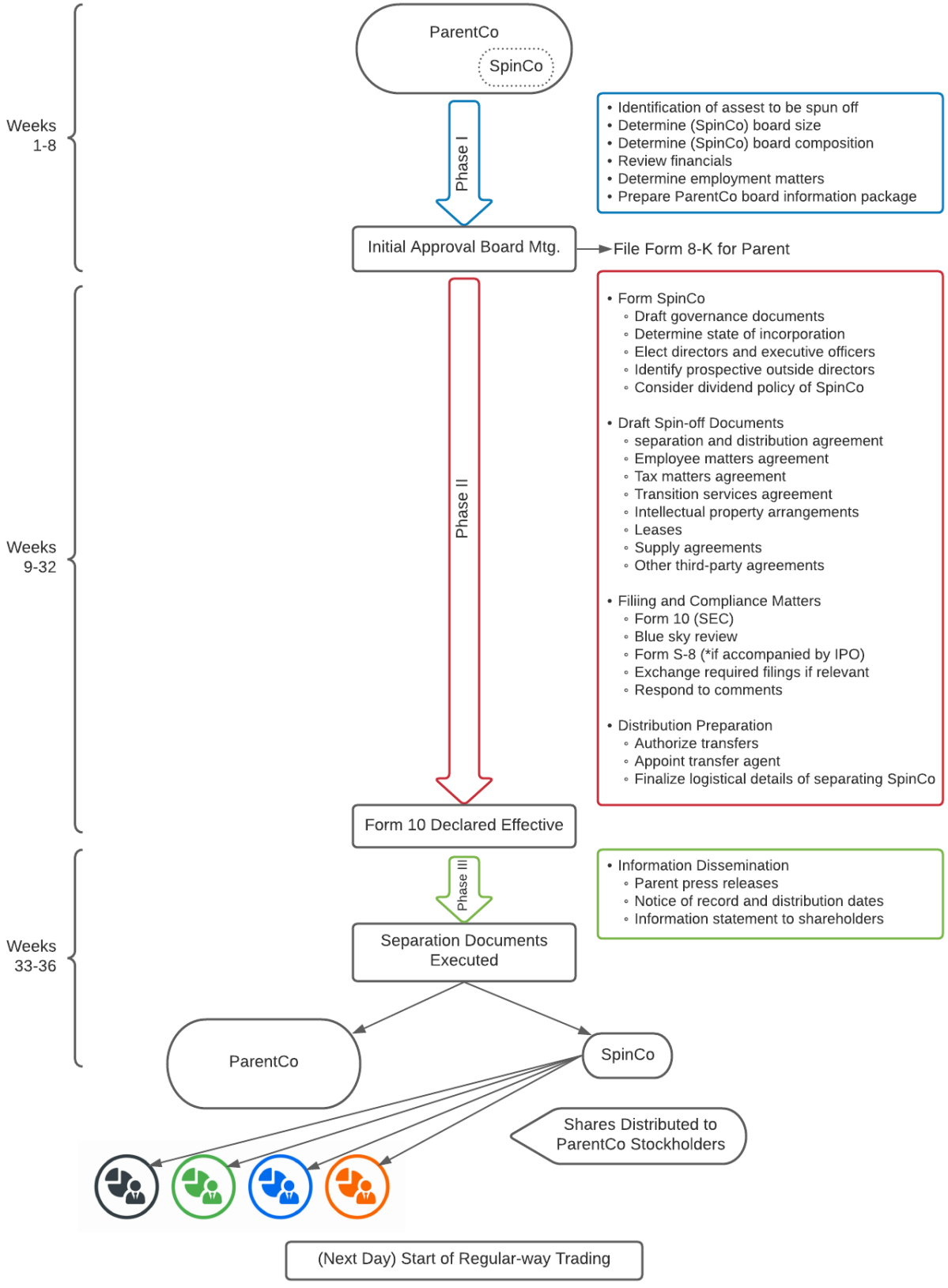
[276] Illustration excerpted from Bodoh et al., *Spin-offs in the Current Uncertain Environment*, WEIL, GOTSHAL & MANGES LLP, 1, 6 (Jan. 27, 2021), https://www.weil.com/~/media/mailings/2021/q1/part-i--spinoffs-in-the-current-uncertain-environment.pdf.

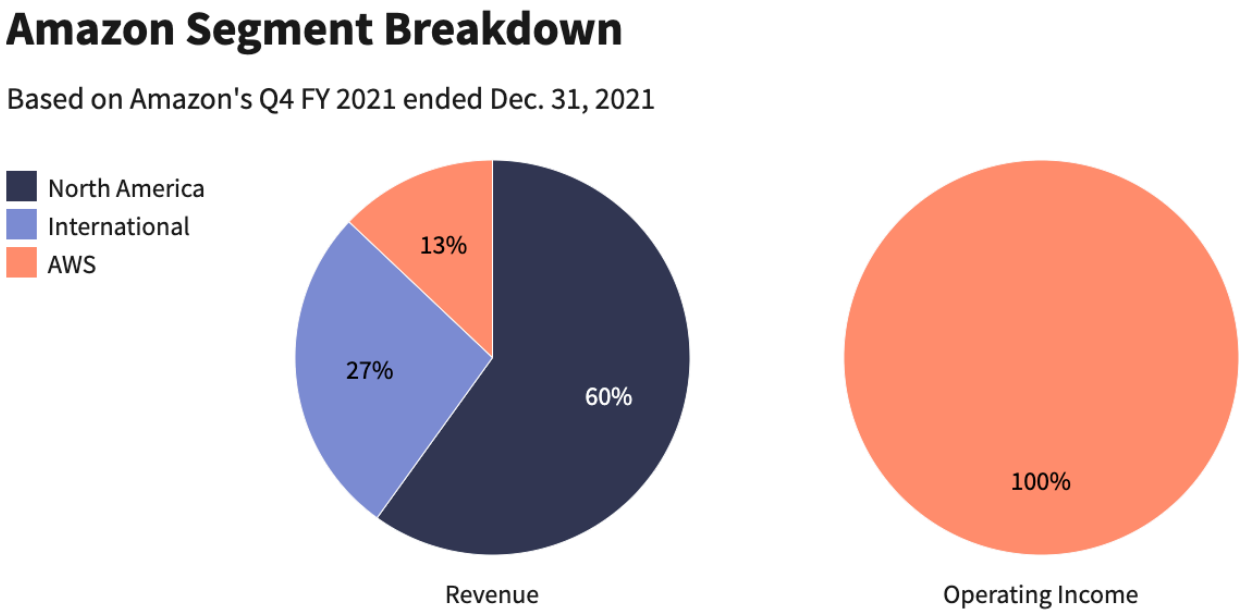
SpinCo's may be pre-existing or newly created. In the case of two SpinCo's, some prior shareholders of ParentCo hold stock in SpinCo1 ("C1") and a different group of prior shareholders hold stock in SpinCo2 ("C2"). At the end of the transaction, ParentCo ceases to exist.

II. Spin-off Timeline



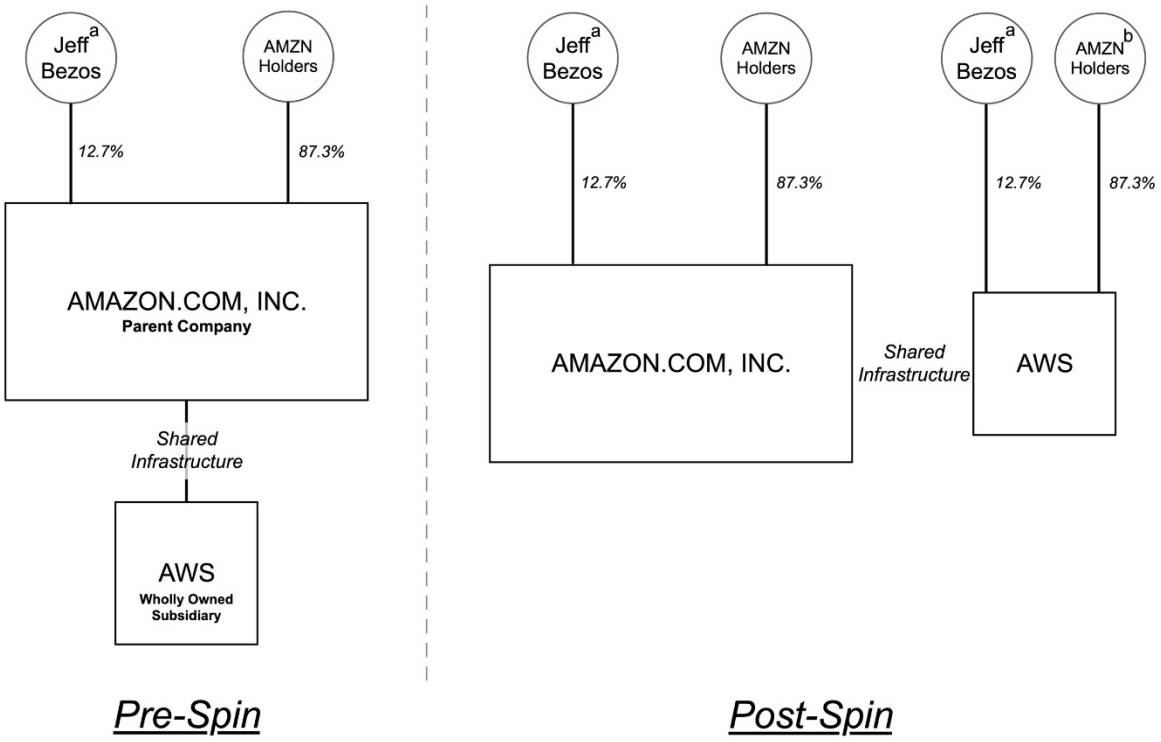
III. Amazon / AWS Spin-off

A. Financials[277]



[277] The chart is excerpted from Nathan Reiff's article, *How Amazon Makes Money Product Sales, Advertising, Subscription Services, and Cloud Services*, and was prepared by Matthew Johnston. INVESTOPEDIA (Feb. 19, 2022), https://www.investopedia.com/how-amazon-makes-money-4587523.

B. Amazon/AWS Spin-off: Ownership and Infrastructure[278]



[a] Jeff Bezos controls the majority (12.7%) of the voting stock. Post-spin, Mr. Bezos controls the majority of the voting stock of Amazon (stock symbol, "AMZN") *and* AWS.

[b] Post-spin shareholders hold shares in AMZN (87.3%) *and* AWS (87.3%). The figure refers to AWS holders by their pre-spin holdings, i.e., AMZN shares, to illustrate the post-spin beneficial owners of AWS are the same people and entities who own Amazon and in the same proportions of their holding of AMZN stock.

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[278] Data from Amazon.com, Inc., Notice of 2022 Annual Meeting of Shareholders & Proxy Statement (Schedule 14A) 87 (Apr. 14, 2022).