

Memorandum 2023-16

Antitrust Law: Status Report

This memorandum provides an update on the staff's work on the antitrust study since the February meeting.

The staff is close to finished with the recruitment of experts to assist the Commission in the study. The following experts have agreed to participate since the release of Memorandum 2023-11 (on February 9, 2023):¹

- Prof. Joshua Davis, U.C. College of the Law San Francisco
- Dean M. Harvey, Lieff Cabraser
- Prof. Justin McCrary, Columbia Law School
- Prof. Barak Orbach, James E. Rogers College of Law, University of Arizona
- Prof. Barak Richman, Duke Law
- Shana E. Scarlett, Hagens Berman
- Marc Seltzer, Susman Godfrey LLP
- Dena Sharp, Girard Sharp
- Prof. Guofu Tan, University of Southern California

The brief affiliations noted above are intended only for identification. The listed experts have too many other affiliations and honors to be included in a readable list. Fuller biographies of the participating experts are provided in the attached Exhibit. On a related point, many of the practitioners who are participating in this study are also adjunct faculty at various universities. For brevity, those affiliations and titles have not been noted in this memorandum.

The staff is extremely grateful for the invaluable assistance that these experts will provide. The reports that they prepare for the Commission will establish a critical foundation for the Commission's deliberations.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Most materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

Working Groups

The participating experts have been formed into seven working groups, each examining a different topic within the scope of the Commission's charge. The topics and membership of each of the groups are as follows:

Group 1. Single Firm Conduct

Prof. Aaron Edlin, UC Berkeley Law and Economics
Prof. Douglas Melamed, Stanford Law
Prof. Samuel Miller, Sidley Austin LLP (ret.)
Prof. Fiona Scott Morton, Yale School of Management, Economics
Prof. Carl Shapiro, UC Berkeley Economics

Group 2. Mergers and Acquisitions

Prof. Jonathan Baker, American University Washington College of Law
Prof. Richard Gilbert, UC Berkeley Economics
Prof. Prasad Krishnamurthy, UC Berkeley Law
Prof. John Kwoka, Northeastern University, Economics
Prof. Daniel Sokol, USC Gould School of Law, Marshall School of Business
Prof. Guofu Tan, University of Southern California, Economics

Group 3. Concerted Action

Prof. Peter Carstensen, University of Wisconsin School of Law (emeritus)
Prof. Joshua Davis, UC College of the Law San Francisco
Prof. Joseph Farrell, UC Berkeley Economics
Prof. Christopher Leslie, UC Irvine School of Law
Judith Zahid, Zelle LLP

Group 4. Consumer Welfare Standard

Professor Jorge Contreras, University of Utah College of Law
Prof. Warren Grimes, Southwestern Law School
Prof. Douglas Melamed, Stanford Law
Heather Nyong'o, Cleary Gottlieb
Prof. Barak Orbach, James E. Rogers College of Law, University of Arizona

Group 5. Technology Platforms

Prof. Babette Boliek, Pepperdine Caruso School of Law
David Kesselman, Kesselman Brantly Stockinger LLP
Prof. Mark Lemley, Stanford Law
Prof. Justin McCrary, Columbia Law
Prof. Steve Tadelis, UC Berkeley Economics

Group 6. Enforcement and Exemptions

Kathleen Foote, California Attorney General's Office, Antitrust Section
Head (ret.)
Prof. Roger Noll, Stanford Economics (emeritus)
Marc Seltzer, Susman Godfrey LLP
Dena Sharp, Girard Sharp

Group 7. Concentration in California

Dean Harvey, Lieff Cabraser
Cheryl Johnson, California Attorney General's Office, Antitrust Section
(ret.)
Diana Moss, President, American Antitrust Institute
Prof. Barak Orbach, James E. Rogers College of Law, University of Arizona
Prof. Barak Richman, Duke Law
Shana Scarlett, Hagens Berman

Each working group will designate a liaison to communicate with the staff. In addition, all of those contacts will be members of a "coordinating group," which will meet periodically to discuss matters that involve more than one group.

Working Group Reports

Each group will prepare an *objective* report on the topic addressed by the group. The reports will not make recommendations.² One advantage of the objective framing is that it should make it easier for experts with different views to reach agreement about the content of the report. For example, experts do not need to agree that a particular reform is sensible in order to acknowledge that the reform has been proposed and has some support. The point is to provide the Commission with an objective survey of the state of antitrust law and policy.

The first six groups will each be addressing a different aspect of antitrust law (with some overlap). The intention is that those groups' reports will do all of the following:

- Describe federal and state law on the topic.
- Discuss the policy purpose of the law on the topic. What public goal does the law address? What problem does it seek to solve?
- Describe any deficiencies in the law that have been identified (either in existing scholarship or by the working group).

2. While the working group reports will not make recommendations, working group participants will of course be free to share their own views and recommendations to the Commission as individuals.

- Describe possible reforms that have been identified (again, either in existing scholarship or by the working group). This should include identification of potential advantages and disadvantages of each reform, identification of the principal supporters of each reform, and any attempts to enact the reform, successful or otherwise.

The seventh group has a different focus. It will be preparing an empirically-based description of the degree and effect of business concentration in California. The group will be reaching out to experts in various sectors of the economy to provide necessary information.

Process and Timing

Each group will have the flexibility to determine how to conduct their work. The staff does not intend to dictate any structure or process for that work, beyond what is stated here.

The working groups should prepare initial drafts of their reports by September 2023. Those drafts will then be distributed to all participants, who may offer comments on any of the drafts to their authoring groups. The staff will not be part of that informal exchange.

The groups will then consider the comments from other participants and decide whether to make any revisions to their reports.

Final drafts should be completed by December 2023. The staff will then compile those drafts into a Commission report, for publication and submission to the Legislature and Governor (with attribution to the authors for their work).

Once the compiled report has been publicly released, the Commission will begin its public deliberations on possible reforms to California antitrust law. At appropriate points in that process, the Commission may wish to invite some of the expert participants to attend Commission meetings to answer questions and discuss their views.

NEXT STEP

In the next month, the staff intends to form the coordinating group and continue outreach to business entities.

Respectfully submitted,

Brian Hebert
Executive Director

SHORT BIOGRAPHIES OF EXPERT PARTICIPANTS (ADDED AFTER FEBRUARY 16, 2023)

Note: In the interest of brevity, this Exhibit does not list the extensive antitrust-related litigation experience, honors, and activities of the practicing attorneys discussed below. Instead, the staff has provided links to that information on their websites.

Prof. Joshua P. Davis

Joshua P. Davis is a Research Professor at U.C. College of the Law San Francisco and the managing shareholder of Berger Montague PC's San Francisco office. He focuses his scholarly research in antitrust on private enforcement and procedure, relying on theoretical, doctrinal, and empirical analyses. He has two books in progress: *Unnatural Law: AI, Consciousness, Ethics, and Legal Theory* (forthcoming Cambridge University Press) and *Complex Litigation and Class Action: Ethics* (Lexis Nexis). His primary practice areas include antitrust, appeals, class actions, and ethics in complex litigation.

Further information about Prof. Davis' numerous antitrust-related achievements and honors as a practitioner can be found at:

<https://bergermontague.com/attorneys/joshua-p-davis/>

Dean M. Harvey

Dean M. Harvey represents workers, consumers, and small businesses in antitrust and intellectual property cases. Dean is among the nation's leading advocates for workers asserting antitrust claims.

Education

University of California, Berkeley, School of Law (Berkeley Law). J.D. – 2006.

Law Review: California Law Review, Articles Editor, 2005 – 2006

Law Journal: Berkeley Journal of International Law, Assistant Editor, 2004
University of Minnesota, Twin Cities. B.A. (*Summa Cum Laude*) – 2002

Further information about Mr. Harvey's numerous antitrust-related achievements and honors can be found at:

https://www.lieffcabraser.com/pdf/Harvey_D_bio.pdf

Prof. Justin McCrary

An economist by training, Justin McCrary is an empirical scholar whose primary areas of interest include antitrust, securities regulation, corporations law, the economics of crime, employment discrimination, banking and finance, law and economics, and econometric methods. He teaches Antitrust and Trade Regulation; Corporations; and Litigation, Economics, and Statistics, an experiential course focused on Rule 26 Reports in federal litigation.

McCrary, who was a visiting professor at Columbia Law in the fall of 2017, joined the faculty in 2018 from the University of California, Berkeley, where he taught from 2008 to 2018. He was the founding director of Berkeley's Social Science Data Laboratory, or "D-Lab," a center for innovation in training graduate students regarding quantitative social science generally and emerging big data techniques specifically.

Before teaching at Berkeley, McCrary was an assistant professor at the University of Michigan's Gerald R. Ford School of Public Policy and an assistant professor (courtesy) in Michigan's economics department. He is also a faculty research associate at the National Bureau of Economic Research, where he co-directed the Crime Working Group from 2006 to 2018. In 2011, the University of Chicago Press published his book, *Controlling Crime: Strategies and Tradeoffs* (co-edited with Phil Cook and Jens Ludwig).

He has received grants from the Robert Wood Johnson Foundation, the National Science Foundation, the National Institutes of Health, the Arnold Foundation, and the Spencer Foundation.

He received his PhD from the University of Pennsylvania.

Prof. Barak Orbach

Barak Orbach is the Robert H. Mundheim Professor of Law & Business at the University of Arizona James E. Rogers College of Law, where he serves as the founding director of the Business Law Program. Professor Orbach's primary areas of expertise are antitrust, corporate governance, regulation, and the digital economy. Professor Orbach has also published influential works on motion picture exhibition and confidence schemes. In addition to his academic work, Professor Orbach periodically advises government agencies, companies, trade associations, and shareholders, and serves as an expert witness. Professor Orbach is recognized internationally for his academic and non-academic work.

Professor Orbach is a fellow of the American College of Governance Counsel, Thurman Arnold Project at Yale, Salzburg Global Seminar, and American Bar Foundation. He is also a member of the American Law Institute, and a member of the advisory board of the American Antitrust Institute. In 2023, Professor Orbach will serve as Derek Brewer Visiting Fellow at the University of Cambridge's Emmanuel College.

Professor Orbach holds undergraduate degrees in law and economics from Tel Aviv University and master's and doctorate degrees in law (LLM and SJD) from Harvard Law School. Before joining academia, Professor Orbach served as an Advisor for Law and Economics to Israel Competition Authority and worked as an associate with Cleary, Gottlieb, Steen & Hamilton, New York.

Professor Orbach has been quoted and his research has been featured in numerous media outlets, including *The Atlantic*, *Bloomberg*, *Businessweek*, *CNBC*, *Forbes*, *Fortune*, *Los Angeles Times*, *Mother Jones*, *NPR*, *The New York Times*, *Slate*, *PBS*, *Sports Illustrated*, *Time*, *The Wall Street Journal*, and *The Washington Post*.

Prof. Barak D. Richman

Barak Richman's primary research interests include the economics of contracting, new institutional economics, antitrust, and healthcare policy. His work has been published in the *Columbia Law Review*, the *University of Pennsylvania Law Review*, *Law and Social Inquiry*, the *New England Journal of Medicine*, the *Journal of the American Medical Association*, and *Health Affairs*. In 2006, he co-edited with Clark Havighurst a symposium volume of *Law and Contemporary Problems* entitled "Who Pays? Who Benefits? Distributional Issues in Health Care," and his book *Stateless Commerce* was published by Harvard University Press in 2017.

Richman represented the NFL Coaches Association in an amicus curiae brief in *American Needle v. The Nat'l Football League*, which was argued before the U.S. Supreme Court in January 2010 and again in *Brady v. The Nat'l Football League* in 2011. His recent work challenging illegal practices by Rabbinical Associations was featured in the New York Times. And in 2020, he was a member of the Working Group on Platform Scale at Stanford University's Program on Democracy and the Internet that proposed middleware as a solution to stem the economic and political power of dominant internet platforms.

Richman also is on the Health Sector Management faculty at Duke's Fuqua School of Business and is a Senior Fellow at the Kenan Institute for Ethics. He won Duke Law School's Blueprint Award in 2005 and was named Teacher of the Year in 2010. He has had visiting appointments at Columbia, Harvard, and Stanford.

Richman has an A.B., *magna cum laude*, from Brown University, a J.D., *magna cum laude*, from Harvard Law School, and a PhD from the University of California, Berkeley, where he studied under Nobel Laureate in Economics Oliver Williamson. He served as a law clerk to Judge Bruce M. Selya of the United States Court of Appeals for the First Circuit, and from 1994-1996 he handled international trade legislation as a staff member of the United States Senate Committee on Finance, then chaired by Senator Daniel Patrick Moynihan.

Shana E. Scarlett

Partner, Hagens Berman Sobol Shapiro LLP. Managing Partner of Hagens Berman's Berkeley office. Practice is devoted entirely to representing plaintiffs in complex litigation, and primarily in the areas of antitrust and unfair competition.

Education: Stanford Law School J.D., University of British Columbia B.A.

Further information about Ms. Scarlett's numerous antitrust-related achievements and honors can be found at:

<https://www.hbsslw.com/attorneys/shana-scarlett>

Marc Seltzer

Marc Seltzer has practiced law for more than forty-five years, litigating complex cases in state and federal courts throughout the United States. Before joining Susman Godfrey, he was a principal in the law firm of Corinblit & Seltzer, a Professional Corporation.

Education: UCLA Law School J.D., University of California Berkeley B.A.

Further information about Mr. Seltzer's numerous antitrust-related achievements and honors can be found at:

<https://www.susmangodfrey.com/attorneys/marc-m-seltzer/>

Dena Sharp

Dena Sharp is a partner at Girard Sharp, a law firm headquartered in San Francisco that represents plaintiffs across the United States in class actions, multidistrict litigation, and arbitrations.

Dena is a graduate, *cum laude*, of the University of California College of the Law, San Francisco, where she was a member of the Thurston Society and received the Best Oral Advocate and Witkin awards. She graduated *magna cum laude* from Brown University. During law school, Dena externed for the Honorable Phyllis J. Hamilton of the Northern District of California, and the Honorable John E. Munter of the San Francisco Superior Court.

Further information about Ms. Sharp's numerous antitrust-related achievements and honors can be found at:

<https://www.girardsharp.com/attorneys-dena-sharp>

Prof. Guofu Tan

Guofu Tan's research focuses on business strategy and industrial organization, competition and regulatory policies, auction theory, and microeconomics with applications. His most recent work is concerned with (1) the welfare impact of nonlinear pricing including all-units discounts, market share discounts and other loyalty programs; (2) the welfare impact of mergers and joint-ventures with complements and substitutes; (3) business models of platform firms in multi-sided markets; (4) competition in two-part tariffs between asymmetric firms (and business models of membership subscription); (5) business strategies and regulatory policies in the markets for music streaming, video streaming, video-game live broadcasting and short-video; (6) the economics of technology standard setting and patent royalty.

He is currently a professor of Economics at the University of Southern California. Previously, he held the positions of Associate Professor and Assistant professor of Economics at the University of British Columbia and Associate Professor of Economics at the Hong Kong University of Science and Technology. He has also held visiting professor positions at Tsinghua University (Beijing), Cheung Kong Graduate School of Business (Beijing), and Shanghai University of Finance and Economics.

In addition to his academic positions, he held the T.D. MacDonald Chair in Industrial Economics at the Competition Bureau in Canada from 2000 to 2001. In the areas of auctions, business strategies, antitrust and regulatory policies, he has advised a number of public and private clients.

His research work has been published in such leading scholarly journals as the *American Economic Review*, *Econometrica*, *Review of Economic Studies*, *RAND Journal of Economics*, *Journal of Economic Theory*, *Games and Economic Behavior*,

International Economic Review, International Journal of Industrial Organization,
and Journal of Development Economics, as well as many others.
