

Memorandum 2023-11

Antitrust Law: Status Report

This memorandum provides an update on the staff's work in this study since the January meeting.

The staff is continuing to recruit experts to assist the Commission in the study. The following experts have agreed to participate since the release of Memorandum 2023-7 (on January 12, 2023):

- Prof. Babette E. Boliek, Pepperdine Caruso School of Law
- Prof. Jorge L. Contreras, University of Utah College of Law
- Prof. Richard J. Gilbert, Berkeley Economics
- David W. Kesselman, Kesselman Brantly Stockinger LLP (and Adjunct Professor, Loyola School of Law)
- Prof. John Kwoka, Northeastern University Graduate Programs, Economics
- Samuel R. Miller, Adjunct Professor, UC College of the Law San Francisco
- Prof. Fiona M. Scott Morton, Yale School of Management
- Prof. Roger G. Noll, Stanford University, Economics
- Heather S. Nyong'o, Cleary Gottlieb
- Judith A. Zahid, Zelle LLP

The brief affiliations noted in the list 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.

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

The staff expects that the recruitment of experts will wind down soon. Expert working groups should be formed shortly and will then begin their work. Each group will address one of the following topics:

- Single Firm Conduct
- Mergers and Acquisitions
- Concerted Action
- Consumer Welfare Standard
- Tech Platforms
- Enforcement and Exemptions
- Effect of Concentration in California

Most groups will have four or five members. Every group should include at least one economist. Most will also include at least one current or former practitioner.

Before the March meeting, the staff intends to reach out to large technology companies and other major business groups, to invite their input in the Commission's process. The staff will also invite the participation of labor unions.

Respectfully submitted,

Brian Hebert
Executive Director

**SHORT BIOGRAPHIES OF EXPERT PARTICIPANTS
(ADDED AFTER JANUARY 12, 2023)¹**

Prof. Babette E. Boliek

Professor Babette Boliek joined the Pepperdine faculty in 2009 and conducts research in the fields of antitrust law, telecommunications, privacy law, and sports law. As an expert in the fields of economics and communications law, Professor Boliek was selected and served as the Chief Economist of the Federal Communications Commission from 2018 to 2019. Her research has been published in academic publications and law reviews such as Boston College Law Review, Cornell Law Review, Fordham Law Review, Hastings Law Journal, and the Review of Industrial Organization. Professor Boliek earned her BA with distinction from California State University, Chico, her JD from Columbia University School of Law, and her PhD in Economics from the University of California, Davis. While at Columbia, she was both a Harlan Fiske Stone Scholar and a John M. Olin Fellow for Law and Economics. Her doctoral, and much of her subsequent research, has focused on the theoretical and quantitative analysis of legal issues in the U.S. communications industry. Professor Boliek clerked for the Honorable Michael B. Mukasey of the U.S. District Court for the Southern District of New York and is admitted to practice law in the State of New York.

Prior to joining the faculty, Professor Boliek served as a Senior Fellow at the Information Economy Project at George Mason University School of Law. In this position, she combined her background in law with her education in economics to analyze media, the Internet, and telecommunications issues. Professor Boliek's work at George Mason drew upon, and extended, her prior work as a Fellow for the Center for Communication Law and Policy, a joint research venture of the University of Southern California Gould School of Law and the Annenberg School of Communication. In addition to her scholarly research at Pepperdine, Professor Boliek has been a Visiting Scholar for the American Enterprise Institute, regularly posting blogs for AEI.org on a variety of technology and telecommunications related issues.

Prof. Jorge L. Contreras

Jorge L. Contreras is the James T. Jensen Endowed Professor for Transactional Law and Director of the Program on Intellectual Property and Technology Law. He teaches and researches in the areas of intellectual property, property law, technical standardization, antitrust and science policy. In 2020 he received the University of Utah's Distinguished Research Award and is an elected member of the American Law Institute. He has testified before the U.S. Senate Subcommittee on Intellectual

1. Biographies of participants who joined the project before that date can be found in Memorandum 2023-7.

Property, and was awarded the Rossman Memorial Award by the Patent & Trademark Office Society in 2022.

Professor Contreras has written or edited twelve books and published more than 150 scholarly articles and book chapters. His most recent book, *The Genome Defense: Inside the Epic Legal Battle to Determine Who Owns Your DNA* (NY: Hachette/Algonquin, 2021), has been praised by the *NY Times*, *Wall St. Journal*, *Nature* and numerous other outlets, and was named "Best Patent Law Book of the Year" by the international IPKat blog. His scholarly articles have appeared in leading scientific, legal and policy journals including *Science*, *Nature*, *NYU Law Review*, *Georgetown Law Journal*, *Iowa Law Review* and *Antitrust Law Journal*. He has been quoted by media outlets around the world including the *New York Times*, *Wall Street Journal*, *Economist*, *Bloomberg*, *Washington Post*, *Korea Times* and has been featured on C-SPAN, NPR, PRI and BBC shows and a range of podcasts and online news programs.

Professor Contreras currently serves Co-Chair of the Interdisciplinary Division of the ABA's Section of Science & Technology Law and a member of the Advisory Board of the American Antitrust Institute. He has previously served as Co-Chair of the National Conference of Lawyers and Scientists, a member of the National Academy of Sciences (NAS) Committee on Intellectual Property Management in Standard-Setting Processes, the National Institutes of Health (NIH) Council of Councils, the Advisory Council of NIH's National Center for the Advancement of Translational Sciences (NCATS), the National Advisory Council for Human Genome Research, and the Intellectual Property Rights Policy Committee of the American National Standards Institute (ANSI). In 2021-22 he served as Chair of the Art Law Section of the Association of American Law Schools (AALS).

Professor Contreras has previously taught at American University Washington College of Law and Washington University in St. Louis. Prior to entering academia he was a partner at the international law firm Wilmer Cutler Pickering Hale and Dorr LLP, where he practiced transactional and intellectual property law in Boston, London and Washington DC. He is a *cum laude* graduate of Harvard Law School (JD) and Rice University (BA, BSEE) and clerked for Chief Justice Thomas R. Philips of the Texas Supreme Court.

Prof. Richard J. Gilbert

Richard Gilbert was educated at Stanford University, where he received his PhD in 1976, the same year he joined UC Berkeley as an assistant professor. He became a full professor in 1983. His research is in industrial organization and regulation with an emphasis on competition policy, innovation and intellectual property. He is currently a Distinguished Professor Emeritus of Economics. He served as Chair of Berkeley's Economics Department from 2002-2005. Professor Gilbert previously was Deputy Assistant Attorney General for Economics with the U.S. Justice Department and was Director of the University of California Energy Institute. He was a Fulbright Scholar in 1989 and was a visiting fellow at Churchill College, University of Cambridge in 1979 and 2006.

David W. Kesselman

David W. Kesselman is a Partner of Kesselman Brantly Stockinger LLP. Prior to founding KBS, Mr. Kesselman was a partner in the highly regarded antitrust and litigation boutique, Blecher & Collins, P.C., in Los Angeles. He began his legal career at the international law firm, Jones Day. Mr. Kesselman represents plaintiffs and defendants in complex litigation matters, with a particular expertise in antitrust, unfair competition, and business tort cases. Mr. Kesselman has significant trial and arbitration experience, and has argued cases in both federal and state appellate courts. He also provides antitrust counseling and compliance advice to corporations. He was selected as a Southern California Rising Star every year from 2005 to 2013, and has been named a Southern California Super Lawyer for his expertise in antitrust law from 2015-2023.

For many years, Mr. Kesselman has served as an adjunct professor of Antitrust Law at Loyola Law School in Los Angeles (2009-2013; 2016-present). He has served on the executive committee for the California State Bar's Antitrust and Unfair Competition section (and continues to serve as an Advisor), and he is a past Chair of the Los Angeles County Bar's Antitrust and Unfair Business Practices Section. He is also a contributing author and editor of the *California State Antitrust and Unfair Competition* treatise.

Mr. Kesselman received his J.D. from the University of California, Davis, where he received the U.C. Davis Lasky Antitrust Award. He holds an M.A. from the London School of Economics in International History. He received his B.A. from the University of California, Irvine, where he majored in political science and served as student body president.

Prof. John Kwoka

John Kwoka is the Neal F. Finnegan Distinguished Professor of Economics at Northeastern University. He has just completed his appointment as Chief Economist to Federal Trade Commission Chair Lina M. Khan. Kwoka's book *Mergers, Merger Control, and Remedies* has been widely cited for showing the need for merger reform. His most recent book *Controlling Mergers and Market Power* sets out an agenda for updating and strengthening merger policy. Kwoka has published, lectured and consulted widely in the areas of industrial and competition policy and has published more than 85 research and policy papers on economic issues. He has previously served at the Antitrust Division of the Justice Department, the Federal Communications Commission, and once before at the FTC. Kwoka has also taught at the University of North Carolina at Chapel Hill and George Washington University, and has had visiting positions at Northwestern University and Harvard University. He received his PhD from the University of Pennsylvania.

Samuel R. Miller

Samuel R. Miller retired from the San Francisco office of Sidley Austin LLP in 2015 after 40 years of practice. He is currently an affiliated scholar with the Center for Innovation, UC Law SF, and an Adjunct Faculty member who teaches the "Antitrust & Intellectual Property" seminar.

Miller focused his litigation practice in areas of antitrust, intellectual property, and complex civil litigation. In 1994, he was recruited by the Antitrust Division of the U.S. Department of Justice to serve as lead counsel in the first Section 2 monopolization case brought by the Department of Justice against Microsoft Corporation. He has represented major national and international companies in price-fixing government investigations and private class actions in both Federal and State courts. He has also represented a number of companies in matters relating to the conduct of a dominant firm.

He was involved in the creation of a standard-setting organization involving major semiconductor and consumer electronics companies. He was invited to testify before the Federal Trade Commission in hearings related to the antitrust issues involving standard-setting. He has been recognized in Chambers USA, the Legal 500, Northern California Super Lawyers, the Best Lawyers in America, Who's Who Legal and Global Competition Review 100 for his antitrust work. He has published numerous articles relating to antitrust and other issues.

He has also been invited to lecture by government institutions and law schools in various countries, including China, Thailand, and several Latin American countries.

Miller received his undergraduate degree from Yale University in 1971 and his J.D. from UC Berkeley Law School in 1975. He served as a law clerk for U.S. District Judge William H. Orrick during 1975-1976.

Prof. Roger G. Noll

Roger G. Noll is professor of economics emeritus at Stanford University. Noll also is a Senior Fellow and member of the Advisory Board at the American Antitrust Institute. Noll received a B.S. with honors in mathematics from the California Institute of Technology and a Ph. D. in economics from Harvard University. Prior to joining Stanford, Noll was a Senior Economist at the President's Council of Economic Advisers, a Senior Fellow at the Brookings Institution, and Institute Professor of Social Science and Chair of the Division of Humanities and Social Sciences at the California Institute of Technology. At Stanford, Noll served as Associate Dean for Social Sciences in the School of Humanities and Sciences, Director of the Public Policy Program, and Senior Fellow in the Stanford Institute for Economic Policy Research where he also was Director of the Program in Regulatory Policy and Director of the Stanford Center for International Development.

Noll is the author or co-author of seventeen books and over three hundred articles and reviews. His primary research interests include technology policy; antitrust, regulation and privatization policies in both advanced and developing economies; economic aspects of public law (administrative law, judicial processes, and statutory interpretation); and the economics of sports and entertainment. Among Noll's published books are *Economic Aspects of Television Regulation* (1973), *Government and the Sports Business* (1974), *The Technology Pork Barrel* (1991), *Constitutional Reform in California* (1995), *Sports, Jobs and Taxes* (1997), *Challenges to Research Universities* (1998), and *Economic Reform in India* (2013).

Noll has been a member of the advisory boards of the U.S. Department of Energy, Jet Propulsion Laboratory, National Aeronautics and Space Administration, National Renewable Energy Laboratory, and National Science Foundation. He also

has been a member of the Commission on Behavioral and Social Sciences and the Board on Science, Technology and Economic Policy of the National Research Council, and of the California Council on Science and Technology.

Noll has been awarded a Guggenheim Fellowship, the annual book award of the National Association of Educational Broadcasters, the Rhodes Prize for undergraduate education at Stanford, the Distinguished Service Award of the Public Utilities Research Center, the Alfred E. Kahn Distinguished Career Award from the American Antitrust Institute, the Distinguished Member Award from the Transportation and Public Utilities Group of the American Economic Association, Economist of the Year from Global Competition Review, and the American Antitrust Institute award for Distinguished Achievement by an Economist in Antitrust Litigation.

Heather S. Nyong'o

Heather Nyong'o is a partner at Cleary Gottlieb. She is a seasoned litigator and skilled first-chair trial attorney with over two decades of antitrust and white-collar experience. She regularly represents major multinational corporations and executives in complex civil and criminal investigations and litigation in the United States and abroad. Heather fully serves her clients across every phase of investigations and litigation, including through trial. She has led multiple notable cases for individuals and corporations through trial and in non-public grand jury investigations.

Heather spent nearly a decade working in the Antitrust Division of the U.S. Department of Justice. While at the Division, she won the Attorney General's Award, the DOJ's second-highest honor, and handled some of the agency's most significant investigations and criminal prosecutions in recent years.

She is ranked Band 1 in Antitrust: California and Antitrust: Cartel by *Chambers USA* and, in 2021, was named to the Women in Antitrust list by the *Global Competition Review*. She is an Advisor on the California Lawyer's Antitrust, Unfair Competition, and Privacy Executive Committee; a Fellow at the Litigation Counsel of America – Trial Lawyer Honor Society; the Vice Chair of the Cartel and Criminal Enforcement Committee of the American Bar Association; and a Member of the American Bar Association International Task Force.

Heather received her J.D. from the University of California, Berkeley, School of Law and her undergraduate degree from the University of California, Berkeley.

Prof. Fiona M. Scott Morton

Fiona M. Scott Morton is the Theodore Nierenberg Professor of Economics at the Yale School of Management, where she has been on the faculty since 1999. Her area of academic research is industrial organization, with a focus on empirical studies of competition. The focus of her current research is competition in healthcare markets and the economics of antitrust. From 2011-12, Professor Scott Morton served as the Deputy Assistant Attorney General for Economic Analysis (Chief Economist) at the Antitrust Division of the U.S. Department of Justice, where she helped enforce the nation's antitrust laws. At Yale School of Management, she teaches courses in the area of competitive strategy and antitrust economics. She served as Associate Dean

from 2007-10 and has won the school's teaching award three times. She founded and directs the Thurman Arnold Project at Yale, a vehicle to provide more antitrust programming and policy projects to Yale students. Professor Scott Morton has a BA from Yale and a PhD from MIT, both in Economics. She is a frequent speaker at seminars and conferences across the United States and Europe.

Judith A. Zahid

Judith is Managing Partner of Zelle's Oakland office and co-chair of the Firm's Antitrust group. Judith's practice is focused on assessing complex antitrust claims and pursuing recoveries on behalf of individual corporate clients in many different industries, with a growing expertise in the pharmaceutical and healthcare sectors. She has represented plaintiffs in numerous high-stakes price-fixing and monopolization cases, with recoveries from those cases totaling well over \$2 billion. While Judith is involved in all aspects of the cases she litigates, she places particular emphasis on her work with industry and damages experts.

Judith also has substantial experience helping corporate clients respond to civil investigative demands, government and civil litigation subpoenas, European Commission requests for information, and other third-party discovery obligations, including supporting clients called as non-party witnesses at trial.

Judith is a frequent speaker on several aspects of antitrust recovery and currently sits on Council for the ABA Antitrust Section.
