FEDERAL TRADE COMMISSION

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*There were no exhibits to these proceedings*

For The Record, Inc.
Waldorf, Maryland
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FEDERAL TRADE COMMISSION

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.

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APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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MR. SIMONS: Good afternoon. Good afternoon, everyone. Thanks for coming.

This is part of a process that we've initiated in terms of both the second request process and the remedies process. This initiates the remedies portion of our initiative. We've had several meetings already, brown bags, and other types of meetings, to hear comment and get some criticism and feedback on the second request process, and I've got to tell you, when we started this process, we were pretty fearful, actually, because, you know, you've been in this business long enough, you hear all the kinds of horrible things that people have to say and the venting and everything and the frustration kind of comes to the surface and whatever, and we thought, gee, is this such a good idea. This may turn out to be kind of, you know, a fist fight as opposed to something constructive.

And what we had happen with the second request program is really something pretty phenomenal. The amount of interest and participation has been really tremendous, and I've just been incredibly impressed by the thoughtfulness that folks have put into their comments. We've gotten a bunch of written submissions

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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

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cost from consumers onto the parties who are doing the
deal which, after all we've concluded is going to be
otherwise anticompetitive.

And we recognize that that imposes costs, we
think that is the proper balance to be struck, obviously
we want to hear from people out here and elsewhere
whether they agree with that, but, you know, I think
it's hard to argue with the premise that it's
unreasonable to expect the agencies to take remedies
that are loaded with risks, because if the risks come to
bear and the remedy doesn't work, then we've had an
anticompetitive deal that's gone on and we have no
solution to it. That's just not an acceptable outcome.

Let me also lay out on the table what I came up
with this morning as three assumptions which I will
acknowledge, at least I make when I go through this
exercise. The first one is that more of a belief than
an assumption, maybe, and that is that assets don't
compete, businesses compete with particular assets, and
a lot of what we do is addressing the question is what's
being divested really going to constitute a business or
allow someone to constitute a business that can compete
with the parties post divestiture.

The next assumption is that -- Joe mentioned
this in his speech last week, is that the buyers and the
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.

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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
acquire the assets and to operate them if they're in the
business.

Number two, their expertise and/or experience,
and I use those separately because that -- they may have
expertise in related industries that give us comfort
that they can operate the assets in the industry that
they're in. And also they may have experience in the
actual industry in different markets or experience in
this market, but we're going to be looking at their
ability to actually compete, and again, to form the same
kind of competitive constraint on the merging party as
it did before the merger.

In looking at these questions, a couple of
issues have come up repeatedly, and I think a couple of
misperceptions about what we do. And the first is
whether or not we have an absolute requirement for
out-of-market purchasers. Obviously one of the things
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 which a buyer that is in the market is a fringe player in the market and that a divestiture of that player would perhaps enhance competition instead of imposing competitive constraint.

So, we will and we have divested to in-market purchasers in a variety of matters over the past years, the most recently being Valero/UDS where we divested a player, and in Nestle/Ralston and in some of the supermarket cases, most notably the Jitney Jungle/Delchamps. And our preference would be for an out-of-market buyer, because that's the easiest way to determine fairly quickly that the buyer itself is not going to pose competitive harm itself.

Another question is raised as to whether or not we prefer, and this is the reason most pointedly in the supermarket industry, whether we have a preference for large chain purchasers of stores. And again, if you go back, if you go back and look at what we have actually done in that industry and in others, you'll see that
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.

The second reason is that for many of these products, there aren't a lot of interested buyers. You know, pharmaceutical divestitures are not something that a financial buyer can just pick up, and in many of these cases, they're esoteric drugs that not a lot of people are interested in. But even if there are a number of companies that are interested, for the third reason, the FTC may not approve a number of those buyers. The potential purchaser may need to have certain assets or certain businesses in place such as an R&D department, a sales department, in the industry, things like that, in order for them to be acceptable to the Commission as a potential buyer -- potential acquirer.

And finally, the fourth reason is that it's my experience that divestitures in the pharmaceutical field
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 needed.

If parties want to come to us and bring us a
more narrowly tailored asset package than what's
currently being used to research, develop, manufacture,
market and sell that drug, they need to explain to us
why that will affect viability competitiveness. I've
had that happen before, people have explained it to me,
it's gotten through, but you have to -- I just want to
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 mean, they won't be able to offer the product at the same price, they maybe won't be doing innovation at the same issue, but these are the sort of issues that we look at and these are the sort of questions we will ask.

So, I think that people who bring in mergers in the pharmaceutical area should be prepared to discuss these issues when talking about a remedy.

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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
giving the relief that it negotiated for, which is
namely to restore and preserve the competition that
existed before the merger.

I think by now, circumstances in which these
contems arise should be fairly obvious to a certain
number of practitioners. One of the most celebrated
failures of our post-ordered divestitures arose in the
area of supermarkets. Everyone around here sort of
chuckles at the deal Schnuck's divestiture, but what
that told us and taught us along with some other things,
over examples of supermarkets is that we really can't
let supermarkets languish too long in the hands of the
divesting party, because of the quite obvious and maybe
even unintended result that supermarkets will waste away
the longer their future is uncertain.

And so that by the time a divestiture period

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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 us that we don't need relief, and then once we've agreed on the asset package and the need for relief, come in and say, oh, by the way, in two weeks I've got to close my deal, so I don't have time to get an up-front buyer. You've got to build time into the process for at least to take a run at trying to persuade us not to have an up-front buyer, because that kind of an argument is going to fall on deaf ears, if we have -- if we legitimately believe that there's a chance that the Commission won't get the relief that it's negotiated for.

MR. LIEBESKIND: Yeah, a couple of quick comments on fix-it-first and fix-it-myself. Fix-it-first, in my understanding, refers to the situation where the parties come in with a merger and say, we know you're going to have a problem with this, but we have a solution to your problem, and here's the solution and we're going to go ahead and do it.

And there is, I think, a general perception in
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. SCHILDKRAUT: This relates to -- this
relates to buyers up-front, and I'll give you an example
of this after I finish this, but why aren't you
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 lot 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 I have is how many buyers are going to be willing to buy subject to having to give it up in 30 or 45 days if the Commission decides to let the order go. But it's a balance.
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 heard both from small chains of independents and their representatives, both in the parade and on Capitol Hill.
that there's this perception of a -- that the deck is somehow stacked against independents, and we would ask ourselves, well why is this there this disconnect, and I think we heard maybe part of the answer today.

Chris touched on this, I think she said it very well, when she referred to there being a default position, and that I think is what we run into, is that nobody at the agency ever says, no, we won't accept the divestiture to somebody who is already in the market, nobody ever says, no, we have to have zero divestiture or we have to have divestiture or all of A or all of B, but these are the preferences, and any deviation from the template or from the default position adds time, uncertainty, and frequently seems to add the requirement that you comply completely with the second request.

And so the net effect of all this -- of this default and the high burden of what we're coming to default is that parties again and again seem to conclude, gee, it's really a thousand miles of bad road if I try to divest to anybody other than an out-of-market buyer divesting the entire group of assets up-front, so that's the way it almost always goes, and you wind up with this pool of unhappy potential buyers who maybe wanted to buy a few of the stores or maybe they were already in this market with a smaller market

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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 frequently asked questions, you heard it here again today, it's in Commission consent orders, yet somehow in the process it doesn't seem to quite have that openness and it winds up pushing people again and again in the direction away from these smaller buyers.

So, I don't know whether that's much of a concrete suggestion, be more open, but there it is.

MR. DUCORE: Let me, and I don't want to defend, not that I don't want to defend, I don't want to take the time. Let me ask you the question, in your experience, I mean, do you get a sense that a lot of merging parties are eager to divest to, you know, smaller groups and independents and things like that, and they feel like it's not worth the effort to go to the staff with that or is it more that, you know, more of an overall policy preference that you would like to see and that your clients really don't care as long as

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the can get their deal done as fast as they can get their deal done?

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
following bundle of assets that that's useful
information, but I think if there's only one potential
buyer, that it's not a good proxy, and a recognition of
that and an appropriate due diligence as to what the
right package is with the investigatory tools that you
have is a better way to proceed.

And third, much as I'm identified with buyer
up-front as a policy, I guess, and much as I have lots
of good things to say about it in the appropriate
context, I think one ought to think seriously about
whether a buyer up-front is an appropriate policy if
there's only one buyer. If there's only this third
party with rights. And I think careful thought ought to
be given to the question of whether in that
circumstance, rather than that being an argument in
favor of a buyer up-front, because if that guy doesn't
come up to the table then there's a divestiture, then
there's a problem, one ought to think about the default
position of allow the deal to close and let the parties
work it out without the blackmail of holding up the
entire transaction hanging over the heads of one party.

My experience suggests that that will yield
quite a satisfactory result, especially if the
Commission has identified the right bundle and has
created an order that says you shall divest this bundle

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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 the third party's issues are simply about price, I think the more willing we are to identify that as something that we can -- we can define the asset package and the merging parties can run the risk that they don't get any money for it later. The more difficult it is to -- for us to define the asset package, because it is more complicated, more intangible, more confusing, more whatever, and the more uncomfortable we're going to be in doing 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
going to happen there needs to be some flexibility
there.

        MR. CAREY: I'm talking about negotiating a
price. I'm talking about saying to the buyer, aren't
you paying too much for this, and won't this affect your
competitiveness in the marketplace by paying so much. I
think that's an inappropriate statement from the point
of view of the Commission's role and also from the point
of view of the economics and that that's a competitive
view that shouldn't necessarily affect competitors going
forward.

        MR. SIMONS: Let me ask you a question about the
buyer up-front approach. Does anyone have any kind of
feeling about, you know, are we doing it too often, if
so, what circumstances are we doing it in that we
shouldn't be doing it in, are there other ways to
approach it that we're not using that maybe we should be
using. Anyone have any thoughts on that? In specifics
like -- yes, sir?

        MR. KOVNER: Well, one of the issues with buyer
up-front is that -- this builds off George's comment, is
that it gives the FTC an opportunity to discuss with
that buyer what the appropriate terms, even beyond
price, of the deal might be, and so there's nothing
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 selling, and it's a portion of what we told them we think they need, and they say, if you want anything, you're going to take this.
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 that is because if you don't, if you do a post-order divestiture, you've already written in what the assets are going to be, and if you find out later that it's too narrow a package, you know, our ability to expand that is very limited.

As part of that, though, and as Joe was getting at, we have learned that buyers sometimes or frequently come in asking for a small amount, in part because they figure if they ask for more, the merging parties will find somebody else who is willing to take less and they won't be in on the bidding at all, so there's that game going on, and we have to be alert to, and I don't think -- well, we try to avoid saying, you should be acquiring these other things as well, but instead what
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 actually be surprised
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 least tentatively have made a decision that there's a -- that there's a fix to be done and that the parties are willing to talk about that, the litigating staff's focus is not on what does it take to constitute a viable business, it's on whether or not there's a competitive problem. Which is a somewhat different set of issues.

And you're not really normally in the course of thinking about whether there's a competitive problem thinking about now, what exactly are the assets they use to compete in this business. You're thinking about other issues, basically. And so quite often, particularly in a fast-moving transaction, that's not something that you've given a whole lot of thought to up until that point.

You may have given thought to it as it relates to competitive issues, as it relates to entry and things like that, but you haven't necessarily thought about it in terms of what would it take to constitute a stand-alone business if you're going to carve up the seller in some sense.

MR. BROYLES: And I think we're also sensitive, I think, to trying not to inject ourselves between
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-it-firsts 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
buying some of those from the acquirer entity and just
with the intent that they were going to work creates
greater skepticism.

What I don't know, I don't think the department
has gone back and looked over time at a divestiture
study to test whether it's properly calibrated those
risks or whether they needed to address it as too
tolerant.

MR. SIMONS: Thanks, John.

Jaret?

MR. SEIBERG: Can you explain why in the
Bayer/Aventis deal there was an up-front buyer in one
market but not in the other ones? I mean, if you read
that order, it just doesn't seem clear why the
Commission wanted it for only one market.

MR. LIEBESKIND: Well, the simple version of it,
the complicated version of it I would mess up, but the
simple version is that the up-front buyer situation was
one where there wasn't a complete business. And the
other ones, whether they were complete businesses or
not, were more complete.

I mean, this notion of a complete business is
something that's a little problematic, because it's a
little bit of a fiction. What's being divested, when we
say we're getting a complete business, isn't always like

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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

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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
competitive issues, because they would say I've got a
strip mall and the supermarket is the anchor, and the
success of the mall depends on the strength of the
anchor. And if you want this buyer in, I'm concerned
they're not going to be as good, and they have done
their own competitive analysis. And some of the reasons
that they've identified may have been missed by the
staff or would complement some of the concerns that the
staff raised all along.

MR. MacAVOY: Although it's amazing how a big
check would just make those concerns disappear.

MR. FISHKIN: No comment, I never got involved
in those negotiations. Thank you.

MR. SIMONS: Thanks, Jim.

MR. DUCORE: Okay?

MR. SIMONS: Well, thanks everyone for coming
and like we said, if you have other comments, you want
to send them in, that would be great, or just, you know,
call Dan, he's got nothing to do, right, Dan?

No, seriously, we really do want to get your
comments. So, if you have any authority, please help us

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out. (Whereupon, at 1:37 p.m., the workshop was concluded.)
CERTIFICATE OF REPORTER

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

CERTIFICATE OF PROOFREADER

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

Sara J. Vance

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