Dissenting Statement of Commissioner Joshua D. Wright
In the Matter of Fidelity National Financial, Inc. and Lender Processing Services, Inc.

FTC File No. 131-0159

December 23, 2013

The Commission has voted to issue a Complaint and Decision & Order against Fidelity National Financial, Inc. ("FNF") to remedy the allegedly anticompetitive effects of FNF's proposed acquisition of Lender Processing Services, Inc. ("LPS"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe FNF's acquisition will substantially lessen competition for title information services in the Oregon counties identified in the Complaint in violation of Section 7 of the Clayton Act. I commend staff for their hard work in this matter. Staff has worked diligently to collect and analyze a substantial quantity of evidence related to numerous product and geographic markets within the U.S. mortgage lending industry. Based upon this evidence, I concluded there is no reason to believe the proposed transaction is likely to lessen competition in the Oregon counties identified in the Complaint. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I. Mortgage Lending Industry Background

Title insurance protects against the risk that a sale of real property fails to result in the transfer of clear title. Before a title insurance policy can issue, a title insurance underwriter must evaluate the risk that a subsequent title challenge will be made against the property. Title plants are privately owned repositories of real estate records that help underwriters examine property-specific title information in order to establish chain of title and identify any potential obstacles—such as liens or encumbrances—that could impair the transfer of title. In recent years, third-party title information services have begun to offer an alternative to title plants by providing access to the necessary data and records on a transactional or subscription basis. However, in Oregon, state law requires all title insurance underwriters to own an interest in a title plant in each county in which it issues policies. This law therefore effectively precludes a market in third-party provision of title information services.[1]

II. Coordinated Effects Analysis Under the Horizontal Merger Guidelines

The Commission's theory of anticompetitive harm in this matter is based solely upon a structural analysis. In other words, the Commission seeks to satisfy its prima facie burden of production to demonstrate the merger will substantially lessen competition based exclusively upon a tenuous logical link between the reduction in the number of firms that own title plants in

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[1] It is important to note at the outset that Oregon's vertical integration requirement creates a scenario in which there is no relevant market for title information services in Oregon. As a result, any competitive concerns arising from increased concentration in title plant ownership must be based upon anticompetitive effects in the downstream title insurance underwriting market in Oregon. The Commission does not allege, and there is no evidence to support the conclusion, that the merger will result in a substantial lessening of competition in the title insurance underwriting market in Oregon.

each of the Oregon counties identified in the Complaint and a presumption that the merger between FNF and LPS will increase the likelihood of collusion or coordinated interaction among the remaining competitors for the sale of title information services.[2]

It is of course true that a reduction in the number of firms in a relevant market, all else equal, makes it easier for the remaining firms to coordinate or collude.[3] However, this is true of any reduction of firms, whether it be from seven to six or three to two, and therefore that proposition alone would have us condemn all mergers. The pertinent question is whether and when a reduction in the number of firms, without more, gives reason to believe an acquisition violates the Clayton Act.[4] The Horizontal Merger Guidelines ("Guidelines") clarify that the focus of modern coordinated effects analysis is not merely upon the number of firms but rather "whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction."[5] The key economic issue underlying coordinated effects analysis is to understand how the merger changes incentives to coordinate, or, as the Guidelines explain, to examine "how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct."[6] Consistent with the focus on changes in post-merger incentives to coordinate rather than mere structural analysis, the Guidelines declare the federal antitrust agencies are not likely to challenge a merger based upon a coordinated effects theory of harm unless the following three conditions are satisfied: (1) "the merger would increase concentration and lead to a moderately or highly concentrated market"; (2) "the market shows signs of vulnerability to coordinated conduct"; and (3) "the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[7]

Although market structure is relevant to assessing the first and second conditions, the Guidelines require more than the observation that the merger has decreased the number of firms to satisfy the third condition. This is the correct approach. And it is no less correct for mergers that reduce the number of firms from three to two. Of what relevance is market structure if the Commission does not allege or otherwise describe the relevance of the reduction in the number

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[2] The Complaint appears to allege that the proposed transaction also may result in unilateral effects by stating the proposed merger will substantially lessen competition "by eliminating actual, direct, and substantial competition between Respondents Fidelity and LPS in the relevant markets." Complaint ¶ 16(a), Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013). I have seen no evidence to support a unilateral effects theory of harm in either the title insurance services or title insurance underwriting markets. Nor does the Commission's Analysis to Aid Public Comment discuss the potential for a unilateral effects theory in this matter. *See* Analysis of the Agreement Containing Consent Order to Aid Public Comment § 4, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013). Moreover, the merger cannot possibly result in unilateral effects in the title insurance services market because no such market exists in Oregon as a result of the state's vertical integration requirement.

[3] *See generally* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

[4] One reason to disfavor an approach that assesses the likelihood of anticompetitive effects based solely upon the number of firms in a market is that the approach is sensitive to the market definition exercise and requires great faith that we have defined the relevant market correctly.

[5] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [hereinafter 2010 Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[6] *Id*.

[7] *Id.*

of firms to post-merger incentives to coordinate? There is no basis in modern economics to conclude with any modicum of reliability that increased concentration—without more—will increase post-merger incentives to coordinate.[8] Thus, the Guidelines require the federal antitrust agencies to develop additional evidence that supports the theory of coordination and, in particular, an inference that the merger increases incentives to coordinate.

For example, the Guidelines observe that "an acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects."[9] In short, the Guidelines correctly, and consistent with the modern economics of collusion, require the Commission to do more than point to a reduction in the number of firms to generate inferences of likely competitive harm. Although the acquisition of a maverick is not necessary for a coordinated effects theory, a theory consistent with the Guidelines must include a specific economic rationale explaining why—above the mere reduction in the number of firms attendant to all mergers—the acquisition of this rival is likely to eliminate or reduce a constraint upon successful coordination and thus lead to increased incentives to coordinate, or alternatively, some evidence supporting structural inferences in the context of the specific transaction.

III. Insufficient Evidence to Conclude an Increased Likelihood of Coordination Exists Post-Merger

In my view, the Commission's coordinated effects theory and the evidence to support it do not provide a credible basis for concluding the merger between FNF and LPS will enhance incentives to coordinate. There is no evidence beyond the mere increase in the concentration of

[8] The Commission touts legal authority rooted in a long ago established legal presumption that disfavors mergers that create concentrated markets. Statement of the Commission, Fidelity National Financial, Inc., FTC File No. 131-0159, n. 2. (Dec. 23, 2013) (citing to authority); *see also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (creating the so-called "structural presumption" that shifts the burden of proof away from the federal antitrust agencies and towards defendants in cases where the government challenges certain mergers resulting in concentrated markets). Significantly, however, modern economic learning and evidence no longer supports the foundations for the structural presumption upon which the Commission relies today. *See* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets, Remarks at the 2013 Georgetown Global Antitrust Symposium Dinner (Sept. 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%E2%80%99s-role-shapi ng-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsymposium.pdf. And although *Philadelphia National Bank* remains good law in that it has not been overruled by the Supreme Court, it should not be the basis for the Commission's decision if the economic foundations upon which the legal proposition was built no longer hold. The Commission has correctly taken a similar approach with other disavowed but not yet overturned precedent, such as, for instance, *United States v. Von's Grocery Co.*, 385 U.S. 270 (1966).

[9] *See* 2010 Guidelines, *supra* note 5, § 7.1. The Guidelines define a maverick as a firm "that plays a disruptive role in the market to the benefit of customers," and provide a number of examples. *See id.* § 2.1.5. Each example has in common the acquisition of a firm that imposes a particularized constraint upon successful coordination before the merger. *See* Jonathan B. Baker, *Mavericks, Mergers and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U.L. REV. 135 (2002); Taylor M. Owings, *Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor*, 66 VAND. L. REV. 323 (2013).

title plants in the Oregon counties identified in the Complaint that provides a reason to believe that the merger will increase the likelihood or coordination or collusion for title insurance underwriting and thereby substantially reduce competition for the same.

Significantly, because insurance rates are generally set at the state level and also because Oregon is a "prior approval" state in which underwriters must request specific rates that the regulator then approves or amends, it is unlikely that concentration in title plant ownership at the county level can increase the likelihood of collusion or coordinated interaction and thereby result in an increase in price.[10] There also is no evidence that FNF's acquisition of LPS will eliminate a maverick that is currently a constraint upon successful coordination. Furthermore, there is no evidence that title insurance underwriters can effectively coordinate on non-price factors, such as service and turnaround time. Lastly, there is no empirical evidence demonstrating that similar levels and changes in concentration in other title information service markets have resulted in a reduction in price or non-price competition.

Section 7 of the Clayton Act requires that the Commission first find that a merger likely will substantially lessen competition prior to agreeing to enter into a consent agreement with merging parties. Because there is insufficient evidence to conclude that the proposed transaction will substantially lessen competition, I respectfully dissent and believe the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

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[10] Notably absent from the Commission's statement is any explanation of how the proposed transaction will increase the parties' incentives to coordinate on non-price terms post-merger. Such analysis is fundamental to modern merger analysis under the Guidelines. *See* 2010 Guidelines, *supra* note 5, § 7.1 ("The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction.").