FEDERAL TRADE COMMISSION

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In the Matter of:)
A WORKSHOP TO DISCUSS THE)
FEDERAL TRADE COMMISSION'S)
REMEDIES PROCESS.)
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Tuesday, June 18, 2002

Room 332
Federal Trade Commission
6th & Pennsylvania Ave., NW
Washington, D.C. 20580

The above-entitled workshop came on for comments, pursuant to notice, at 12:00 p.m.

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

JOSEPH J. SIMONS, Director, Bureau of Competition
DANIEL P. DUCORE, Assistant Director Compliance
RICHARD LIEBESKIND, Assistant Director Mergers II
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and they've been really just incredibly well thought out and very helpful.

In terms of the remedies process, we've actually already gotten some input in writing from folks, Chris is in the room some place, submitted something really quite thoughtful from the folks at FMI, and so we're pretty -- we're also very kind of optimistic about how this process is going to work out.

This is not an exercise, we hope, that will just kind of be a lot of dialogue without any concrete action, so we're really looking forward to making some improvements to the process and the results.

And I guess with that introduction, let me turn it over to the guys who really know what they're doing, at least are doing.

MR. DUCORE: Okay. We're going to start with just a brief overview of some ideas and hopefully sit back and listen, but I'm Dan Ducore, as that indicates.

The real idea of this is to get a discussion going about how we've been approaching merger remedies, what you all think has been working, what you think maybe hasn't been working, ideas you have about things we should be doing and shouldn't be doing and arguments in favor of that.

But I want to start by laying out, what we're going to do is lay out our -- talk about some of the things we're doing specifically.

So, Rick is going to talk about how we decide what should be in the package of assets that's going to be divested, talking about divestiture.

Phil is going to talk about the kinds of questions we ask and analysis we go through when we're considering whether a proposed buyer is a good buyer.

Chris is going to talk about some issues about third party rights and talk some about mergers in the pharmaceuticals industry as sort of a context for that. Then she'll talk some about the hot issue I suppose which is up-front buyers and fix-it-first.

But I want to emphasize that this is really just, you know, we call ourselves five minutes each, so I am spending 30 seconds on a card here, to really just get that out as the broad strokes of the discussion and then hear from you guys.

One of the things we also want to hear about is how we should go about testing the things we're doing to see if they're working, if they're not working and whether we're overdoing it in some areas and if we're not doing enough in other areas, and suggestions on how we should go and try to gauge that.

We have a reporter here who is taking down everything we say, so if you're going to speak, please stand up and identify yourself for both the audience and for the reporter.

But let me just sort of lay out, and I'll speak for myself here, my view of what it is we're doing here, and that is, you know, what's our goal. And I think it's important and it doesn't go without saying that we only get into a consideration of remedies at the point where we decide that it's a problem. So that the first thing we're thinking about is can it be fixed, and if it can't be fixed, then the deal needs to be prevented.

I think it's a mistake to approach merger remedies without having that overall view in mind, because in the back of our mind is always going to be if we can't work out a deal that we think solves the problem we've identified, then we need to think about going into court to stopping the deal. So, that means our bottom line below which we can't go.

What we're doing when we do all that is very simple, I think, and that's that we're trying to reduce and minimize the risk that the remedy won't work. And a lot of things we've been doing over the last five, ten years are done to address our perceived -- our perception that these things are risky and we want to do as much as we can, frankly, to shift that risk or that

proposed buyers of the divested assets, their interests don't comport and don't coincide precisely with consumers' interests as viewed through the FTC's eyes. So, there are three parties to the deal, there is the parties to the merger who have their views and of what they're can look for the divestiture, there's the buyer of the assets who has its views of what it's looking for in the divestiture, and it's us standing in the shoes on behalf of consumers that probably have a somewhat different view of what we're looking for than even the buyers do.

And the third assumption is that buyers are going to make a lot of assumptions about what they're getting that don't necessarily bear out, and that it's therefore our job to challenge the buyer, to question the assumption that they're making and to be careful not to come at a deal that they're going to buy divested assets -- through which they're going to buy divested assets on the assumption that this is just like any other commercial transaction.

So, if the proposed remedies look iffy, we need protection against the risks falling on consumers, and those protections have been things like crown jewel provisions, if the divestiture doesn't happen, hold separates to preserve competition before the divestiture happens, and in cases where we're really not sure that the package is saleable or that anybody is going to come forward to make it work, up-front buyer.

So, our goal, and now I'm going to turn it over to the other folks here, is quick and effective divestitures, preservation of competition during that time, and minimization of the risks on consumers. If we can reduce those risks, I think we can negotiate successful remedies, that's going to pose costs on the parties that they may not have warned in previous arrangements, but I guess the challenge I put out there is that I don't know what the alternative is to that. That should be acceptable to the agency.

So, with that, let me turn it over to Rick.

MR. LIEBESKIND: Thanks, Dan.

On the subject of the asset package, the goal is easy to state. The goal is to put an acquirer in a position where it can compete in the business as effectively or at least as effectively as the -- typically the acquired firm or, you know, one of the two firms that is merging.

So, the goal is easy to state. The important point to remember is that it's not sufficient merely that they don't go out of business in six months or a year or two years but that they will be as much of a competitive constraint on the merged firm as one of the merging firms was on the other.

The practicality of that involves, and to talk about it in the context of a situation where we don't have an up-front buyer, is have we identified the assets that one of the merging firms uses to compete in its business. And that would be whatever those assets happen to be. It could be some combination of tangible assets, factories, stores, plants, equipment, so forth.

Intangible assets, including both intellectual property and people. And not that tangible assets are easy, because there's all sorts of issues come up, but I just wanted to touch for two seconds on both the intellectual property issues and the personnel issues. More to invite discussion than to set forth anything on.

Intellectual property issues, these are among me personally the most vexing we have in finding an asset package, particularly in a non-up-front buyer situation. To know not only what intellectual property the acquirer would need, but in what form in terms of divestitures of intellectual property versus licenses and versus what kinds of -- and the issue comes up what kinds of rights to exclude the merging parties or others from the use of the intellectual property in question are all issues that come up that I would be interested in hearing from people how they think we should be thinking about them.

I think that how we think about them in large part depends on what our goal is, whether our goal is to let somebody compete in the business or whether our goal is to let somebody compete in innovation, or both, and you might get different answers depending on what your theory of competitive harm is.

On the personnel issue, the issue I want to flag, simply just thinking about what I would say about this, is whether legally we can force people to work somewhere else or not, sometimes we can, sometimes we can't. We often have the -- an issue that I would call simply a political issue that the FTC, in my view, my own view, doesn't often want to be seen in the position of forcing people to work in one place versus another. So, we're more likely to be trying to incentivize people to work in one place rather than another. And a lot of issues will come up in that regard, but that's something that also may be the subject of some discussion.

MR. DUCORE: Okay. Phil?

MR. BROYLES: Yeah, as with the asset package, I believe the criteria that we apply is fairly easy to state, but again, the devil is in the details, and essentially what we're looking for, are buyers ready, willing and able to opt -- first of all to acquire the assets in question, that is they can afford them, and secondly to operate the assets in the manner in which they were operated before -- before the merger.

Again, the operative goal being to preserve or restore the competition that existed before the merger. And so obviously when we look at buyers, one of the things that we're going to be looking at are the financial viability, that is do they have the money to
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that we look at when we look at a buyer is the extent to which the -- that buyer itself can pose competitive problems, which -- and clearly if that's a concern, it's a concern that is most easily addressed with a buyer that is not currently competing in the market at issue.

Having said that, there are also situations in there's no real clear-cut pattern of preferring large chains or smaller independent chains.

What we do is look at the assets in question, the market in question, the nature of competition, and then determine what are the criterion in the buyer that we are going to look for that would best restore that competition.

In some instances where the asset packages were particularly large, that necessarily self selected a large buyer to be able to afford and to operate, but again, we have divested to large chains, we have divested to independent operators, we have divested to, in fact, wholesalers buying these stores in particular markets.

So, our overriding goal is not to find a particular buyer, but to find the buyer that based on the facts of the situation that is before us is adequate to preserve and restore the competition that we see entering into the merger.

MR. DUCORE: Okay, Chris, third party rights, pharmaceuticals.

MS. PEREZ: Well, I was going to start off sort of giving an overview of how we've looked at the pharmaceutical mergers in the past and talk a little bit about third party rights as they apply to that. I think overall what I am going to say not only has to do with pharmaceuticals, deals with mergers as a whole, but as I am going to talk about them now, it's in relation to pharmaceuticals.

Because pharmaceutical mergers tend to be complex processes, they're long, they tend to require or almost always require buyers up front for four reasons. One, they're not divestitures of ongoing businesses, the acquirer can't just start producing the divested product the next day. So, that's the main reason.

tend to need to be tailored specifically to a specific buyer. There may be multiple buyers that would be acceptable to the Commission, but let's say buyer A has expertise in the sales and marketing area of that product, whereas buyer B has expertise or experience in the manufacturing of the related products. And in that case, you know, the divestiture package would be tailored completely differently if sold to buyer A than if sold to buyer B.

The main issue that seems to come up in pharmaceutical cases is whether the assets that need to be divested. The agency default is that every asset, including intellectual property, that is used in the research, development, production, marketing or sale of a product needs to be divested.

Now, what the parties tend to think, at least in my experience, is that the assets that should be divested are those assets that are dedicated or used solely for the manufacture and sale of that product. This really becomes a tension when the divesting party has multiple products that use the same assets.

For example, let's say they have five cancer drugs that they manufacture and only one of them is an overlap product with the anticompetitive or that we view is the anticompetitive effects. The parties are reluctant to divest all of the assets that manufacture the overlap product because they're used in four other drugs, and why should they have to give up all those assets when they're four drugs that they need to make, that are valuable to the marketplace and, you know, just give away those assets that are related to the overlap product.

That makes perfect sense, I understand why they're thinking about that, but what they have to remember is that what we are trying to accomplish is to make the acquirer that's viable and competitive, and clearly an acquirer won't be viable if they don't have all of the necessary assets to make or market the product. Plus, we don't, as others have said, we're not just looking at viability. They have to be competitive, and they have to be competitive in a way that's similarly situated to the divesting party. And so we would look and see what assets are need the make sure that everyone understands what our default is, and that I believe it is the burden of the parties to explain to us why we should move off that default.

And the other issue that seems to come up is competitiveness doesn't just mean being out into the marketplace and selling the product. It means -- it includes cost competitiveness. So that we will look at the divesting party and see what -- how that party runs its business. And we will make sure that the acquirer is in a similarly situated business.

With my example of five cancer drugs, if the divesting party had five cancer drugs, maybe it spread its cost over the five drugs and the acquirer is now just going to have one. We need to see how that will affect the acquirer in terms of costing, procedure, research and development, because they're not going to be similarly situated if their cost structure is twice as high as the divesting party. I- it wotr1rwosn'tbhe abple to ofver the produc hat thesamhe pwic wotr1r maybe wosn'tbhedgoinginnovation hat thesamhe issut, uat thsce aure thesorts of issuso that we look at and thsceaure the sorts ofquvestouns we willasks.

So, Ithink that completely bringing - regarding the harmlacuticaleaurae shouldbhe pe paeed todiscusse thsef issusowhdentalkoingab outa rmedy.e

Third party consents, which is why I started out with pharmaceuticals, are almost always present in pharmaceutical mergers. There seems to be a lot of joint marketing arrangements, joint development arrangements, co-promotion arrangements, anything you can think of. Co-owned IP. Sometimes these can be resolved easily by just selling back or reverting back the rights to a non-party to the merger.

Other times, they can't just simply be given back to the non-party of the merger, there has to be some negotiation that the acquirer will get whatever rights the divested party has. And that's where tension comes in, I think, because what I've heard from the outside bar is, oh, they're holding up this entire -- this third party company asset is holding up this entire deal so that they can squeeze as much money out of us as possible to get this third party consent that will go to the acquirer.

I want to hear what your comments are on how to make sure that the Commission gets the goal that it wants, which is a viable competitive acquirer without having the parties be held up beyond what is necessary, of course everyone knows there's going to be some part of the system where the consent needs to be done, but so that the consent is gotten at a reasonable rate, at a reasonable time period, and we still get our acquirer who needs everything that they need. I think that's an issue that needs to be discussed.

I frankly have tried various outcomes, I've tried working and being the mediator, I've tried staying away, and in no case has anyone come out happy with any of this, least of all me, who is in the middle.

So, I frankly want to just throw this out to everyone and hopefully you can give me ideas on how we can do this better in the future.

But my last overall point on this, and I think this definitely applies to everyone, if outside parties bring us a strong acquirer, who brings something to the table, this is clearly going to be something that gets through the agency quicker, you're going to have less headaches, there's going to be probably less assets that have to go along with it. You bring a weak acquirer to the table, who needs a lot of property, who needs a lot of explaining, this is going to be a lengthy time table. You need to put that into -- you can't expect the Commission to prop up a weak buyer and have it go through the Commission in two weeks. That's just not going to happen.

MR. BROYLES: Just to conclude on up-front buyers, this has obviously been one of the hottest issues that we've dealt with in recent years, and I kind of cringe when I hear people refer to this as an up-front buyer policy. I don't see it as a policy, what I see it instead is a tool that enables us to achieve the overarching policy of making sure that the Commission gets the benefit of the deal that is struck.

Our experiences have taught us that in certain industries and in certain circumstances, a post-ordered divestiture is not likely to result in the Commission ered

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tnumbr pf tpracituon ers IOneof the dmst-cerlebratd runs, what is actually being divested in no way resembles what existed before the merger. So, if there's anything close to a bottom line on up-front buyers, it's that you're going to have a high burden to convince us in the supermarket industry that an up-front buyer is not necessary. Not insurmountable, but often high because of our past experience.

Our experience has also taught us that when the idea and when the parties are trying to divest something less than a complete pre-existing business unit, that there are going to be questions that we're going to have to answer that could suggest that an up-front buyer is necessary, not necessarily absolutely necessary, but it's going to raise questions that we're going to have to answer and resolve, and in a lot of instances, an up-front buyer helps us to answer those questions.

The first one that we have to answer is what we have seen is that when the people try to cobble together assets to sort of recreate in their idea, in their mind the competition that existed, I don't know if there is a tendency or there is an intent, but what we have seen is that typically what happens is what is divested falls far short of what existed before the mergers.

If the parties try to cherry pick the assets for themselves and then divest what's left, that, of course, doesn't meet our goal of making sure that the party itself is in the -- the acquiring party is in the position of competing as effectively because they may be stuck with higher costs, they may be stuck with a less attractive bundle of assets, or a variety of things that hamper their ability. We're going to need the assistance of the perspective purchasers to help us figure out whether or not what they're actually buying is going to enable them to compete.

And we go into that recognizing two things. Number one, that some buyers have incentive to overreach and try to get us to help them get more than they absolutely need in order to compete, and on the other hand, some buyers come into this with an idea that they don't -- as I think was mentioned before, their interest is not necessarily in recreating competition, but in striking a deal that makes business sense for them.

So, that puts us in a position of trying to figure out how to balance between those assets, and I think that an up-front buyer that works -- that we get a chance to work our way through that process and realize what the final asset package looks like helps us do that.

One of the things that we're also concerned about is when you start cutting away assets, the question is are you reducing at that point the pool of available buyers. If you're divesting an existing ongoing business unit, then under most circumstances, I think you're going to have a wider pool of buyers, even though the extent that we could accept financial buyers where they are simply buying something that's an ongoing operation with management that's remaining in place and all the assets that's needed. When you start cutting away, then we have got to start figuring out what the -- what the pool of buyers are that have the things that have been cut away to make sure that what we have in the end is a completely competitively viable entity. And so that's one of the things that we're going to have to look at.

Now, one of the things that -- one alternative that can help us or to get us more comfortable if there is still some question is a crown jewel provision. Crown jewel provisions are basically provisions that include something that is clearly divestable, something that will clearly operate and for which there are clearly identified pool of buyers such that if what you want to divest we actually can't divest, there is something that we will be able to sell that will get the relief that we've negotiated for. That's an alternative to doing an up-front buyer, but again, the objective is to make sure that when we negotiate for a remedy that we think is going to restore competition, that the Commission actually gets that remedy.

One of the things that Chris mentioned, which she has also been dealing with quite a bit lately, is when there are third party priority rights, such that in instances where an asset is joint owners, the other owner might have a right of first refusal or the right to match any offer for the assets. Where that joint owner is not an approvable buyer, what you're going to have to do for us is to demonstrate that that buyer is not going to stand in the way of the relief that the Commission has negotiated. It uses third party rights to frustrate the Commission's efforts to get relief.

Obviously the best thing to do is to bring us a buyer that has third party rights exhausted. Another way is to get a release from the third parties. Again it's an issue that we've been dealing with quite a lot lately, and if there are suggestions or alternatives that you have for us to deal with this short of the two alternatives that I just mentioned, I would certainly love to hear them.

Finally, the other point that I would like to make is that frequently, and we've run into this on occasion lately, is that in a situation where the parties have a time table for the merger in their mind, and there are issues which suggest that an up-front buyer is at least going to be something that we're going to think about, we have to be persuaded that we don't need, you really can't afford to spend all of your time negotiating with us on the merits of trying to convince the world, or at least I hear there's a general perception in the world, that DOJ is accommodating of that view, and the FTC generally is not. And there's probably some truth to that. It's also true that we have from time to time when people have brought us genuine fix-it-firsts, gone along with it and let people fix their deals without asking them or requiring them or to submit to a Commission order, or suing them if they don't do it.

It requires a clean fix without continuing entanglements, and without things that are going to make us think that there's reasons to think that there's ongoing obligations of the merging parties that need to be enforced that won't be enforced if there's not a Commission order, but it has happened, I've done a couple of them myself in the last couple of years, and I think there's a few others lying around, although generally speaking, it's not the way things go.

Fix-it-ourself is a term I just made up to characterize the Libby case that we had and Franklin Electric case at Justice that is what's normally characterized as litigating a fix. That is I have a remedy in mind and the agency doesn't like it and so we're going to make them sue us and we'll tell the judge that our remedy is good enough and they should make the agency take our remedy.

This is leaving aside whether it's the right way to make friends and influence people, it is, I think, going to be problematic, there's a lot of debating after the Libby opinion came down about whether the government won the battle and lost the war or lost the battle and won the war or vice versa, I don't remember which way is which, and which was the battle and which was the war.

I think I read that decision, although it wasn't necessarily everything we argued for, as establishing the basic proposition along the lines of what everybody said here, which is that if the proposed fix, as in Franklin Electric, I think there's consistently some loose language in Franklin Electric that's been quoted against the government. If the fix merely keeps somebody else in business, but on a basis that is going to raise serious issues about their viability and competitiveness going forward and whether the constraints on the merging party will be lessened as a result of this purported fix, I think what we learned from Judge Walton in the Libby case is that at least one district judge, I think it's also true of the district judge in the Franklin Electric case that DOJ had, the district courts will be sensitive to those issues and will not allow fix-it-ourselves where the government raises a genuine issue about viability and competitiveness, even though the competitor has been preserved or the number of competitors hasn't changed.

So, I think that I, at least, would not recommend that merging parties assume that they're going to win a lot of litigating the fix cases and that when the agency is concerned that a -- when the agency rejects a proposed fix, because he thinks it's not going to create a viable competitor, it's going to reserve competition, we're at least going to have a chance of persuading a court of that, and that will be the upshot of it.

So, that's my views on that, but other people undoubtedly have other views.

MR. SIMONS: So, can we take comments from the audience?

MR. DUCORE: We apologize for going long. We went too long, but --

MR. SIMONS: Yes, that's what I wrote down, too long.

MR. DUCORE: No questions? I have questions.

MR. SIMONS: I know Marc has a question.

MR. SCHILDKRAce?

concerned that you are divesting their public of the rights to make comments that have an impact, and what I mean by that is in the buyer up-front situation, you certainly require that there be the ability to unwind if the Commission doesn't think the remedy is good enough, but what about the situation where the Commission decides no remedy is necessary? Then the assets have already been divested, in that situation, and there's no way to sort of unwind it at that point, the Commission couldn't even order it, the Commission doesn't have an order.

An example that is -- that's reasonable, and the only reason it didn't come out this way is because it was slightly before the buyer up-front policy came into vogue, was a case which I think Dan is familiar with, which is Nestle/Alpo, where there was a divestiture required of a factory, and just a factory, not a business.

I think under present policies, a buyer up-front would have been required under those circumstances. The Commission after getting 10,000 letters from the local community, among others, decided that there was, you know, that there -- relooked at it and decided that there was actually nothing wrong with the merger to begin with.

But under the buyer up-front policy, those assets would have already been divested, those 10,000 people would have been divested of their rights to explain this to the Commission.

MR. LIEBESKIND: Well, one approach, of course, would be to say that the Commission -- that you can't close the deal until the order is made final, but I don't think that's what you're looking for.

MR. SCHILDKRAUT: No.

MR. LIEBESKIND: One of the things that we have done, from time to time, and then this goes -- this goes into what we actually mean by an up-front buyer, and it's going to depend on the industry in question and the situation. There's a loft of talk about supermarkets where we actually want to get the assets in the hands of the buyer quickly because of the erosion of good will. There have been other cases, but what we mean by an up-front buyer is an identified buyer that can be put out for public comment, identified before the merger closes, before the Commission accepts the agreement from public comment, take comment on the buyer, transaction -- divestiture transaction to close after the public comment period, after the Commission makes the order final.

I know of at least one case where the Commission did that, was sufficiently concerned about the quality of the buyer going into the process, that at the end of the day, it made the order final, rejected the buyer and went out and found another buyer. The Commission could have also said, you know, you have to find a way to eliminate it and keep the asset, if it wanted to in that case.

So, in a situation where the buyer is questionable and there are ways to preserve the viability of the asset package in the meanwhile, I mean, these issues can be dealt with on a case-by-case basis, I think.

MR. DUCORE: You're talking about how do you reserve your right to argue the merits of the case or hear from the public that suggests that on the merits there isn't a case, and then release the parties from the remedy. I guess -- I think I saw one where there was actually a contingency in the divestiture contract that it would basically be rescinded if the Commission didn't make the order final.

You could do that, I mean, I guess one question

MR. SCHILDKRAUT: But it's not the seller and the buyer who care about it at this point, it's the public. In the Nestle/Alpo matter, the seller said fine, I'll get rid of the factory, just where do I sign. It was the public who cared about it and said they would never under those circumstances try to contract for an unwind if they didn't have to, they just wanted to get the deal done. So, it's those other 10,000 people who you need to think about and there's nobody else to think about them.

MR. BROYLES: Do you have a suggestion?

MR. SCHILDKRAUT: Yeah, I mean, I would think -- yeah, my suggestion is that as a general matter, there -- the -- there should not be consummation until after the public comment period. You can certainly identify the buyer up-front, but the consummation should wait until after the public comment period.

MR. LIEBESKIND: And there should be a hold separate in the meanwhile if we're concerned about the merging parties' ability to acquire the assets?

MR. SCHILDKRAUT: I mean, you have to consider all of the different scenarios.

MS. PEREZ: No consummation of the divestiture or --

MR. LIEBESKIND: Oh, no, he wants to consummate the merger.

MR. SCHILDKRAUT: All of my clients would fire me if I proposed that.

MR. LIEBESKIND: No, I propose the idea that they hold off on the merger for 30 days and he didn't really want to go along with that.

MR. BROYLES: Marc, I'm not sure, you talked about a situation where the Commission doesn't enter an order, just rejects the unwind premise of the buyer. How would a provision that says you can't consummate as opposed to one that says that you have to rescind or in the scenario that you just outlined?

MR. SCHILDKRAUT: I mean, I assume what we're talking about is a situation that basically says, you know, in the -- in the order, in a hold separate agreement or something like that, you shall hold these assets separate, but you should be allowed to divest them until the divestiture is approved by the Commission until after the public comment period.

MR. LIEBESKIND: I was going to say we have done that at least once.

MR. SCHILDKRAUT: But as a matter of policy, you seem to generally go in the other direction to get these very quick divestitures.

MR. BROYLES: So, if I understand what you're saying, you're talking about not having an up-front buyer as we've defined it with a signed deal.

MR. LIEBESKIND: No, it's a signed deal, it's just that it wasn't closed.

MR. SCHILDKRAUT: You could have it one of two ways, you could just have -- and I think it would be sufficient just to have an identified buyer who basically says, yeah, we haven't crossed all Ts or dotted all Is, but I've done my due diligence, I'm ready to buy, and I don't see any problem entering into a contract. And I think a good example of that, Phil, that you're aware of, is in Exxon/Mobil, with the northeast divestiture, where it was an identified buyer, in essence, but there really was no up-front contract.

So, I think under those kinds of circumstances, it leaves a little more flexibility for everybody, including giving the public the right to comment.

MR. LIEBESKIND: Well, what happens? There's a risk on the Commission, there's a risk on the Commission, of course, that it will conclude not that the up-front buyer is the wrong buyer or that the relief is excessive or that the relief is inadequate as a result of the public comment period. And so how do you cope with that? I guess to start with, we have to live with that.

MR. SCHILDKRAUT: That's true of an up-front buyer, you have that problem, so I'm not creating any new problems.

MR. DUCORE: I don't want to cut you off, but let's try to go back. Anything else, Chris?

MR. MacAVOY: For the benefit of the reporter, I'm Chris MacAvoy. I don't subscribe to everything my colleague just said, by the way, we'll talk about this later. We -- from the Howrey firm -- we filed a comment on behalf of Food Marketing Institute which some of you, I think, have.

I wanted to respond and comment, make an observation about just a couple of things. Phil in particular said on the issue of divestitures to in the retail area -- to small chains and independents, and Phil said here today, this is completely consistent with what the Commission has said in the past, that there is no policy and certainly not an intentional bias at the agency against divestitures to independents and small chains.

Nevertheless, you will see in our comment quite a discussion about the perception that I think is widely held and I know, you know, you here at the agency have that there's this perception of a -- that the deck is share and they say, gee, I'm discriminated against in this process.

So, I -- you know, by way of -- that's my observation, by way of recommendation, I guess what I'm proposing is frankly just more openness and working with the parties in a more constructive way maybe than is the case historically in accomplishing divestitures to some of these small buyers. It's out there stated in the consent order of frequeaF12 uagnsome

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MR. MacAVOY: I have to say I have seen both. Certainly I have been involved in situations where the merging parties had, you know, rapping on the door, you know, one or more smaller buyers, but then on the other hand, had some large buyers out-of-market and knew that going -- coming in with the smaller buyers or somebody who was maybe in-market with a small market share, that that was just going to be a much longer and tougher proposition. They just didn't intuit that, I mean they were told that by the staff, gosh, we can't say no, but we can tell you it's going to be hard, it's going to be long, it's going to have questions across the street, and that just makes people, particularly when you're getting towards the end of the, you know, you're looking at a drop dead date.

MS. PEREZ: I have a question, are you talking in general about small buyers over all of the mergers or specifically about the supermarket industry?

MR. MacAVOY: My comments and experience are much more retail specific, although I have heard that this is an issue in other areas, but my specific experience is much more retailer specific.

MS. PEREZ: Well, I can tell you in the couple of my cases where I've been the lead attorney and looked at divestiture, there were a couple of divestitures that ended up going to much smaller companies than I had initially anticipated in the beginning, and what seemed to work for them in convincing me that they were good viable divestiture candidates is they had the business people come in, they had the business plan drawn up, they understood that they were smaller and maybe not the ideal candidate and they had already prepared for me the reasons why they were still viable, what advantages they would bring over the larger candidates, and I have to say that they really swayed me.

And I think in the couple of divestitures where this has happened, it's really worked out where the small divestiture candidate turned out to be an excellent candidate, but that's how -- I mean, they came in prepared, knew what their disadvantages were and talked me over the disadvantages and showed me what their advantages were, and that seemed to work, at least for me.

MR. MacAVOY: Anybody else have observations on that area or anything else, I'll concede the floor.

MR. DUCORE: There's more than two questions, I know.

MS. PEREZ: Can I ask for somebody to comment on these third party consents? Really, I honestly want to know what you think I can do to help this process along, make it easier and yet still get us a viable competitor. Oh, yeah. Go ahead, go ahead.

MR. LIEBESKIND: George has been waiting for this question for two years now.

MR. CAREY: Well, I mean, it's the right question, and it does raise the question of what the appropriate policy is in a situation where you've got a third party who exercises veto power, because in that context, that party is in a position to extract the full value of the deal minus $1 as the cost of admission if they're the only potential buyer.

I think the FTC could do a number of things. I think first what the FTC can do is realize what the incentives are and bring the same degree of skepticism to the claims of that third party that they bring to the parties' claims. Not advocate their responsibility to do their own thorough review of exactly what the Commission thinks the party needs in order to be viable, rather than relying as a default again on what the third party says they need.

I think it's fine to say that the third party in a competitive market would be a good proxy and if you hear from a lot of third parties that they need the

at no minimum price with a trustee at the back end. That, at least, puts a floor on the blackmail that can be exercised, protects the Commission, and doesn't hold up the entire transaction.

MS. PEREZ: Is there something in the middle or some other mechanism that can be used in terms -- I can't even think of what it would be, but some sort of -- I understand that sometimes third parties try to hold up the parties in their deal, but trying to do a -- when there's a limited amount of buyers and not doing a buyer up-front, not sure what the assets are needed, maybe you can get like 99 percent of the way there, except for this third party consent, and then just do what you say. Is there something short of that? Is there some alternative mechanism for going around this? Do you have any suggestions?

MR. CAREY: I really don't. I mean, I think that if there's a legal principle that's been either adjudicated or statutory or some other principle that basically says an FTC order, whether voluntarily entered into or through adjudication trumps the private contractual provision, I don't see a middle way out.

I think that the Commission has to have more confidence in its own ability to make the evaluation of what the right bundle is, and then enter into the order and let the parties close and then force a divestiture. Or if that's too much of a risk, appoint a trustee immediately to do the divestiture, to take over that negotiation, understanding that, again, there's a limit to what can be extracted through the give and take, because the deal is not being held up as a --

MS. PEREZ: Why is it different? Why do the incentives change on a third party when a divestiture trustee is in place? Why wouldn't they stick to their guns just as much?

MR. CAREY: Because at that point they can't hold up. Let's take an example, a $30 million deal for $100 million product. There's a limit as to how much they can extract, and that limit makes them more reasonable.

MR. SIMONS: The one thing that could happen, though, is if you go to a trustee, the order will generally say you must divest at any price, even a negative price.

MR. CAREY: Right.

MR. SIMONS: So if there's only one buyer, they'll say we'll pay a dollar, but if it's a $100 million asset, they pay a dollar, they only get $99 million out of it. Whereas you can't hold up the larger transaction.

MR. CAREY: That's real problem. It's a $99 million problem, but there have been examples where the third party has tried to extract $500 million of rents by virtue of knowing that they can hold up the transaction.

MR. LIEBESKIND: Well, there have also been examples where we haven't done that, and not with any third parties who have put themselves in that position, and so there's examples both ways in my experience -- in my own experience, and then more broadly in the Commission's experience, and I think one of the things that separates the examples is something you alluded to, George, which is the extent to which we are or are not comfortable defining the asset package ourselves.

The more -- the more comfortable we are defining the asset package, the more willing -- and the more that

MS. PEREZ: And also what does one do with sort of the Phil example of the right of first refusal when they are clearly not an acceptable buyer, and they're holding things up?

MR. CAREY: Again, if all they're going to get is a payment for their right of first refusal, because the entire transaction is not in abeyance while that's being worked out, I think it becomes a more manageable risk. If they have the ability to hold up the whole transaction, it's where they have huge leverage and they can extract rents, basically.

But just one other point, on a related but slightly different point, I've also seen situations where either the compliant staff or the litigating staff at the Commission has actually gotten in the fray and negotiated on behalf of buyers for things that do not immediately look to be important competitive aspects of the divestiture package like price, fixed price, and I think that -- I mean I think everybody ought to acknowledge that that is an inappropriate role for any Commission personnel to undertake.

MR. DUCORE: You're talking about negotiating the price or are you talking about coming back to the parties with sort of the staff view that what the buyer -- proposed buyer says they think they need, the staff agrees that they need and if something else is makes a client angrier than when they start to negotiate with a buyer up-front and find that the FTC has already been talking to that buyer and sort of suggesting that you might want to ask for this, that and the other thing, and sometimes what the FTC seems to be asking for is really beyond the core assets and business that would need to be divested to fix the competitive problem.

It seems like they want to build in a buffer zone just to make sure, and I'm actually wondering, and that is sort of a downside, an additional downside, I think, from the client's perspective to going to buyer up-front route. So, I'm actually rather than answering, I'm throwing a question back, to what extent does the staff think it's appropriate and useful and perhaps even necessary to do that kind of probing and due diligence with the buyer up-front?

MR. SIMONS: Well, there's I think a balancing concern there, and sometimes what happens is we will tell the parties here's our concern, here's what we think you need to do in order to fix this problem, and wound up telling them, you know, it's this asset, this asset, and then they then go to the buyers and they say, here's what we're dIrder,F,uyeI3n.y say,

asset, and then they then go to he bucy ige of :ffffaadnsw

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So, we have seen situations in which the buyer has been told, well, here's what I can get, I can't get any more than that. So, we have to do some kind of diligence to make sure that kind of a thing hasn't happened.

MR. DUCORE: Let me -- I would like to ask you introduce yourself, identify yourself for the record.

MARK KOVNER: Mark Kovner with Kirkland & Ellis.

MR. DUCORE: I mean, I think you hit on the -- the underlying tension and probably the reason that there is a -- that we use up-front buyers, and Ellisltheu,k0bf1 we're trying to do is ask if you -- if this is all you get, how are you going to make this work, you know, what else do you need to bring to the deal, and if you don't have it internally, shouldn't you be getting it as part of the package as well.

I know that can sound like we're out there seeding the buyers with ideas for how to ask for more, but I guess our question is how do you -- how do you get around that. If you're going to do that exercise and do that due diligence on our part, how do we avoid that?

MR. KOVNER: Well, it would seem to me that obviously you need to test the viability of the buyer and the resources and the means and the ability to take the business and run with it. So, that much due diligence seems to be perfectly appropriate.

In terms of whether the package is appropriate, it seems to me that you can do that principally by talking to the main buyer, the main transaction, because you know at this point presumably generally what assets would need to be part of that package, and if the -- buyer with a capital B is playing tricks on you and trying to negotiate some smaller package, you have the ability, because -- ultimately to test that, because ultimately you have to approve it.

MR. LIEBESKIND: You would k7qutwavoidtal2e caphat?

at how often we don't know that, but we don't know it for fairly obvious reasons, because up until the point where we've -- where we've made a decision or we at negotiations between the buyer with the big B and the buyer of as the assets, but we also, we have concerns about the buyer as well. One of the things, we have two potential exchanges with the buyer that I've mentioned before is that the buyer may be over-reaching in trying to negotiate for something that we don't care about, and then on the other hand it might be under-reaching in just trying to make a deal.

At some point in that process, we do have to talk to the buyer, we do have to talk to the buyer about the assets that it's negotiating for, what it's asking for, and it seems to me that while we don't want to do it too early, we don't want to do it too late, also, because that may also delay -- also would mean you would be getting your deal done if we go back and we're in a disagreement about what the buyer is getting.

So, there is a tension there as to when we step in and do that so we can get to the bottom line quicker, but also not too early so that we're interfering with the negotiation process.

MR. DUCORE: Let me pose a question. If you had a choice between spending the time to negotiate the buyer up-front, which is going to delay your deal, but will give you the certainty that, you know, this is the remedy you're going to face, it gives us the benefit, I guess, of getting a remedy in place sooner, if you have that as one choice.

And the other choice was, you know, you get six months to divest whatever this package is you've negotiated with the staff, but there is this crown jewel out there that's looming, which is I think fairly readily seen to be a self-contained business and is much larger than that package. And you knew that come, you know, six months plus a day the Commission is going to revoke its rights to trustee and give the trustee that crown jewel to divest, do your clients out there have a sense or do you have a sense in which you can recommend it?

MR. KOVNER: I would say it would depend on the factors. I think if the client felt fairly confident, very confident in its ability to sell the assets within the business within six months, they might want that extra time and be able to consummate the deal quickly. On the other hand, certainly I know from experience that the threat of a crown jewel provision being put into effect is a huge club, and that is -- that is certainly an impetus for them to want the buyer up-front, and the buyer up-front also just will save time in process as well, I recognize that.

When you've got a buyer up-front, you can test everything right there, ask them whether the assets are sufficient. When you don't have the buyer up-front, sometimes -- in a negotiation of a consent decree and also conceivably the hold separate just takes a lot more time. So, sometimes not having a buyer up-front means a longer process. I think just that.

MR. SIMONS: How about experiences with the DOJ, are they doing stuff that, you know, is much better than we're doing and we need to, you know, copy them or vice versa? Anything like that?

(No response.)

MR. LIEBESKIND: I guess not.

MR. SIMONS: There are no DOJ people here, other than a former DOJ person who is sitting in the back. John?

MR. NANNES: I don't know what's transpired recently in the past year or so, but certainly if you go back over time and track what other agencies do, it's quite evident I think that the Federal Trade Commission is much, much more thorough when it comes to divestiture process than currently Justice has been.

Now, I don't know whether that means that Justice is too relaxed about it and that the FTC is too much -- is too concerned about it, but I think it may be fair to say that one of the greatest disparities between the two agencies today is not so much what they do substantively in terms of interpreting Section 7, but it really is quite the diversity that they bring towards the divestiture process.

I know when I was at the department, there were some instances where people would come in with proposed fix-it-firsts and that we would look at that and if the private parties had negotiated the transaction and they were credible parties, so you had good cause to believe that they were taking into account the proper circumstances, the department would let the proceedings transact and not even bother getting a consent decree. And I think a couple of times that backfired because when deals turned out to not go as envisioned, there were private contractual remedies but no public interest remedy that the department had to enforce.

On the other hand, one of the incentives you had if you do allow the party to fix it first, and I think -- if you think fix-it-first is better than a contracted post consummation divestiture and a potential trustee, then I think the agencies have some obligation to make the fix-it-first mechanism easier for the parties. And by that I mean that if the parties do negotiate fix-it-first and come up with an incredibly good asset package and a very substantial buyer, that the Commission or the Antitrust Division, depending on which agency, might be prepared, I think with some cause, to assume that some of the issues that the agency might otherwise have to work through, that they can rely on the parties to work through given their credibility and their reference to a fix it first that's fully vetted.

So that you do want to encourage people, so I think the best public policy is to have fix-it-first and a credible buyer and know what you're getting, although subjected to post-consummation divestiture rights.

MR. SIMONS: Were there particular types of transactions that the division would consider, you know, most appropriate for fix-it0firsts and certain types that they would consider least appropriate?

MR. NANNES: I don't know that we had judgments that were industry-specific, I think we looked at a number of factors and with Ann and others that were identified here today. Some of the things -- some of the criteria that come out of the Pitofsky speech, for example, if it's a freestanding incorporated entity and you're not moving any assets out, then you have some cause to believe that if they were, if you're coming out of a particular entity, certain assets were worse than trying to take assets from the acquiring entity and

completely complete, it doesn't necessarily include the information systems, it doesn't -- it might not include this, might not include that, corporations aren't really organized that way quite often.

So, it's more of a -- it's more of a more or less complete business versus a less or more complete business. The business that was divested with an up-front buyer in the Bayer case is -- was one that was very much not a stand-alone business. They did not divest manufacturing, they did not divest processes and things, basically that was -- had already -- it was a business that had already existed as a toll production business for Aventis, that is Bayer was already before the merger making the stuff that Aventis was selling, and so what we did was we said, well, if you get somebody else who wants to step into Aventis' shoes, it's a little -- we don't know how likely it is that you are going to find somebody like that, so you better find them now, whereas the other -- the other divestitures were more like, I don't know if I want to call them stand-alone businesses, but were more like stand-alone businesses than the -- whatever it was business, Tribufos business. But comment period is still open on that, so --

MR. DUCORE: Well, let me throw another question out. We've been criticized in the past, I think, fairly, for not getting sort of the remedies people involved with the investigative staff until fairly late in the game, which then slows down the negotiation process, and over the last number of years, we've been making conscious efforts to not -- to not leave that towards the end.

Is there a perception that that is improving or is it not improving and it's still a major problem? Is it still an annoyance or what do people think? I guess we're doing just fine.

MR. LIEBESKIND: There's a perception that the remedies people are getting involved too early.

MR. SIMONS: Well, sometimes it's at all.

MR. DUCORE: Well, if we were going to -- I mean, I don't want to cut anybody off, but I just want to hold hands up, but if we were going to go back and look more at -- how should we be figuring out whether we're engaging in overkill here? I mean, you know, do we get criticized for pushing for up-front buyers in too many cases? How should we test that? We get critiqued for wanting hold separates and maybe more often than we should, and again, you know, we don't know how to assess whether we are or aren't other than, you know, arguing on a case-by-case basis, but does anybody have any ideas about how we could go back and look at what we've done to assess whether, you know, we didn't really need it here or, you know, we should have done it? It's probably easier to find out how we should have done it in failures, but how do you gauge a success and decide whether we were overdoing it in our negotiation?

MR. SIMONS: We'll take written comments, too.

MR. DUCORE: Anonymous, too.

MR. SIMONS: Whether you email it anonymously or send it over, we'll accept that, also.

MS. HIGGINS: Well, let me weigh in a little bit on this, this is Claudia Higgins with Kay Scholer.

I am now representing a third party in one of your transactions who purchased assets, and it's clear to me that the agency did a very careful job of trying to make sure that the parties had cobbled together enough assets for this divestiture, but I can tell you that when the cobbling together has occurred, it does create little niches that are problems. And I mean, we have to some degree worked out some of those problems, and but also had to come back to you to say we need you to apply some pressure here on the parties to this transaction.

So, the care with which you put together the order is something that I would not want you to relax, given the experience I've just had.

Now, I may at some point have other clients who will kill me for these words, but I think that it is very important for the agency to continue to be asked about these things. There are a couple of little words in the order that I am speaking of that are problematic. Now, it turns out that before I got involved in this, my client was saying, sure, those words are no problem, because they were in hand with the parties to the transaction. And that's exactly the problem we've identified, and I think that issuance is appropriately placed.

MR. DUCORE: Well, I mean, we don't have to leave now, people can leave if they want. I don't want to cut off discussion, but -- before we close, Jim, before you speak, I mean, I want to say that there is this email address, remedies@ftc.gov, which I am not aware of anybody having used yet, but seriously, you know, we -- I mean, one of the things -- one of the reasons we're having -- we had this session today is because, you know, there has been some level of criticism out there about what we're doing and where we're overplaying our hand, and, you know, if there's -- if those are legitimate concerns, we would expect to hear them and, you know, with a little more formality behind them.

So, people should be feeling free to submit comments, I'm sure you can figure out a way to submit anonymous comments through regular mail, and the point is we actually do want to hear and that I'm frankly a little surprised that we didn't hear more today. I thought we were going to be sitting ducks up here.

But Jim, you wanted to criticize.

MR. FISHKIN: I'm Jim Fishkin at Swidler Berlin, used to be at the FTC for a long time. I just want to make a few comments in the various comments I've heard.

The first one is what Marc started off with, I guess he left the room. Marc talked about what do you do about public comments when you have an up-front buyer, and you want to have the up-front buyer's deal consummated right away, and when we did on -- I can think of two examples that may bridge the gap that Marc talked about.

One was the Jitney Jungle/Delchamps deal, which was a late 1997 deal, and this stretches my memory a little bit, but I think at the time we were just -- well we, when I was at the FTC, the FTC was just switching to up-front buyers, and there was an up-front buyer identified in the order and they had a contract to consummate, but they could not consummate until the order was final.

And so those were the days of 60-day public comments, and there was a short-term asset maintenance agreement, and today, those would be even shorter because it's a 30-day public comment period rather than a 60-day public comment period. I want to add a caveat, though, if you get a lot of public comments, then that's really going to stretch out the time, so you never know for sure.

And when we did another smattering case with Mark, who is here, it was the Albertson's/American Stores deal, although the up-front buyers could consummate before the order became final, there were staggered consummation periods for each of the buyers, and some of those were, you know, like 90 days or 120 days, so there was room for the public to comment on it.

So, I guess my point is, maybe Marc's example could be worked out with this 30-day public comment period, or at least a lot more -- or a lot easier than it could be when there was a 60-day public comment period. Where maybe you could even add, I don't know, a 15-day public comment period just for the buyer but not necessarily the orders, at least, you know, the concerned public would have some opportunity to comment, even if it's not quite as extensive as previously.

Chris MacAvoy and I worked on a lot of supermarket cases, I need to comment on what he said, and this was on the perception of a small buyer for supermarkets versus a chain and then Chris said, well, it may, you know, the staff had said it may take longer with the small buyers, and I just do want to add in, and I have to put in Claudia's caveat, in case I come back here on some other deal, but the small buyer issue may also raise competitive issues, because a chain is usually vertically integrated where they're buying themselves and their own distribution centers and small buyers don't have that due to their size, they have to go to a wholesaler, and in some of these cases, the wholesalers also own retail stores in the same market, so you get other horizontal and vertical issues that come up, and that sometimes adds to the time period.

And finally, Chris, this is on your third party comments, and third party rights, the only example I can think of, and this is quasi relevant to what you were saying, is in the supermarket cases, what about landlords? Because there's a provision that says, or at least there was a provision in some of those other orders, saying that, you know, the third parties offer to waive their rights and it usually meant the landlord.

But in some of the cases I worked on, the landlord, there were cases where the landlord was very reticent to jettison their rights if there were, let's say, 25 years left on the lease. A lot of the reasons that the landlords articulated had to do with out.

(Whereupon, at 1:37 p.m., the workshop was concluded.)

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C E R T I F I C A T E   O F   R E P O R T E R

CASE TITLE: WORKSHOP ON REMEDIES PROCESS
HEARING DATE: JUNE 18, 2002

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 6/19/02

Sally Jo Bowling

C E R T I F I C A T E   O F   P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J. Vance