UNITED STATES OF AMERICA

concentrated market"; whether the transaction involved "(2) a market vulnerable to coordinated conduct"; and whether we had "(3) a credible basis for concluding the transaction will enhance that vulnerability."[5] The recently adopted 2023 Guidelines propose three "primary factors" for assessing the increased risk of coordination—(1) the existence of a highly concentrated market, (2) prior actual or attempted attempts to coordinate, and (3) elimination of a maverick.[6] No court to date has endorsed these new factors. Even assuming they accurately summarize the state of the law, they are not satisfied here.

The Complaint is unclear on which of the three factors are present here, but it focuses most on "actual or attempted attempts to coordinate." It alleges that "Mr. Sheffield's history of attempting to coordinate with other oil industry participants suggests that the market here is susceptible to anticompetitive coordination."[7] We do not agree.

The 2023 Guidelines provide that "attempts to coordinate" are relevant to the risk of coordination inquiry where "firms representing a substantial share in the relevant market appear to have previously engaged in express or tacit coordination."[8] The Complaint alleges only that a combined OPEC and OPEC+ "account for over 50% of global crude oil production."[9] Importantly, it does not allege the merging parties' market shares at all. As such, it fails to allege that either Exxon or Pioneer represents part of "any substantial share" of the market, and for good reason: the post-merger firm's share in the alleged market will not be substantial. This concentration in this market, and thus, the likelihood of successful coo (nt)-2 (s)-5 ( 8.52wuA(s)-1 o2( r

this alleged risk presents a Section 7 problem.