1 FEDERAL TRADE COMMISSION

2 I N D E X

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4 WORKSHOP: PAGE:

5 Remedies Process 4

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9 EXHIBITS: DESCRIPTION: PAGE:

10 *There were no exhibits to these proceedings*

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1 FEDERAL TRADE COMMISSION

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3 In the Matter of:)

4 A WORKSHOP TO DISCUSS THE)

5 FEDERAL TRADE COMMISSION'S)

6 REMEDIES PROCESS.)

7 ------------------------------)

8 Tuesday, June 18, 2002

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10 Room 332

11 Federal Trade Commission

12 6th & Pennsylvania Ave., NW

13 Washington, D.C. 20580

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15 The above-entitled workshop came on for

16 comments, pursuant to notice, at 12:00 p.m.

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1 APPEARANCES:

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3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 JOSEPH J. SIMONS, Director, Bureau of Competition

5 DANIEL P. DUCORE, Assistant Director Compliance

6 RICHARD LIEBESKIND, Assistant Director Mergers II

7 PHILLIP L. BROYLES, Assistant Director Mergers III

8 CHRISTINA R. PEREZ, Attorney

9 Federal Trade Commission

10 6th Street and Pennsylvania Avenue, N.W.

11 Washington, D.C. 20580-0000

12 (202) 326-3667

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1 P R O C E E D I N G S
2 - - - - - -
3 MR. SIMONS: Good afternoon. Good afternoon,
4 everyone. Thanks for coming.
5 This is part of a process that we've initiated
6 in terms of both the second request process and the
7 remedies process. This initiates the remedies portion
8 of our initiative. We've had several meetings already,
9 brown bags, and other types of meetings, to hear comment
10 and get some criticism and feedback on the second
11 request process, and I've got to tell you, when we
12 started this process, we were pretty fearful, actually,
13 because, you know, you've been in this business long
14 enough, you hear all the kinds of horrible things that
15 people have to say and the venting and everything and
16 the frustration kind of comes to the surface and
17 whatever, and we thought, gee, is this such a good idea.
18 This may turn out to be kind of, you know, a fist fight
19 as opposed to something constructive.
20 And what we had happen with the second request
21 program is really something pretty phenomenal. The
22 amount of interest and participation has been really
23 tremendous, and I've just been incredibly impressed by
24 the thoughtfulness that folks have put into their
25 comments. We've gotten a bunch of written submissions

1 and they've been really just incredibly well thought out
2 and very helpful.
3 In terms of the remedies process, we've actually
4 already gotten some input in writing from folks, Chris
5 is in the room some place, submitted something really
6 quite thoughtful from the folks at FMI, and so we're
7 pretty -- we're also very kind of optimistic about how
8 this process is going to work out.
9 This is not an exercise, we hope, that will just
10 kind of be a lot of dialogue without any concrete
11 action, so we're really looking forward to making some
12 improvements to the process and the results.
13 And I guess with that introduction, let me turn
14 it over to the guys who really know what they're doing,
15 at least are doing.
16 MR. DUCORE: Okay. We're going to start with
17 just a brief overview of some ideas and hopefully sit
18 back and listen, but I'm Dan Ducore, as that indicates.
19 The real idea of this is to get a discussion
20 going about how we've been approaching merger remedies,
21 what you all think has been working, what you think
22 maybe hasn't been working, ideas you have about things
23 we should be doing and shouldn't be doing and arguments
24 in favor of that.
25 But I want to start by laying out, what we're

1 going to do is lay out our -- talk about some of the
2 things we're doing specifically.
3 So, Rick is going to talk about how we decide
4 what should be in the package of assets that's going to
5 be divested, talking about divestiture.
6 Phil is going to talk about the kinds of
7 questions we ask and analysis we go through when we're
8 considering whether a proposed buyer is a good buyer.
9 Chris is going to talk about some issues about
10 third party rights and talk some about mergers in the
11 pharmaceuticals industry as sort of a context for that.
12 Then she'll talk some about the hot issue I suppose
13 which is up-front buyers and fix-it-first.
14 But I want to emphasize that this is really
15 just, you know, we call ourselves five minutes each, so
16 I am spending 30 seconds on a card here, to really just
17 get that out as the broad strokes of the discussion and
18 then hear from you guys.
19 One of the things we also want to hear about is
20 how we should go about testing the things we're doing to
21 see if they're working, if they're not working and
22 whether we're overdoing it in some areas and if we're
23 not doing enough in other areas, and suggestions on how
24 we should go and try to gauge that.
25 We have a reporter here who is taking down

1 everything we say, so if you're going to speak, please
2 stand up and identify yourself for both the audience and
3 for the reporter.
4 But let me just sort of lay out, and I'll speak
5 for myself here, my view of what it is we're doing here,
6 and that is, you know, what's our goal. And I think
7 it's important and it doesn't go without saying that we
8 only get into a consideration of remedies at the point
9 where we decide that it's a problem. So that the first
10 thing we're thinking about is can it be fixed, and if it
11 can't be fixed, then the deal needs to be prevented.
12 I think it's a mistake to approach merger
13 remedies without having that overall view in mind,
14 because in the back of our mind is always going to be if
15 we can't work out a deal that we think solves the
16 problem we've identified, then we need to think about
17 going into court to stopping the deal. So, that means
18 our bottom line below which we can't go.
19 What we're doing when we do all that is very
20 simple, I think, and that's that we're trying to reduce
21 and minimize the risk that the remedy won't work. And a
22 lot of things we've been doing over the last five, ten
23 years are done to address our perceived -- our
24 perception that these things are risky and we want to do
25 as much as we can, frankly, to shift that risk or that

1 cost from consumers onto the parties who are doing the
2 deal which, after all we've concluded is going to be
3 otherwise anticompetitive.
4 And we recognize that that imposes costs, we
5 think that is the proper balance to be struck, obviously
6 we want to hear from people out here and elsewhere
7 whether they agree with that, but, you know, I think
8 it's hard to argue with the premise that it's
9 unreasonable to expect the agencies to take remedies
10 that are loaded with risks, because if the risks come to
11 bear and the remedy doesn't work, then we've had an
12 anticompetitive deal that's gone on and we have no
13 solution to it. That's just not an acceptable outcome.
14 Let me also lay out on the table what I came up
15 with this morning as three assumptions which I will
16 acknowledge, at least I make when I go through this
17 exercise. The first one is that more of a belief than
18 an assumption, maybe, and that is that assets don't
19 compete, businesses compete with particular assets, and
20 a lot of what we do is addressing the question is what's
21 being divested really going to constitute a business or
22 allow someone to constitute a business that can compete
23 with the parties post divestiture.
24 The next assumption is that -- Joe mentioned
25 this in his speech last week, is that the buyers and the

1 proposed buyers of the divested assets, their interests
2 don't comport and don't coincide precisely with
3 consumers' interests as viewed through the FTC's eyes.
4 So, there are three parties to the deal, there is the
5 parties to the merger who have their views and of what
6 they're can look for the divestiture, there's the buyer
7 of the assets who has its views of what it's looking for
8 in the divestiture, and it's us standing in the shoes on
9 behalf of consumers that probably have a somewhat
10 different view of what we're looking for than even the
11 buyers do.
12 And the third assumption is that buyers are
13 going to make a lot of assumptions about what they're
14 getting that don't necessarily bear out, and that it's
15 therefore our job to challenge the buyer, to question
16 the assumption that they're making and to be careful not
17 to come at a deal that they're going to buy divested
18 assets -- through which they're going to buy divested
19 assets on the assumption that this is just like any
20 other commercial transaction.
21 So, if the proposed remedies look iffy, we need
22 protection against the risks falling on consumers, and
23 those protections have been things like crown jewel
24 provisions, if the divestiture doesn't happen, hold
25 separates to preserve competition before the divestiture

1 happens, and in cases where we're really not sure that
2 the package is saleable or that anybody is going to come
3 forward to make it work, up-front buyer.
4 So, our goal, and now I'm going to turn it over
5 to the other folks here, is quick and effective
6 divestitures, preservation of competition during that
7 time, and minimization of the risks on consumers. If we
8 can reduce those risks, I think we can negotiate
9 successful remedies, that's going to pose costs on the
10 parties that they may not have warned in previous
11 arrangements, but I guess the challenge I put out there
12 is that I don't know what the alternative is to that.
13 That should be acceptable to the agency.
14 So, with that, let me turn it over to Rick.
15 MR. LIEBESKIND: Thanks, Dan.
16 On the subject of the asset package, the goal is
17 easy to state. The goal is to put an acquirer in a
18 position where it can compete in the business as
19 effectively or at least as effectively as the --
20 typically the acquired firm or, you know, one of the two
21 firms that is merging.
22 So, the goal is easy to state. The important
23 point to remember is that it's not sufficient merely
24 that they don't go out of business in six months or a
25 year or two years but that they will be as much of a

1 competitive constraint on the merged firm as one of the
2 merging firms was on the other.
3 The practicality of that involves, and to talk
4 about it in the context of a situation where we don't
5 have an up-front buyer, is have we identified the assets
6 that one of the merging firms uses to compete in its
7 business. And that would be whatever those assets
8 happen to be. It could be some combination of tangible
9 assets, factories, stores, plants, equipment, so forth.
10 Intangible assets, including both intellectual
11 property and people. And not that tangible assets are
12 easy, because there's all sorts of issues come up, but I
13 just wanted to touch for two seconds on both the
14 intellectual property issues and the personnel issues.
15 More to invite discussion than to set forth anything on.
16 Intellectual property issues, these are among me
17 personally the most vexing we have in finding an asset
18 package, particularly in a non-up-front buyer situation.
19 To know not only what intellectual property the acquirer
20 would need, but in what form in terms of divestitures of
21 intellectual property versus licenses and versus what
22 kinds of -- and the issue comes up what kinds of rights
23 to exclude the merging parties or others from the use of
24 the intellectual property in question are all issues
25 that come up that I would be interested in hearing from

1 people how they think we should be thinking about them.
2 I think that how we think about them in large
3 part depends on what our goal is, whether our goal is to
4 let somebody compete in the business or whether our goal
5 is to let somebody compete in innovation, or both, and
6 you might get different answers depending on what your
7 theory of competitive harm is.
8 On the personnel issue, the issue I want to
9 flag, simply just thinking about what I would say about
10 this, is whether legally we can force people to work
11 somewhere else or not, sometimes we can, sometimes we
12 can't. We often have the -- an issue that I would call
13 simply a political issue that the FTC, in my view, my
14 own view, doesn't often want to be seen in the position
15 of forcing people to work in one place versus another.
16 So, we're more likely to be trying to incentivize people
17 to work in one place rather than another. And a lot of
18 issues will come up in that regard, but that's something
19 that also may be the subject of some discussion.
20 MR. DUCORE: Okay. Phil?
21 MR. BROYLES: Yeah, as with the asset package, I
22 believe the criteria that we apply is fairly easy to
23 state, but again, the devil is in the details, and
24 essentially what we're looking for, are buyers ready,
25 willing and able to opt -- first of all to acquire the

1 assets in question, that is they can afford them, and
2 secondly to operate the assets in the manner in which
3 they were operated before -- before the merger.
4 Again, the operative goal being to preserve or
5 restore the competition that existed before the merger.
6 And so obviously when we look at buyers, one of the
7 things that we're going to be looking at are the
8 financial viability, that is do they have the money to
9 acquire the assets and to operate them if they're in the
10 business.
11 Number two, their expertise and/or experience,
12 and I use those separately because that -- they may have
13 expertise in related industries that give us comfort
14 that they can operate the assets in the industry that
15 they're in. And also they may have experience in the
16 actual industry in different markets or experience in
17 this market, but we're going to be looking at their
18 ability to actually compete, and again, to form the same
19 kind of competitive constraint on the merging party as
20 it did before the merger.
21 In looking at these questions, a couple of
22 issues have come up repeatedly, and I think a couple of
23 misperceptions about what we do. And the first is
24 whether or not we have an absolute requirement for
25 out-of-market purchasers. Obviously one of the things

1 that we look at when we look at a buyer is the extent to
2 which the -- that buyer itself can pose competitive
3 problems, which -- and clearly if that's a concern, it's
4 a concern that is most easily addressed with a buyer
5 that is not currently competing in the market at issue.
6 Having said that, there are also situations in
7 which a buyer that is in the market is a fringe player
8 in the market and that a divestiture of that player
9 would perhaps enhance competition instead of imposing
10 competitive constraint.
11 So, we will and we have divested to in-market
12 purchasers in a variety of matters over the past years,
13 the most recently being Valero/UDS where we divested a
14 player, and in Nestle/Ralston and in some of the
15 supermarket cases, most notably the Jitney
16 Jungle/Delchamps. And our preference would be for an
17 out-of-market buyer, because that's the easiest way to
18 determine fairly quickly that the buyer itself is not
19 going to pose competitive harm itself.
20 Another question is raised as to whether or not
21 we prefer, and this is the reason most pointedly in the
22 supermarket industry, whether we have a preference for
23 large chain purchasers of stores. And again, if you go
24 back, if you go back and look at what we have actually
25 done in that industry and in others, you'll see that

1 there's no real clear-cut pattern of preferring large
2 chains or smaller independent chains.
3 What we do is look at the assets in question,
4 the market in question, the nature of competition, and
5 then determine what are the criterion in the buyer that
6 we are going to look for that would best restore that
7 competition.
8 In some instances where the asset packages were
9 particularly large, that necessarily self selected a
10 large buyer to be able to afford and to operate, but
11 again, we have divested to large chains, we have
12 divested to independent operators, we have divested to,
13 in fact, wholesalers buying these stores in particular
14 markets.
15 So, our overriding goal is not to find a
16 particular buyer, but to find the buyer that based on
17 the facts of the situation that is before us is adequate
18 to preserve and restore the competition that we see
19 entering into the merger.
20 MR. DUCORE: Okay, Chris, third party rights,
21 pharmaceuticals.
22 MS. PEREZ: Well, I was going to start off sort
23 of giving an overview of how we've looked at the
24 pharmaceutical mergers in the past and talk a little bit
25 about third party rights as they apply to that. I think

1 overall what I am going to say not only has to do with
2 pharmaceuticals, deals with mergers as a whole, but as I
3 am going to talk about them now, it's in relation to
4 pharmaceuticals.
5 Because pharmaceutical mergers tend to be
6 complex processes, they're long, they tend to require or
7 almost always require buyers up front for four reasons.
8 One, they're not divestitures of ongoing businesses, the
9 acquirer can't just start producing the divested product
10 the next day. So, that's the main reason.
11 The second reason is that for many of these
12 products, there aren't a lot of interested buyers. You
13 know, pharmaceutical divestitures are not something that
14 a financial buyer can just pick up, and in many of these
15 cases, they're esoteric drugs that not a lot of people
16 are interested in. But even if there are a number of
17 companies that are interested, for the third reason, the
18 FTC may not approve a number of those buyers. The
19 potential purchaser may need to have certain assets or
20 certain businesses in place such as an R&D department, a
21 sales department, in the industry, things like that, in
22 order for them to be acceptable to the Commission as a
23 potential buyer -- potential acquirer.
24 And finally, the fourth reason is that it's my
25 experience that divestitures in the pharmaceutical field

1 tend to need to be tailored specifically to a specific
2 buyer. There may be multiple buyers that would be
3 acceptable to the Commission, but let's say buyer A has
4 expertise in the sales and marketing area of that
5 product, whereas buyer B has expertise or experience in
6 the manufacturing of the related products. And in that
7 case, you know, the divestiture package would be
8 tailored completely differently if sold to buyer A than
9 if sold to buyer B.
10 The main issue that seems to come up in
11 pharmaceutical cases is whether the assets that need to
12 be divested. The agency default is that every asset,
13 including intellectual property, that is used in the
14 research, development, production, marketing or sale of
15 a product needs to be divested.
16 Now, what the parties tend to think, at least in
17 my experience, is that the assets that should be
18 divested are those assets that are dedicated or used
19 solely for the manufacture and sale of that product.
20 This really becomes a tension when the divesting party
21 has multiple products that use the same assets.
22 For example, let's say they have five cancer
23 drugs that they manufacture and only one of them is an
24 overlap product with the anticompetitive or that we view
25 is the anticompetitive effects. The parties are

1 reluctant to divest all of the assets that manufacture
2 the overlap product because they're used in four other
3 drugs, and why should they have to give up all those
4 assets when they're four drugs that they need to make,
5 that are valuable to the marketplace and, you know, just
6 give away those assets that are related to the overlap
7 product.
8 That makes perfect sense, I understand why
9 they're thinking about that, but what they have to
10 remember is that what we are trying to accomplish is to
11 make the acquirer that's viable and competitive, and
12 clearly an acquirer won't be viable if they don't have
13 all of the necessary assets to make or market the
14 product. Plus, we don't, as others have said, we're not
15 just looking at viability. They have to be competitive,
16 and they have to be competitive in a way that's
17 similarly situated to the divesting party. And so we
18 would look and see what assets are needed.
19 If parties want to come to us and bring us a
20 more narrowly tailored asset package than what's
21 currently being used to research, develop, manufacture,
22 market and sell that drug, they need to explain to us
23 why that will affect viability competitiveness. I've
24 had that happen before, people have explained it to me,
25 it's gotten through, but you have to -- I just want to

1 make sure that everyone understands what our default is,
2 and that I believe it is the burden of the parties to
3 explain to us why we should move off that default.
4 And the other issue that seems to come up is
5 competitiveness doesn't just mean being out into the
6 marketplace and selling the product. It means -- it
7 includes cost competitiveness. So that we will look at
8 the divesting party and see what -- how that party runs
9 its business. And we will make sure that the acquirer
10 is in a similarly situated business.
11 With my example of five cancer drugs, if the
12 divesting party had five cancer drugs, maybe it spread
13 its cost over the five drugs and the acquirer is now
14 just going to have one. We need to see how that will
15 affect the acquirer in terms of costing, procedure,
16 research and development, because they're not going to
17 be similarly situated if their cost structure is twice
18 as high as the divesting party. I mean, they won't be
19 able to offer the product at the same price, they maybe
20 won't be doing innovation at the same issue, but these
21 are the sort of issues that we look at and these are the
22 sort of questions we will ask.
23 So, I think that people who bring in mergers in
24 the pharmaceutical area should be prepared to discuss
25 these issues when talking about a remedy.

1 Third party consents, which is why I started out
2 with pharmaceuticals, are almost always present in
3 pharmaceutical mergers. There seems to be a lot of
4 joint marketing arrangements, joint development
5 arrangements, co-promotion arrangements, anything you
6 can think of. Co-owned IP. Sometimes these can be
7 resolved easily by just selling back or reverting back
8 the rights to a non-party to the merger.
9 Other times, they can't just simply be given
10 back to the non-party of the merger, there has to be
11 some negotiation that the acquirer will get whatever
12 rights the divested party has. And that's where tension
13 comes in, I think, because what I've heard from the
14 outside bar is, oh, they're holding up this entire --
15 this third party company asset is holding up this entire
16 deal so that they can squeeze as much money out of us as
17 possible to get this third party consent that will go to
18 the acquirer.
19 I want to hear what your comments are on how to
20 make sure that the Commission gets the goal that it
21 wants, which is a viable competitive acquirer without
22 having the parties be held up beyond what is necessary,
23 of course everyone knows there's going to be some part
24 of the system where the consent needs to be done, but so
25 that the consent is gotten at a reasonable rate, at a

1 reasonable time period, and we still get our acquirer
2 who needs everything that they need. I think that's an
3 issue that needs to be discussed.
4 I frankly have tried various outcomes, I've
5 tried working and being the mediator, I've tried staying
6 away, and in no case has anyone come out happy with any
7 of this, least of all me, who is in the middle.
8 So, I frankly want to just throw this out to
9 everyone and hopefully you can give me ideas on how we
10 can do this better in the future.
11 But my last overall point on this, and I think
12 this definitely applies to everyone, if outside parties
13 bring us a strong acquirer, who brings something to the
14 table, this is clearly going to be something that gets
15 through the agency quicker, you're going to have less
16 headaches, there's going to be probably less assets that
17 have to go along with it. You bring a weak acquirer to
18 the table, who needs a lot of property, who needs a lot
19 of explaining, this is going to be a lengthy time table.
20 You need to put that into -- you can't expect the
21 Commission to prop up a weak buyer and have it go
22 through the Commission in two weeks. That's just not
23 going to happen.
24 MR. BROYLES: Just to conclude on up-front
25 buyers, this has obviously been one of the hottest

1 issues that we've dealt with in recent years, and I kind
2 of cringe when I hear people refer to this as an
3 up-front buyer policy. I don't see it as a policy, what
4 I see it instead is a tool that enables us to achieve
5 the overarching policy of making sure that the
6 Commission gets the benefit of the deal that is struck.
7 Our experiences have taught us that in certain
8 industries and in certain circumstances, a post-ordered
9 divestiture is not likely to result in the Commission
10 giving the relief that it negotiated for, which is
11 namely to restore and preserve the competition that
12 existed before the merger.
13 I think by now, circumstances in which these
14 concerns arise should be fairly obvious to a certain
15 number of practitioners. One of the most celebrated
16 failures of our post-ordered divestitures arose in the
17 area of supermarkets. Everyone around here sort of
18 chuckles at the deal Schnuck's divestiture, but what
19 that told us and taught us along with some other things,
20 over examples of supermarkets is that we really can't
21 let supermarkets languish too long in the hands of the
22 divesting party, because of the quite obvious and maybe
23 even unintended result that supermarkets will waste away
24 the longer their future is uncertain.
25 And so that by the time a divestiture period

1 runs, what is actually being divested in no way
2 resembles what existed before the merger. So, if
3 there's anything close to a bottom line on up-front
4 buyers, it's that you're going to have a high burden to
5 convince us in the supermarket industry that an up-front
6 buyer is not necessary. Not insurmountable, but often
7 high because of our past experience.
8 Our experience has also taught us that when the
9 idea and when the parties are trying to divest something
10 less than a complete pre-existing business unit, that
11 there are going to be questions that we're going to have
12 to answer that could suggest that an up-front buyer is
13 necessary, not necessarily absolutely necessary, but
14 it's going to raise questions that we're going to have
15 to answer and resolve, and in a lot of instances, an
16 up-front buyer helps us to answer those questions.
17 The first one that we have to answer is what we
18 have seen is that when the people try to cobble together
19 assets to sort of recreate in their idea, in their mind
20 the competition that existed, I don't know if there is a
21 tendency or there is an intent, but what we have seen is
22 that typically what happens is what is divested falls
23 far short of what existed before the mergers.
24 If the parties try to cherry pick the assets for
25 themselves and then divest what's left, that, of course,

1 doesn't meet our goal of making sure that the party
2 itself is in the -- the acquiring party is in the
3 position of competing as effectively because they may be
4 stuck with higher costs, they may be stuck with a less
5 attractive bundle of assets, or a variety of things that
6 hamper their ability. We're going to need the
7 assistance of the perspective purchasers to help us
8 figure out whether or not what they're actually buying
9 is going to enable them to compete.
10 And we go into that recognizing two things.
11 Number one, that some buyers have incentive to overreach
12 and try to get us to help them get more than they
13 absolutely need in order to compete, and on the other
14 hand, some buyers come into this with an idea that they
15 don't -- as I think was mentioned before, their interest
16 is not necessarily in recreating competition, but in
17 striking a deal that makes business sense for them.
18 So, that puts us in a position of trying to
19 figure out how to balance between those assets, and I
20 think that an up-front buyer that works -- that we get a
21 chance to work our way through that process and realize
22 what the final asset package looks like helps us do
23 that.
24 One of the things that we're also concerned
25 about is when you start cutting away assets, the

1 question is are you reducing at that point the pool of
2 available buyers. If you're divesting an existing
3 ongoing business unit, then under most circumstances, I
4 think you're going to have a wider pool of buyers, even
5 though the extent that we could accept financial buyers
6 where they are simply buying something that's an ongoing
7 operation with management that's remaining in place and
8 all the assets that's needed. When you start cutting
9 away, then we have got to start figuring out what the --
10 what the pool of buyers are that have the things that
11 have been cut away to make sure that what we have in the
12 end is a completely competitively viable entity. And so
13 that's one of the things that we're going to have to
14 look at.
15 Now, one of the things that -- one alternative
16 that can help us or to get us more comfortable if there
17 is still some question is a crown jewel provision.
18 Crown jewel provisions are basically provisions that
19 include something that is clearly divestable, something
20 that will clearly operate and for which there are
21 clearly identified pool of buyers such that if what you
22 want to divest we actually can't divest, there is
23 something that we will be able to sell that will get the
24 relief that we've negotiated for. That's an alternative
25 to doing an up-front buyer, but again, the objective is

1 to make sure that when we negotiate for a remedy that we
2 think is going to restore competition, that the
3 Commission actually gets that remedy.
4 One of the things that Chris mentioned, which
5 she has also been dealing with quite a bit lately, is
6 when there are third party priority rights, such that in
7 instances where an asset is joint owners, the other
8 owner might have a right of first refusal or the right
9 to match any offer for the assets. Where that joint
10 owner is not an approvable buyer, what you're going to
11 have to do for us is to demonstrate that that buyer is
12 not going to stand in the way of the relief that the
13 Commission has negotiated. It uses third party rights
14 to frustrate the Commission's efforts to get relief.
15 Obviously the best thing to do is to bring us a
16 buyer that has third party rights exhausted. Another
17 way is to get a release from the third parties. Again
18 it's an issue that we've been dealing with quite a lot
19 lately, and if there are suggestions or alternatives
20 that you have for us to deal with this short of the two
21 alternatives that I just mentioned, I would certainly
22 love to hear them.
23 Finally, the other point that I would like to
24 make is that frequently, and we've run into this on
25 occasion lately, is that in a situation where the

1 parties have a time table for the merger in their mind,
2 and there are issues which suggest that an up-front
3 buyer is at least going to be something that we're going
4 to think about, we have to be persuaded that we don't
5 need, you really can't afford to spend all of your time
6 negotiating with us on the merits of trying to convince
7 us that we don't need relief, and then once we've agreed
8 on the asset package and the need for relief, come in
9 and say, oh, by the way, in two weeks I've got to close
10 my deal, so I don't have time to get an up-front buyer.
11 You've got to build time into the process for at
12 least to take a run at trying to persuade us not to have
13 an up-front buyer, because that kind of an argument is
14 going to fall on deaf ears, if we have -- if we
15 legitimately believe that there's a chance that the
16 Commission won't get the relief that it's negotiated
17 for.
18 MR. LIEBESKIND: Yeah, a couple of quick
19 comments on fix-it-first and fix-it-myself.
20 Fix-it-first, in my understanding, refers to the
21 situation where the parties come in with a merger and
22 say, we know you're going to have a problem with this,
23 but we have a solution to your problem, and here's the
24 solution and we're going to go ahead and do it.
25 And there is, I think, a general perception in

1 the world, or at least I hear there's a general
2 perception in the world, that DOJ is accommodating of
3 that view, and the FTC generally is not. And there's
4 probably some truth to that. It's also true that we
5 have from time to time when people have brought us
6 genuine fix-it-firsts, gone along with it and let people
7 fix their deals without asking them or requiring them or
8 to submit to a Commission order, or suing them if they
9 don't do it.
10 It requires a clean fix without continuing
11 entanglements, and without things that are going to make
12 us think that there's reasons to think that there's
13 ongoing obligations of the merging parties that need to
14 be enforced that won't be enforced if there's not a
15 Commission order, but it has happened, I've done a
16 couple of them myself in the last couple of years, and I
17 think there's a few others lying around, although
18 generally speaking, it's not the way things go.
19 Fix-it-ourself is a term I just made up to
20 characterize the Libby case that we had and Franklin
21 Electric case at Justice that is what's normally
22 characterized as litigating a fix. That is I have a
23 remedy in mind and the agency doesn't like it and so
24 we're going to make them sue us and we'll tell the judge
25 that our remedy is good enough and they should make the

1 agency take our remedy.
2 This is leaving aside whether it's the right way
3 to make friends and influence people, it is, I think,
4 going to be problematic, there's a lot of debating after
5 the Libby opinion came down about whether the government
6 won the battle and lost the war or lost the battle and
7 won the war or vice versa, I don't remember which way is
8 which, and which was the battle and which was the war.
9 I think I read that decision, although it wasn't
10 necessarily everything we argued for, as establishing
11 the basic proposition along the lines of what everybody
12 said here, which is that if the proposed fix, as in
13 Franklin Electric, I think there's consistently some
14 loose language in Franklin Electric that's been quoted
15 against the government. If the fix merely keeps
16 somebody else in business, but on a basis that is going
17 to raise serious issues about their viability and
18 competitiveness going forward and whether the
19 constraints on the merging party will be lessened as a
20 result of this purported fix, I think what we learned
21 from Judge Walton in the Libby case is that at least one
22 district judge, I think it's also true of the district
23 judge in the Franklin Electric case that DOJ had, the
24 district courts will be sensitive to those issues and
25 will not allow fix-it-ourselves where the government

1 raises a genuine issue about viability and
2 competitiveness, even though the competitor has been
3 preserved or the number of competitors hasn't changed.
4 So, I think that I, at least, would not
5 recommend that merging parties assume that they're going
6 to win a lot of litigating the fix cases and that when
7 the agency is concerned that a -- when the agency
8 rejects a proposed fix, because he thinks it's not going
9 to create a viable competitor, it's going to reserve
10 competition, we're at least going to have a chance of
11 persuading a court of that, and that will be the upshot
12 of it.
13 So, that's my views on that, but other people
14 undoubtedly have other views.
15 MR. SIMONS: So, can we take comments from the
16 audience?
17 MR. DUCORE: We apologize for going long. We
18 went too long, but --
19 MR. SIMONS: Yes, that's what I wrote down, too
20 long.
21 MR. DUCORE: No questions? I have questions.
22 MR. SIMONS: I know Marc has a question.
23 MR. SCHILDKRAUT: This relates to -- this
24 relates to buyers up-front, and I'll give you an example
25 of this after I finish this, but why aren't you

1 concerned that you are divesting their public of the
2 rights to make comments that have an impact, and what I
3 mean by that is in the buyer up-front situation, you
4 certainly require that there be the ability to unwind if
5 the Commission doesn't think the remedy is good enough,
6 but what about the situation where the Commission
7 decides no remedy is necessary? Then the assets have
8 already been divested, in that situation, and there's no
9 way to sort of unwind it at that point, the Commission
10 couldn't even order it, the Commission doesn't have an
11 order.
12 An example that is -- that's reasonable, and the
13 only reason it didn't come out this way is because it
14 was slightly before the buyer up-front policy came into
15 vogue, was a case which I think Dan is familiar with,
16 which is Nestle/Alpo, where there was a divestiture
17 required of a factory, and just a factory, not a
18 business.
19 I think under present policies, a buyer up-front
20 would have been required under those circumstances. The
21 Commission after getting 10,000 letters from the local
22 community, among others, decided that there was, you
23 know, that there -- relooked at it and decided that
24 there was actually nothing wrong with the merger to
25 begin with.

1 But under the buyer up-front policy, those
2 assets would have already been divested, those 10,000
3 people would have been divested of their rights to
4 explain this to the Commission.
5 MR. LIEBESKIND: Well, one approach, of course,
6 would be to say that the Commission -- that you can't
7 close the deal until the order is made final, but I
8 don't think that's what you're looking for.
9 MR. SCHILDKRAUT: No.
10 MR. LIEBESKIND: One of the things that we have
11 done, from time to time, and then this goes -- this goes
12 into what we actually mean by an up-front buyer, and
13 it's going to depend on the industry in question and the
14 situation. There's a loft of talk about supermarkets
15 where we actually want to get the assets in the hands of
16 the buyer quickly because of the erosion of good will.
17 There have been other cases, but what we mean by an
18 up-front buyer is an identified buyer that can be put
19 out for public comment, identified before the merger
20 closes, before the Commission accepts the agreement from
21 public comment, take comment on the buyer,
22 transaction -- divestiture transaction to close after
23 the public comment period, after the Commission makes
24 the order final.
25 I know of at least one case where the Commission

1 did that, was sufficiently concerned about the quality
2 of the buyer going into the process, that at the end of
3 the day, it made the order final, rejected the buyer and
4 went out and found another buyer. The Commission could
5 have also said, you know, you have to find a way to
6 eliminate it and keep the asset, if it wanted to in that
7 case.
8 So, in a situation where the buyer is
9 questionable and there are ways to preserve the
10 viability of the asset package in the meanwhile, I mean,
11 these issues can be dealt with on a case-by-case basis,
12 I think.
13 MR. DUCORE: You're talking about how do you
14 reserve your right to argue the merits of the case or
15 hear from the public that suggests that on the merits
16 there isn't a case, and then release the parties from
17 the remedy. I guess -- I think I saw one where there
18 was actually a contingency in the divestiture contract
19 that it would basically be rescinded if the Commission
20 didn't make the order final.
21 You could do that, I mean, I guess one question
22 I have is how many buyers are going to be willing to buy
23 subject to having to give it up in 30 or 45 days if the
24 Commission decides to let the order go. But it's a
25 balance.

1 MR. SCHILDKRAUT: But it's not the seller and
2 the buyer who care about it at this point, it's the
3 public. In the Nestle/Alpo matter, the seller said
4 fine, I'll get rid of the factory, just where do I sign.
5 It was the public who cared about it and said they would
6 never under those circumstances try to contract for an
7 unwind if they didn't have to, they just wanted to get
8 the deal done. So, it's those other 10,000 people who
9 you need to think about and there's nobody else to think
10 about them.
11 MR. BROYLES: Do you have a suggestion?
12 MR. SCHILDKRAUT: Yeah, I mean, I would think --
13 yeah, my suggestion is that as a general matter,
14 there -- the -- there should not be consummation until
15 after the public comment period. You can certainly
16 identify the buyer up-front, but the consummation should
17 wait until after the public comment period.
18 MR. LIEBESKIND: And there should be a hold
19 separate in the meanwhile if we're concerned about the
20 merging parties' ability to acquire the assets?
21 MR. SCHILDKRAUT: I mean, you have to consider
22 all of the different scenarios.
23 MS. PEREZ: No consummation of the divestiture
24 or --
25 MR. LIEBESKIND: Oh, no, he wants to consummate

1 the merger.

2 MR. SCHILDKRAUT: All of my clients would fire

3 me if I proposed that.

4 MR. LIEBESKIND: No, I propose the idea that

5 they hold off on the merger for 30 days and he didn't

6 really want to go along with that.

7 MR. BROYLES: Marc, I'm not sure, you talked

8 about a situation where the Commission doesn't enter an

9 order, just rejects the unwind premise of the buyer.

10 How would a provision that says you can't consummate as

11 opposed to one that says that you have to rescind or in

12 the scenario that you just outlined?

13 MR. SCHILDKRAUT: I mean, I assume what we're

14 talking about is a situation that basically says, you

15 know, in the -- in the order, in a hold separate

16 agreement or something like that, you shall hold these

17 assets separate, but you should be allowed to divest

18 them until the divestiture is approved by the Commission

19 until after the public comment period.

20 MR. LIEBESKIND: I was going to say we have done

21 that at least once.

22 MR. SCHILDKRAUT: But as a matter of policy, you

23 seem to generally go in the other direction to get these

24 very quick divestitures.

25 MR. BROYLES: So, if I understand what you're

1 saying, you're talking about not having an up-front
2 buyer as we've defined it with a signed deal.
3 MR. LIEBESKIND: No, it's a signed deal, it's
4 just that it wasn't closed.
5 MR. SCHILDKRAUT: You could have it one of two
6 ways, you could just have -- and I think it would be
7 sufficient just to have an identified buyer who
8 basically says, yeah, we haven't crossed all Ts or
9 dotted all Is, but I've done my due diligence, I'm ready
10 to buy, and I don't see any problem entering into a
11 contract. And I think a good example of that, Phil,
12 that you're aware of, is in Exxon/Mobil, with the
13 northeast divestiture, where it was an identified buyer,
14 in essence, but there really was no up-front contract.
15 So, I think under those kinds of circumstances,
16 it leaves a little more flexibility for everybody,
17 including giving the public the right to comment.
18 MR. LIEBESKIND: Well, what happens? There's a
19 risk on the Commission, there's a risk on the
20 Commission, of course, that it will conclude not that
21 the up-front buyer is the wrong buyer or that the relief
22 is excessive or that the relief is inadequate as a
23 result of the public comment period. And so how do you
24 cope with that? I guess to start with, we have to live
25 with that.

1 MR. SCHILDKRAUT: That's true of an up-front
2 buyer, you have that problem, so I'm not creating any
3 new problems.
4 MR. DUCORE: I don't want to cut you off, but
5 let's try to go back. Anything else, Chris?
6 MR. MacAVOY: For the benefit of the reporter,
7 I'm Chris MacAvoy. I don't subscribe to everything my
8 colleague just said, by the way, we'll talk about this
9 later. We -- from the Howrey firm -- we filed a comment
10 on behalf of Food Marketing Institute which some of you,
11 I think, have.
12 I wanted to respond and comment, make an
13 observation about just a couple of things. Phil in
14 particular said on the issue of divestitures to in the
15 retail area -- to small chains and independents, and
16 Phil said here today, this is completely consistent with
17 what the Commission has said in the past, that there is
18 no policy and certainly not an intentional bias at the
19 agency against divestitures to independents and small
20 chains.
21 Nevertheless, you will see in our comment quite
22 a discussion about the perception that I think is widely
23 held and I know, you know, you here at the agency have
24 heard both from small chains of independents and their
25 representatives, both in the parade and on Capitol Hill

1 that there's this perception of a -- that the deck is
2 somehow stacked against independents, and we would ask
3 ourselves, well why is this there this disconnect, and I
4 think we heard maybe part of the answer today.
5 Chris touched on this, I think she said it very
6 well, when she referred to there being a default
7 position, and that I think is what we run into, is that
8 nobody at the agency ever says, no, we won't accept the
9 divestiture to somebody who is already in the market,
10 nobody ever says, no, we have to have zero divestiture
11 or we have to have divestiture or all of A or all of B,
12 but these are the preferences, and any deviation from
13 the template or from the default position adds time,
14 uncertainty, and frequently seems to add the requirement
15 that you comply completely with the second request.
16 And so the net effect of all this -- of this
17 default and the high burden of what we're coming to
18 default is that parties again and again seem to
19 conclude, gee, it's really a thousand miles of bad road
20 if I try to divest to anybody other than an
21 out-of-market buyer divesting the entire group of assets
22 up-front, so that's the way it almost always goes, and
23 you wind up with this pool of unhappy potential buyers
24 who maybe wanted to buy a few of the stores or maybe
25 they were already in this market with a smaller market

1 share and they say, gee, I'm discriminated against in
2 this process.
3 So, I -- you know, by way of -- that's my
4 observation, by way of recommendation, I guess what I'm
5 proposing is frankly just more openness and working with
6 the parties in a more constructive way maybe than is the
7 case historically in accomplishing divestitures to some
8 of these small buyers. It's out there stated in the
9 consent order of frequently asked questions, you heard
10 it here again today, it's in Commission consent orders,
11 yet somehow in the process it doesn't seem to quite have
12 that openness and it winds up pushing people again and
13 again in the direction away from these smaller buyers.
14 So, I don't know whether that's much of a
15 concrete suggestion, be more open, but there it is.
16 MR. DUCORE: Let me, and I don't want to defend,
17 not that I don't want to defend, I don't want to take
18 the time. Let me ask you the question, in your
19 experience, I mean, do you get a sense that a lot of
20 merging parties are eager to divest to, you know,
21 smaller groups and independents and things like that,
22 and they feel like it's not worth the effort to go to
23 the staff with that or is it more that, you know, more
24 of an overall policy preference that you would like to
25 see and that your clients really don't care as long as

1 they can get their deal done as fast as they can get
2 their deal done?
3 MR. MacAVOY: I have to say I have seen both.
4 Certainly I have been involved in situations where the
5 merging parties had, you know, rapping on the door, you
6 know, one or more smaller buyers, but then on the other
7 hand, had some large buyers out-of-market and knew that
8 going -- coming in with the smaller buyers or somebody
9 who was maybe in-market with a small market share, that
10 that was just going to be a much longer and tougher
11 proposition. They just didn't intuit that, I mean they
12 were told that by the staff, gosh, we can't say no, but
13 we can tell you it's going to be hard, it's going to be
14 long, it's going to have questions across the street,
15 and that just makes people, particularly when you're
16 getting towards the end of the, you know, you're looking
17 at a drop dead date.
18 MS. PEREZ: I have a question, are you talking
19 in general about small buyers over all of the mergers or
20 specifically about the supermarket industry?
21 MR. MacAVOY: My comments and experience are
22 much more retail specific, although I have heard that
23 this is an issue in other areas, but my specific
24 experience is much more retailer specific.
25 MS. PEREZ: Well, I can tell you in the couple

1 of my cases where I've been the lead attorney and looked
2 at divestiture, there were a couple of divestitures that
3 ended up going to much smaller companies than I had
4 initially anticipated in the beginning, and what seemed
5 to work for them in convincing me that they were good
6 viable divestiture candidates is they had the business
7 people come in, they had the business plan drawn up,
8 they understood that they were smaller and maybe not the
9 ideal candidate and they had already prepared for me the
10 reasons why they were still viable, what advantages they
11 would bring over the larger candidates, and I have to
12 say that they really swayed me.
13 And I think in the couple of divestitures where
14 this has happened, it's really worked out where the
15 small divestiture candidate turned out to be an
16 excellent candidate, but that's how -- I mean, they came
17 in prepared, knew what their disadvantages were and
18 talked me over the disadvantages and showed me what
19 their advantages were, and that seemed to work, at least
20 for me.
21 MR. MacAVOY: Anybody else have observations on
22 that area or anything else, I'll concede the floor.
23 MR. DUCORE: There's more than two questions, I
24 know.
25 MS. PEREZ: Can I ask for somebody to comment on

1 these third party consents? Really, I honestly want to
2 know what you think I can do to help this process along,
3 make it easier and yet still get us a viable competitor.
4 Oh, yeah. Go ahead, go ahead.
5 MR. LIEBESKIND: George has been waiting for
6 this question for two years now.
7 MR. CAREY: Well, I mean, it's the right
8 question, and it does raise the question of what the
9 appropriate policy is in a situation where you've got a
10 third party who exercises veto power, because in that
11 context, that party is in a position to extract the full
12 value of the deal minus $1 as the cost of admission if
13 they're the only potential buyer.
14 I think the FTC could do a number of things. I
15 think first what the FTC can do is realize what the
16 incentives are and bring the same degree of skepticism
17 to the claims of that third party that they bring to the
18 parties' claims. Not advocate their responsibility to
19 do their own thorough review of exactly what the
20 Commission thinks the party needs in order to be viable,
21 rather than relying as a default again on what the third
22 party says they need.
23 I think it's fine to say that the third party in
24 a competitive market would be a good proxy and if you
25 hear from a lot of third parties that they need the

1 following bundle of assets that that's useful
2 information, but I think if there's only one potential
3 buyer, that it's not a good proxy, and a recognition of
4 that and an appropriate due diligence as to what the
5 right package is with the investigatory tools that you
6 have is a better way to proceed.
7 And third, much as I'm identified with buyer
8 up-front as a policy, I guess, and much as I have lots
9 of good things to say about it in the appropriate
10 context, I think one ought to think seriously about
11 whether a buyer up-front is an appropriate policy if
12 there's only one buyer. If there's only this third
13 party with rights. And I think careful thought ought to
14 be given to the question of whether in that
15 circumstance, rather than that being an argument in
16 favor of a buyer up-front, because if that guy doesn't
17 come up to the table then there's a divestiture, then
18 there's a problem, one ought to think about the default
19 position of allow the deal to close and let the parties
20 work it out without the blackmail of holding up the
21 entire transaction hanging over the heads of one party.
22 My experience suggests that that will yield
23 quite a satisfactory result, especially if the
24 Commission has identified the right bundle and has
25 created an order that says you shall divest this bundle

1 at no minimum price with a trustee at the back end.
2 That, at least, puts a floor on the blackmail that can
3 be exercised, protects the Commission, and doesn't hold
4 up the entire transaction.
5 MS. PEREZ: Is there something in the middle or
6 some other mechanism that can be used in terms -- I
7 can't even think of what it would be, but some sort
8 of -- I understand that sometimes third parties try to
9 hold up the parties in their deal, but trying to do a --
10 when there's a limited amount of buyers and not doing a
11 buyer up-front, not sure what the assets are needed,
12 maybe you can get like 99 percent of the way there,
13 except for this third party consent, and then just do
14 what you say. Is there something short of that? Is
15 there some alternative mechanism for going around this?
16 Do you have any suggestions?
17 MR. CAREY: I really don't. I mean, I think
18 that if there's a legal principle that's been either
19 adjudicated or statutory or some other principle that
20 basically says an FTC order, whether voluntarily entered
21 into or through adjudication trumps the private
22 contractual provision, I don't see a middle way out.
23 I think that the Commission has to have more
24 confidence in its own ability to make the evaluation of
25 what the right bundle is, and then enter into the order

1 and let the parties close and then force a divestiture.
2 Or if that's too much of a risk, appoint a trustee
3 immediately to do the divestiture, to take over that
4 negotiation, understanding that, again, there's a limit
5 to what can be extracted through the give and take,
6 because the deal is not being held up as a --
7 MS. PEREZ: Why is it different? Why do the
8 incentives change on a third party when a divestiture
9 trustee is in place? Why wouldn't they stick to their
10 guns just as much?
11 MR. CAREY: Because at that point they can't
12 hold up. Let's take an example, a $30 million deal for
13 $100 million product. There's a limit as to how much
14 they can extract, and that limit makes them more
15 reasonable.
16 MR. SIMONS: The one thing that could happen,
17 though, is if you go to a trustee, the order will
18 generally say you must divest at any price, even a
19 negative price.
20 MR. CAREY: Right.
21 MR. SIMONS: So if there's only one buyer,
22 they'll say we'll pay a dollar, but if it's a $100
23 million asset, they pay a dollar, they only get $99
24 million out of it. Whereas you can't hold up the larger
25 transaction.

1 MR. CAREY: That's real problem. It's a $99
2 million problem, but there have been examples where the
3 third party has tried to extract $500 million of rents
4 by virtue of knowing that they can hold up the
5 transaction.
6 MR. LIEBESKIND: Well, there have also been
7 examples where we haven't done that, and not with any
8 third parties who have put themselves in that position,
9 and so there's examples both ways in my experience -- in
10 my own experience, and then more broadly in the
11 Commission's experience, and I think one of the things
12 that separates the examples is something you alluded to,
13 George, which is the extent to which we are or are not
14 comfortable defining the asset package ourselves.
15 The more -- the more comfortable we are defining
16 the asset package, the more willing -- and the more that
17 the third party's issues are simply about price, I think
18 the more willing we are to identify that as something
19 that we can -- we can define the asset package and the
20 merging parties can run the risk that they don't get any
21 money for it later. The more difficult it is to -- for
22 us to define the asset package, because it is more
23 complicated, more intangible, more confusing, more
24 whatever, and the more uncomfortable we're going to be
25 in doing that.

1 MS. PEREZ: And also what does one do with sort
2 of the Phil example of the right of first refusal when
3 they are clearly not an acceptable buyer, and they're
4 holding things up?
5 MR. CAREY: Again, if all they're going to get
6 is a payment for their right of first refusal, because
7 the entire transaction is not in abeyance while that's
8 being worked out, I think it becomes a more manageable
9 risk. If they have the ability to hold up the whole
10 transaction, it's where they have huge leverage and they
11 can extract rents, basically.
12 But just one other point, on a related but
13 slightly different point, I've also seen situations
14 where either the compliant staff or the litigating staff
15 at the Commission has actually gotten in the fray and
16 negotiated on behalf of buyers for things that do not
17 immediately look to be important competitive aspects of
18 the divestiture package like price, fixed price, and I
19 think that -- I mean I think everybody ought to
20 acknowledge that that is an inappropriate role for any
21 Commission personnel to undertake.
22 MR. DUCORE: You're talking about negotiating
23 the price or are you talking about coming back to the
24 parties with sort of the staff view that what the
25 buyer -- proposed buyer says they think they need, the

1 staff agrees that they need and if something else is
2 going to happen there needs to be some flexibility
3 there.
4 MR. CAREY: I'm talking about negotiating a
5 price. I'm talking about saying to the buyer, aren't
6 you paying too much for this, and won't this affect your
7 competitiveness in the marketplace by paying so much. I
8 think that's an inappropriate statement from the point
9 of view of the Commission's role and also from the point
10 of view of the economics and that that's a competitive
11 view that shouldn't necessarily affect competitors going
12 forward.
13 MR. SIMONS: Let me ask you a question about the
14 buyer up-front approach. Does anyone have any kind of
15 feeling about, you know, are we doing it too often, if
16 so, what circumstances are we doing it in that we
17 shouldn't be doing it in, are there other ways to
18 approach it that we're not using that maybe we should be
19 using. Anyone have any thoughts on that? In specifics
20 like -- yes, sir?
21 MR. KOVNER: Well, one of the issues with buyer
22 up-front is that -- this builds off George's comment, is
23 that it gives the FTC an opportunity to discuss with
24 that buyer what the appropriate terms, even beyond
25 price, of the deal might be, and so there's nothing

1 makes a client angrier than when they start to negotiate
2 with a buyer up-front and find that the FTC has already
3 been talking to that buyer and sort of suggesting that
4 you might want to ask for this, that and the other
5 thing, and sometimes what the FTC seems to be asking for
6 is really beyond the core assets and business that would
7 need to be divested to fix the competitive problem.
8 It seems like they want to build in a buffer
9 zone just to make sure, and I'm actually wondering, and
10 that is sort of a downside, an additional downside, I
11 think, from the client's perspective to going to buyer
12 up-front route. So, I'm actually rather than answering,
13 I'm throwing a question back, to what extent does the
14 staff think it's appropriate and useful and perhaps even
15 necessary to do that kind of probing and due diligence
16 with the buyer up-front?
17 MR. SIMONS: Well, there's I think a balancing
18 concern there, and sometimes what happens is we will
19 tell the parties here's our concern, here's what we
20 think you need to do in order to fix this problem, and
21 wound up telling them, you know, it's this asset, this
22 asset, and then they then go to the buyers and they say,
23 here's what we're selling, and it's a portion of what we
24 told them we think they need, and they say, if you want
25 anything, you're going to take this.

1 So, we have seen situations in which the buyer
2 has been told, well, here's what I can get, I can't get
3 any more than that. So, we have to do some kind of
4 diligence to make sure that kind of a thing hasn't
5 happened.
6 MR. DUCORE: Let me -- I would like to ask you
7 introduce yourself, identify yourself for the record.
8 MARK KOVNER: Mark Kovner with Kirkland & Ellis.
9 MR. DUCORE: I mean, I think you hit on the --
10 the underlying tension and probably the reason that
11 there is a -- that we use up-front buyers, and that is
12 because if you don't, if you do a post-order
13 divestiture, you've already written in what the assets
14 are going to be, and if you find out later that it's too
15 narrow a package, you know, our ability to expand that
16 is very limited.
17 As part of that, though, and as Joe was getting
18 at, we have learned that buyers sometimes or frequently
19 come in asking for a small amount, in part because they
20 figure if they ask for more, the merging parties will
21 find somebody else who is willing to take less and they
22 won't be in on the bidding at all, so there's that game
23 going on, and we have to be alert to, and I don't
24 think -- well, we try to avoid saying, you should be
25 acquiring these other things as well, but instead what

1 we're trying to do is ask if you -- if this is all you
2 get, how are you going to make this work, you know, what
3 else do you need to bring to the deal, and if you don't
4 have it internally, shouldn't you be getting it as part
5 of the package as well.
6 I know that can sound like we're out there
7 seeding the buyers with ideas for how to ask for more,
8 but I guess our question is how do you -- how do you get
9 around that. If you're going to do that exercise and do
10 that due diligence on our part, how do we avoid that?
11 MR. KOVNER: Well, it would seem to me that
12 obviously you need to test the viability of the buyer
13 and the resources and the means and the ability to take
14 the business and run with it. So, that much due
15 diligence seems to be perfectly appropriate.
16 In terms of whether the package is appropriate,
17 it seems to me that you can do that principally by
18 talking to the main buyer, the main transaction, because
19 you know at this point presumably generally what assets
20 would need to be part of that package, and if the --
21 buyer with a capital B is playing tricks on you and
22 trying to negotiate some smaller package, you have the
23 ability, because -- ultimately to test that, because
24 ultimately you have to approve it.
25 MR. LIEBESKIND: You would actually be surprised

1 at how often we don't know that, but we don't know it
2 for fairly obvious reasons, because up until the point
3 where we've -- where we've made a decision or we at
4 least tentatively have made a decision that there's a --
5 that there's a fix to be done and that the parties are
6 willing to talk about that, the litigating staff's focus
7 is not on what does it take to constitute a viable
8 business, it's on whether or not there's a competitive
9 problem. Which is a somewhat different set of issues.
10 And you're not really normally in the course of
11 thinking about whether there's a competitive problem
12 thinking about now, what exactly are the assets they use
13 to compete in this business. You're thinking about
14 other issues, basically. And so quite often,
15 particularly in a fast-moving transaction, that's not
16 something that you've given a whole lot of thought to up
17 until that point.
18 You may have given thought to it as it relates
19 to competitive issues, as it relates to entry and things
20 like that, but you haven't necessarily thought about it
21 in terms of what would it take to constitute a
22 stand-alone business if you're going to carve up the
23 seller in some sense.
24 MR. BROYLES: And I think we're also sensitive,
25 I think, to trying not to inject ourselves between

1 negotiations between the buyer with the big B and the
2 buyer of as the assets, but we also, we have concerns
3 about the buyer as well. One of the things, we have two
4 potential exchanges with the buyer that I've mentioned
5 before is that the buyer may be over-reaching in trying
6 to negotiate for something that we don't care about, and
7 then on the other hand it might be under-reaching in
8 just trying to make a deal.
9 At some point in that process, we do have to
10 talk to the buyer, we do have to talk to the buyer about
11 the assets that it's negotiating for, what it's asking
12 for, and it seems to me that while we don't want to do
13 it too early, we don't want to do it too late, also,
14 because that may also delay -- also would mean you would
15 be getting your deal done if we go back and we're in a
16 disagreement about what the buyer is getting.
17 So, there is a tension there as to when we step
18 in and do that so we can get to the bottom line quicker,
19 but also not too early so that we're interfering with
20 the negotiation process.
21 MR. DUCORE: Let me pose a question. If you had
22 a choice between spending the time to negotiate the
23 buyer up-front, which is going to delay your deal, but
24 will give you the certainty that, you know, this is the
25 remedy you're going to face, it gives us the benefit, I

1 guess, of getting a remedy in place sooner, if you have
2 that as one choice.
3 And the other choice was, you know, you get six
4 months to divest whatever this package is you've
5 negotiated with the staff, but there is this crown jewel
6 out there that's looming, which is I think fairly
7 readily seen to be a self-contained business and is much
8 larger than that package. And you knew that come, you
9 know, six months plus a day the Commission is going to
10 revoke its rights to trustee and give the trustee that
11 crown jewel to divest, do your clients out there have a
12 sense or do you have a sense in which you can recommend
13 it?
14 MR. KOVNER: I would say it would depend on the
15 factors. I think if the client felt fairly confident,
16 very confident in its ability to sell the assets within
17 the business within six months, they might want that
18 extra time and be able to consummate the deal quickly.
19 On the other hand, certainly I know from experience that
20 the threat of a crown jewel provision being put into
21 effect is a huge club, and that is -- that is certainly
22 an impetus for them to want the buyer up-front, and the
23 buyer up-front also just will save time in process as
24 well, I recognize that.
25 When you've got a buyer up-front, you can test

1 everything right there, ask them whether the assets are
2 sufficient. When you don't have the buyer up-front,
3 sometimes -- in a negotiation of a consent decree and
4 also conceivably the hold separate just takes a lot more
5 time. So, sometimes not having a buyer up-front means a
6 longer process. I think just that.
7 MR. SIMONS: How about experiences with the DOJ,
8 are they doing stuff that, you know, is much better than
9 we're doing and we need to, you know, copy them or vice
10 versa? Anything like that?
11 (No response.)
12 MR. LIEBESKIND: I guess not.
13 MR. SIMONS: There are no DOJ people here, other
14 than a former DOJ person who is sitting in the back.
15 John?
16 MR. NANNES: I don't know what's transpired
17 recently in the past year or so, but certainly if you go
18 back over time and track what other agencies do, it's
19 quite evident I think that the Federal Trade Commission
20 is much, much more thorough when it comes to divestiture
21 process than currently Justice has been.
22 Now, I don't know whether that means that
23 Justice is too relaxed about it and that the FTC is too
24 much -- is too concerned about it, but I think it may be
25 fair to say that one of the greatest disparities between

1 the two agencies today is not so much what they do
2 substantively in terms of interpreting Section 7, but it
3 really is quite the diversity that they bring towards
4 the divestiture process.
5 I know when I was at the department, there were
6 some instances where people would come in with proposed
7 fix-it-firsts and that we would look at that and if the
8 private parties had negotiated the transaction and they
9 were credible parties, so you had good cause to believe
10 that they were taking into account the proper
11 circumstances, the department would let the proceedings
12 transact and not even bother getting a consent decree.
13 And I think a couple of times that backfired because
14 when deals turned out to not go as envisioned, there
15 were private contractual remedies but no public interest
16 remedy that the department had to enforce.
17 On the other hand, one of the incentives you had
18 if you do allow the party to fix it first, and I
19 think -- if you think fix-it-first is better than a
20 contracted post consummation divestiture and a potential
21 trustee, then I think the agencies have some obligation
22 to make the fix-it-first mechanism easier for the
23 parties. And by that I mean that if the parties do
24 negotiate fix-it-first and come up with an incredibly
25 good asset package and a very substantial buyer, that

1 the Commission or the Antitrust Division, depending on
2 which agency, might be prepared, I think with some
3 cause, to assume that some of the issues that the agency
4 might otherwise have to work through, that they can rely
5 on the parties to work through given their credibility
6 and their reference to a fix it first that's fully
7 vetted.
8 So that you do want to encourage people, so I
9 think the best public policy is to have fix-it-first and
10 a credible buyer and know what you're getting, although
11 subjected to post-consummation divestiture rights.
12 MR. SIMONS: Were there particular types of
13 transactions that the division would consider, you know,
14 most appropriate for fix-it0firsts and certain types
15 that they would consider least appropriate?
16 MR. NANNES: I don't know that we had judgments
17 that were industry-specific, I think we looked at a
18 number of factors and with Ann and others that were
19 identified here today. Some of the things -- some of
20 the criteria that come out of the Pitofsky speech, for
21 example, if it's a freestanding incorporated entity and
22 you're not moving any assets out, then you have some
23 cause to believe that if they were, if you're coming out
24 of a particular entity, certain assets were worse than
25 trying to take assets from the acquiring entity and

1 buying some of those from the acquirer entity and just
2 with the intent that they were going to work creates
3 greater skepticism.
4 What I don't know, I don't think the department
5 has gone back and looked over time at a divestiture
6 study to test whether it's properly calibrated those
7 risks or whether they needed to address it as too
8 tolerant.
9 MR. SIMONS: Thanks, John.
10 Jaret?
11 MR. SEIBERG: Can you explain why in the
12 Bayer/Aventis deal there was an up-front buyer in one
13 market but not in the other ones? I mean, if you read
14 that order, it just doesn't seem clear why the
15 Commission wanted it for only one market.
16 MR. LIEBESKIND: Well, the simple version of it,
17 the complicated version of it I would mess up, but the
18 simple version is that the up-front buyer situation was
19 one where there wasn't a complete business. And the
20 other ones, whether they were complete businesses or
21 not, were more complete.
22 I mean, this notion of a complete business is
23 something that's a little problematic, because it's a
24 little bit of a fiction. What's being divested, when we
25 say we're getting a complete business, isn't always like

1 completely complete, it doesn't necessarily include the
2 information systems, it doesn't -- it might not include
3 this, might not include that, corporations aren't really
4 organized that way quite often.
5 So, it's more of a -- it's more of a more or
6 less complete business versus a less or more complete
7 business. The business that was divested with an
8 up-front buyer in the Bayer case is -- was one that was
9 very much not a stand-alone business. They did not
10 divest manufacturing, they did not divest processes and
11 things, basically that was -- had already -- it was a
12 business that had already existed as a toll production
13 business for Aventis, that is Bayer was already before
14 the merger making the stuff that Aventis was selling,
15 and so what we did was we said, well, if you get
16 somebody else who wants to step into Aventis' shoes,
17 it's a little -- we don't know how likely it is that you
18 are going to find somebody like that, so you better find
19 them now, whereas the other -- the other divestitures
20 were more like, I don't know if I want to call them
21 stand-alone businesses, but were more like stand-alone
22 businesses than the -- whatever it was business,
23 Tribufos business. But comment period is still open on
24 that, so --
25 MR. DUCORE: Well, let me throw another question

1 out. We've been criticized in the past, I think,
2 fairly, for not getting sort of the remedies people
3 involved with the investigative staff until fairly late
4 in the game, which then slows down the negotiation
5 process, and over the last number of years, we've been
6 making conscious efforts to not -- to not leave that
7 towards the end.
8 Is there a perception that that is improving or
9 is it not improving and it's still a major problem? Is
10 it still an annoyance or what do people think? I guess
11 we're doing just fine.
12 MR. LIEBESKIND: There's a perception that the
13 remedies people are getting involved too early.
14 MR. SIMONS: Well, sometimes it's at all.
15 MR. DUCORE: Well, if we were going to -- I
16 mean, I don't want to cut anybody off, but I just want
17 to hold hands up, but if we were going to go back and
18 look more at -- how should we be figuring out whether
19 we're engaging in overkill here? I mean, you know, do
20 we get criticized for pushing for up-front buyers in too
21 many cases? How should we test that? We get critiqued
22 for wanting hold separates and maybe more often than we
23 should, and again, you know, we don't know how to assess
24 whether we are or aren't other than, you know, arguing
25 on a case-by-case basis, but does anybody have any ideas

1 about how we could go back and look at what we've done
2 to assess whether, you know, we didn't really need it
3 here or, you know, we should have done it? It's
4 probably easier to find out how we should have done it
5 in failures, but how do you gauge a success and decide
6 whether we were overdoing it in our negotiation?
7 MR. SIMONS: We'll take written comments, too.
8 MR. DUCORE: Anonymous, too.
9 MR. SIMONS: Whether you email it anonymously or
10 send it over, we'll accept that, also.
11 MS. HIGGINS: Well, let me weigh in a little bit
12 on this, this is Claudia Higgins with Kay Scholer.
13 I am now representing a third party in one of
14 your transactions who purchased assets, and it's clear
15 to me that the agency did a very careful job of trying
16 to make sure that the parties had cobbled together
17 enough assets for this divestiture, but I can tell you
18 that when the cobbling together has occurred, it does
19 create little niches that are problems. And I mean, we
20 have to some degree worked out some of those problems,
21 and but also had to come back to you to say we need you
22 to apply some pressure here on the parties to this
23 transaction.
24 So, the care with which you put together the
25 order is something that I would not want you to relax,

1 given the experience I've just had.
2 Now, I may at some point have other clients who
3 will kill me for these words, but I think that it is
4 very important for the agency to continue to be asked
5 about these things. There are a couple of little words
6 in the order that I am speaking of that are problematic.
7 Now, it turns out that before I got involved in this, my
8 client was saying, sure, those words are no problem,
9 because they were in hand with the parties to the
10 transaction. And that's exactly the problem we've
11 identified, and I think that issuance is appropriately
12 placed.
13 MR. DUCORE: Well, I mean, we don't have to
14 leave now, people can leave if they want. I don't want
15 to cut off discussion, but -- before we close, Jim,
16 before you speak, I mean, I want to say that there is
17 this email address, remedies@ftc.gov, which I am not
18 aware of anybody having used yet, but seriously, you
19 know, we -- I mean, one of the things -- one of the
20 reasons we're having -- we had this session today is
21 because, you know, there has been some level of
22 criticism out there about what we're doing and where
23 we're overplaying our hand, and, you know, if there's --
24 if those are legitimate concerns, we would expect to
25 hear them and, you know, with a little more formality

1 behind them.

2 So, people should be feeling free to submit

3 comments, I'm sure you can figure out a way to submit

4 anonymous comments through regular mail, and the point

5 is we actually do want to hear and that I'm frankly a

6 little surprised that we didn't hear more today. I

7 thought we were going to be sitting ducks up here.

8 But Jim, you wanted to criticize.

9 MR. FISHKIN: I'm Jim Fishkin at Swidler Berlin,

10 used to be at the FTC for a long time. I just want to

11 make a few comments in the various comments I've heard.

12 The first one is what Marc started off with, I

13 guess he left the room. Marc talked about what do you

14 do about public comments when you have an up-front

15 buyer, and you want to have the up-front buyer's deal

16 consummated right away, and when we did on -- I can

17 think of two examples that may bridge the gap that Marc

18 talked about.

19 One was the Jitney Jungle/Delchamps deal, which

20 was a late 1997 deal, and this stretches my memory a

21 little bit, but I think at the time we were just -- well

22 we, when I was at the FTC, the FTC was just switching to

23 up-front buyers, and there was an up-front buyer

24 identified in the order and they had a contract to

25 consummate, but they could not consummate until the

1 order was final.

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

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

17 So, I guess my point is, maybe Marc's example
18 could be worked out with this 30-day public comment
19 period, or at least a lot more -- or a lot easier than
20 it could be when there was a 60-day public comment
21 period. Where maybe you could even add, I don't know, a
22 15-day public comment period just for the buyer but not
23 necessarily the orders, at least, you know, the
24 concerned public would have some opportunity to comment,
25 even if it's not quite as extensive as previously.

1 Chris MacAvoy and I worked on a lot of
2 supermarket cases, I need to comment on what he said,
3 and this was on the perception of a small buyer for
4 supermarkets versus a chain and then Chris said, well,
5 it may, you know, the staff had said it may take longer
6 with the small buyers, and I just do want to add in, and
7 I have to put in Claudia's caveat, in case I come back
8 here on some other deal, but the small buyer issue may
9 also raise competitive issues, because a chain is
10 usually vertically integrated where they're buying
11 themselves and their own distribution centers and small
12 buyers don't have that due to their size, they have to
13 go to a wholesaler, and in some of these cases, the
14 wholesalers also own retail stores in the same market,
15 so you get other horizontal and vertical issues that
16 come up, and that sometimes adds to the time period.
17 And finally, Chris, this is on your third party
18 comments, and third party rights, the only example I can
19 think of, and this is quasi relevant to what you were
20 saying, is in the supermarket cases, what about
21 landlords? Because there's a provision that says, or at
22 least there was a provision in some of those other
23 orders, saying that, you know, the third parties offer
24 to waive their rights and it usually meant the landlord.
25 But in some of the cases I worked on, the

1 landlord, there were cases where the landlord was very
2 reticent to jettison their rights if there were, let's
3 say, 25 years left on the lease. A lot of the reasons
4 that the landlords articulated had to do with
5 competitive issues, because they would say I've got a
6 strip mall and the supermarket is the anchor, and the
7 success of the mall depends on the strength of the
8 anchor. And if you want this buyer in, I'm concerned
9 they're not going to be as good, and they have done
10 their own competitive analysis. And some of the reasons
11 that they've identified may have been missed by the
12 staff or would complement some of the concerns that the
13 staff raised all along.
14 MR. MacAVOY: Although it's amazing how a big
15 check would just make those concerns disappear.
16 MR. FISHKIN: No comment, I never got involved
17 in those negotiations. Thank you.
18 MR. SIMONS: Thanks, Jim.
19 MR. DUCORE: Okay?
20 MR. SIMONS: Well, thanks everyone for coming
21 and like we said, if you have other comments, you want
22 to send them in, that would be great, or just, you know,
23 call Dan, he's got nothing to do, right, Dan?
24 No, seriously, we really do want to get your
25 comments. So, if you have any authority, please help us

1 out.

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

3 concluded.)

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3 CASE TITLE: WORKSHOP ON REMEDIES PROCESS

4 HEARING DATE: JUNE 18, 2002

5

6 I HEREBY CERTIFY that the transcript contained

7 herein is a full and accurate transcript of the notes

8 taken by me at the hearing on the above cause before the

9 FEDERAL TRADE COMMISSION to the best of my knowledge and

10 belief.

11

12 DATED: 6/19/02

13

14

15 Sally Jo Bowling

16

17

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

19

20 I HEREBY CERTIFY that I proofread the transcript

21 for accuracy in spelling, hyphenation, punctuation and

22 format.

23

24

25 Sara J. Vance