

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Federal Trade Commission,)	
Plaintiff,)	File No. 12-CV-307
vs.)	(PJS/AJB)
Graco, Inc., Illinois Tool)	
Works, Inc., and ITW)	
Finishing, LLC,)	Minneapolis, Minnesota
Defendants.)	February 16, 2012
)	2:00 p.m.

BEFORE THE HONORABLE PATRICK J. SCHILTZ
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

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1 Randy Kahnke.

2 MR. DICKINSON: Good afternoon, Your Honor.
3 Charles Dickinson from Hogan Lovells on behalf of the
4 defendants Illinois Tool Works, Inc. and ITW Finishing, LLC.

5 MR. ROBERTSON: And Robbie Robertson also on
6 behalf of ITW, Your Honor.

7 THE COURT: Thank you to all of you for coming
8 here.

9 So I wanted to discuss scheduling with you. I
10 want to preface this by saying one of the either good things
11 or bad things about this job is a day never goes by where I
12 don't feel stupid, and today is a particularly stupid day.
13 I have never had one of these cases. I don't know anything
14 about antitrust law. I don't know anything about these
15 procedures. I don't know how things are usually done. I
16 mean, typically with most cases I have enough experience
17 with the cases in the area of law that I can kind of look
18 beyond the surface and kind of know what's really going on.
19 I have no idea what's really going on in this case. So I'm
20 probably going to ask a lot of really stupid questions, but
21 I'm the judge, right, so there's no bad questions.

22 So maybe, Mr. Hinderaker -- is there a lead person
23 here? Mr. Hinderaker? See, I made the assumption it would
24 be you and I turned out to be right. Maybe if you could
25 just go to the podium and let me talk to you first.

1 I'm having a little trouble just kind of
2 understanding your client's position here. I understand
3 that if I enjoin -- I'm just going to call it the merger; I
4 know it's technically a purchase of assets -- if I enjoin
5 the merger, I can understand why the merger would be off and
6 so I get that part. But, as I understand your argument, you
7 are saying that basically I'm going to decide this case
8 because if I enjoin the merger, the merger is off and it
9 goes away; and if I don't enjoin the merger, the FTC will go
10 away and won't proceed with their administrative
11 proceedings. And it's the second part I don't get.

12 So you're telling me that you get these -- again,
13 these are sincere questions. I really just don't have any
14 sense of how this works. You get these proposed mergers
15 involving a billion dollars. The FTC investigates it for
16 months. They take millions of pages of documents. They
17 might take dozens of depositions. They go in to court. A
18 federal judge gets a bunch of affidavits and in some
19 truncated proceeding either does or doesn't grant a PI and
20 everybody goes home, the case is over. That just seems like
21 a really bad way to run the railroad if that's what happens.
22 Is that, in fact, in real life what happens?

23 MR. HINDERAKER: In real life that is what almost
24 always happens, Your Honor. In fact, the Court is given a
25 very important role by the FTC statute. I think the key

1 language is quoted in one or maybe both of the letters that
2 the parties sent to you.

3 The cold reality, Your Honor, is that the only
4 substantive review of the Commission's objections to this
5 transaction that will ever take place is whatever review
6 takes place in this court, because if the alternative is the
7 year's long review process or year's long administrative
8 process that goes on in the Federal Trade Commission itself,
9 the transaction will simply die.

10 THE COURT: So if what you say is correct, then
11 basically the FTC never has these proceedings? They are oft
12 scheduled, but never actually conducted?

13 MR. HINDERAKER: Rarely actually conducted.
14 Mr. Robertson, who used to be with the Federal Trade
15 Commission, can give you a better statistical breakdown than
16 I can.

17 Sometimes the parties will close and the
18 proceeding will go on after the parties have closed the
19 transaction sometimes for years after the parties close.
20 But the FTC has guidelines, and usually if it's prospective,
21 transaction is not yet closed and the court explores the
22 issues thoroughly and writes an opinion that sets out a
23 reasonable basis for the decision, under the FTC guidelines
24 typically if the court doesn't grant the preliminary
25 injunction, the case is then dropped.

1 THE COURT: I have no basis for disagreeing with
2 what you say. It just seems to me bizarre.

3 So when I have a case come before me where
4 somebody says they got their neck hurt in a car accident, we
5 have a year of discovery, we have dispositive motion
6 practice, and then if we try it, we try the case for a week,
7 and then I decide or the jury decides whether they get, you
8 know, \$30,000 for their neck. But a billion dollar merger,
9 in this case \$650 million merger, essentially comes down to
10 competing affidavits, maybe a few days of testimony, and a
11 judge having to get a rush decision out? So we give less
12 attention to billion dollar mergers than we do to a typical
13 car accident case?

14 MR. HINDERAKER: Often the case, Your Honor. What
15 you just described, frankly, Your Honor, is best-case
16 scenario. Because if the only procedure we had available to
17 us is the FTC process, that can go on literally for years.
18 In fact, I brought along a case which I'd like to just offer
19 to the Court. I've got a citation for it, but I printed it
20 off for the Court and opposing counsel. It's *Federal Trade*
21 *Commission v. Laboratory Corporation of America*, Central
22 District of California, decided in 2011. If I might
23 approach?

24 THE COURT: Yeah. Just give it to Beth.

25 You can just hold on to it.

1 MR. HINDERAKER: And in that case at page 20,
2 Judge Guilford reviewed the history of FTC proceedings and
3 the FTC rules that allow them to drag on and on and on, but
4 then pointed out that the FTC apparently has not followed
5 its own timing constraints in antitrust cases. And he cites
6 cases that have gone on for four or five years and longer
7 and concludes that this is a long, drawn-out process.

8 The reality in the case of the transaction we're
9 talking about here, and I'm sure most transactions, is that
10 while the parties are talking about a possible extension of
11 the terminal date of the transaction, currently April 1, and
12 it may be possible to extend it by a few months -- we don't
13 know that, but it may be possible when we get some input on
14 the Court's calendar -- it certainly cannot be extended for
15 years. It's already almost a year since this acquisition
16 was announced. And so relegating the acquisition to the
17 tender mercies of the Federal Trade Commission
18 administrative procedures kills it. Those procedures would
19 never be completed.

20 THE COURT: You know, I'm looking at this case,
21 and I appreciate very much both sets of letters -- the set
22 that was invited by Judge Kyle's clerk and then the set that
23 I invited -- but, you know, as this case is described by the
24 -- and I will preface this by saying I understand the FTC
25 has argued that this is something different than a typical

1 PI standard; it's easier for them. But I've read the Eighth
2 Circuit cases, and honestly I can't discern the difference
3 between those cases and the private PI cases. It basically
4 turns on likelihood of success on the merits. I know you
5 have pointed out there's the other factors as well. I
6 understand, but they tend to fall with the likelihood of
7 success on the merits.

8 But putting that aside, as I understand it, we've
9 got -- this looks like it's described to me like literally
10 one of the most complicated cases I have been assigned in
11 six years as a judge. It looks to me like this is basically
12 going to turn on the definition of product markets. I
13 understand enough about antitrust law to know that it's
14 defining the market on which the cases turn, but we have
15 five proposed markets by the FTC. Your view is in every
16 single instance, those markets are defined generally you
17 think too broadly, but even there's a couple of arguments
18 that they are defined too narrowly. I don't even know what
19 these things are, what a proportioner is. Except for
20 watching American Restoration on the History Channel, I only
21 have the vaguest sense of what this equipment even is.

22 So I've got to decide how to define markets. I
23 assume from what you've said that we're going to have
24 competing economists. We're going to have competing
25 distributor testimony. We're going to have competing

1 manufacturer testimony. I assume that we're looking at
2 literally dozens of witnesses, thousands of pages of
3 exhibits, extraordinarily complex economic issues in
4 something I know nothing about -- as I said, I wouldn't even
5 recognize the products if they were sitting on the table
6 here -- and I'm supposed to do all that on a motion for a
7 PI. They say I can just do this on the affidavits
8 essentially; I'd be surprised. You say seven days. I say
9 to you how are you going to do this in seven days? If I was
10 going to try this case -- and I know this isn't a full-blown
11 trial, but if I was going to try this case, this is an
12 eight- to ten-week trial. What are we going to do in seven
13 days?

14 MR. HINDERAKER: Our job, Your Honor, is to
15 simplify, frankly. I don't think we're talking about dozens
16 and dozens of witnesses. We're taking depositions. They
17 are ongoing.

18 THE COURT: How many are you taking, 30 some
19 depositions?

20 MR. HINDERAKER: Something like that.

21 THE COURT: That's three dozen.

22 MR. HINDERAKER: We'll be designating portions of
23 those depositions for the Court. The number of live
24 witnesses will be considerably smaller. And our job is to
25 instruct the Court, to teach the Court, to walk through the

1 various products in the market. Some of it is not all that
2 complicated. You can't pump with a spray gun, and you can't
3 spray with a proportioner. I think the Court will find --

4 THE COURT: Even the Court has figured that part
5 out, right. But I understand, apparently, there's lots of
6 different kinds of spray guns and some spray guns don't
7 compete with other spray guns. All that turns on
8 cross-elasticity of demand and things like that. You know,
9 I assume just sitting here and trying to figure out what the
10 spray gun market is is a day or two of work.

11 You know, even if you do this in a seven-day
12 simplified -- simplified means what happens in court. I
13 still have to go back there and figure this stuff out. So
14 to have a witness say here's my 40-page report, let me give
15 you a 10-minute summary still leaves me with 40 pages of
16 economic data to work through.

17 It just seems like a very odd process that this
18 gigantic, complicated case gets dumped on a judge -- any
19 judge, I'm not talking about me -- and essentially
20 two-thirds of a billion dollar merger turns on a judge being
21 able to rush through this and get a PI order out. This
22 really seems like an irrational way to be doing this.

23 MR. HINDERAKER: Your Honor, I can't disagree with
24 that. I will simply say that this is indeed, frankly,
25 best-case scenario how these cases go. And judges have

1 decided these cases and, frankly, usually decide on them
2 rightly, in my view, with shorter hearings than what we're
3 proposing here. And I'm confident that if the Court can
4 find us a week of trial time, that we can indeed cover these
5 issues.

6 THE COURT: Well, you might be able to cover them
7 in a week and then I've got to write an order. So I have to
8 somehow explain in an order, not just -- I have to resolve
9 all the legal disputes there may be between you; although,
10 it seems like this is 95 percent a factual dispute, if I'm
11 reading your letters right. But I've got to write this long
12 order explaining why I've decided that the FTC's definition
13 of liquid finishing spray guns is overbroad. And then if I
14 agree with the FTC's definition or whether I do or not, I
15 have to look into the distributor network, the number and
16 nature of the channels of distribution; the feasibility of
17 manufacturers distributing directly; the barriers to entry
18 into the distribution. I mean, between the two of you you
19 have identified 20 topics on which I'd have to write several
20 pages. It would take me months to get the order out even
21 after our one-week hearing.

22 MR. HINDERAKER: Well, there are multiple factual
23 issues, Your Honor. I can't at all disagree with that.

24 I don't know that a month's long process of
25 opinion writing is necessary. Certainly the parties will

1 submit findings and conclusions, and certainly an opinion
2 will be welcome. But I don't know that it will take pages
3 to address every single one of the factual issues that have
4 been identified.

5 THE COURT: What happens as a matter of
6 substantive law -- suppose I think that the FTC's definition
7 of -- suppose I think that this idea of a market that's the
8 industrial liquid finishing equipment resale market is
9 overbroad because reselling pumps aren't what you would call
10 interchangeable with resold spray guns. Okay? But I
11 decide, yeah, they've got circulation pumps for paint
12 systems in automotive assembly plants dead right, and this
13 merger would create essentially a monopoly in circulation
14 pumps for paint systems in automotive assembly plants. So
15 does that mean the merger doesn't go forward because there
16 is a market in which it would lessen competition or do I
17 enjoin part of a merger or what is that?

18 MR. HINDERAKER: Here's the way that would
19 normally happen, Your Honor -- by the way, I could tell you
20 about why they are wrong about that particular market, but I
21 won't do that today.

22 THE COURT: But you won't.

23 MR. HINDERAKER: Typically, Your Honor, what the
24 Court would do in that case is to deny the motion for the
25 preliminary injunction contingent on the transacting parties

1 agreeing to certain conditions, and one of them could be
2 divestiture of the pump line that's at issue there.

3 THE COURT: That sounds like a pretty complicated
4 order for a judge to write. So these parts of the merger
5 can go forward, but these parts of the merger can't go
6 forward?

7 MR. HINDERAKER: Well, the way that would
8 typically be done is that the merger can go forward, but if
9 there are conditions, the court states what the conditions
10 are.

11 THE COURT: Again, these are just sincere
12 questions. Why wouldn't it be the merger can't go forward,
13 but you can go and come up with a new merger that doesn't
14 involve these pieces and try again?

15 MR. HINDERAKER: Well, that would send the parties
16 back to square one to negotiate a new asset purchase
17 agreement, which would --

18 THE COURT: If I can carve out one piece of it,
19 why can't you carve out one piece of it?

20 MR. HINDERAKER: I'm not saying that the parties
21 necessarily couldn't. But, as you know, Your Honor, these
22 agreements have end dates on them. They have got all kinds
23 of conditions. They are negotiated over a period of months
24 in a particular set of economic conditions.

25 THE COURT: Which is exactly why I can't think how

1 a court could just carve a piece out of this deal. How
2 could I say the injunction is denied contingent upon -- I
3 mean, what's the difference between me saying the injunction
4 is denied contingent upon you pulling out the -- we'll call
5 it the automobile circulation pumps and me saying the
6 injunction is granted and you on your own carve out the
7 automobile pumps? Either way you've got to figure out a way
8 to back the automobile pumps out and figure out what the
9 impact on price is and so on.

10 MR. HINDERAKER: Well, I think, Your Honor, you
11 might have to look at the two orders and it might be that
12 there isn't a practical distinction; that's possible,
13 depending on how they were phrased. But I think the
14 potential difference is that the parties need not to be
15 enjoined from completing the acquisition on the theory that
16 there is some other acquisition that they would be permitted
17 to complete because they don't have a deal for that
18 acquisition.

19 THE COURT: But if I find that the FTC has
20 correctly defined at least one of the markets and that
21 competition would be substantially reduced in one of the
22 markets, then the merger that would bring that about would
23 seem to me to be an unlawful merger and should be enjoined.

24 MR. HINDERAKER: Well, I don't think so, Your
25 Honor. I think the solution there is to permit the merger,

1 but make it contingent on the agreement by the acquiring
2 party who is taking this risk to divest that product group.

3 THE COURT: Well, we're just getting a taste of, I
4 think, some of the complicated questions that await me here.

5 I'm just looking at the notes I took after reading
6 your letters.

7 Okay. I've sort of asked you the preliminary
8 questions I want to ask you. Let me see if any of your
9 colleagues wanted to add anything.

10 MR. ROBERTSON: Just briefly, Your Honor.

11 THE COURT: If you could just go to the podium so
12 my court reporter can hear you better. You are
13 Mr. Robertson; is that right?

14 MR. ROBERTSON: Yes, sir. And I've had the
15 pleasure of working with these folks for a long time as
16 well. I used to work there. So I tried these cases, and
17 I'll just mention *LabCorp*, for example, and mention Judge
18 Howell. I tried the Block case as well. I didn't win that
19 one but won all the other ones. But they are complicated at
20 first blush, I think all antitrust is, because we use
21 language and words that normal people don't use. But even
22 that case, the Block case, Judge Howell tried the case on
23 the merits, not on a PI but on the merits, in five months
24 from beginning to end, from the complaint to the end. It's
25 a lawyer's job to make it simple enough for a judge or for a

1 jury to understand and if we don't do our job or they don't
2 do their job, they don't get an injunction. If we don't do
3 our job, we can't persuade you to do it.

4 THE COURT: I have no problem understanding how
5 this could take a five-month trial. What I can't understand
6 is I can't make the kind of decision this case -- sorry,
7 decide the questions that this case presents in a seven-day
8 trial. It seems to me I would barely scratch the surface.

9 MR. ROBERTSON: Block was nine days total.

10 THE COURT: Oh, I thought you said five months.

11 MR. ROBERTSON: Oh, five months was from the
12 complaint to the end of the opinion.

13 THE COURT: I'm sorry, I thought you said the
14 trial was five months.

15 MR. ROBERTSON: We're already in month four of
16 this case. If the Justice Department had sued us, we would
17 already be at trial and be waiting for our decision from the
18 court, a final, final decision that could be appealed to the
19 appellate court.

20 So it is a different system. The FTC structure
21 and schedule I don't think is fair to business people. I
22 tried to make it shorter when I was there and was not that
23 successful. I did Chicago Bridge. That took us seven years
24 to get to the end. And when we finally did get to the end,
25 they went ahead and closed, by the way. The Commission at

1 the very end ended up divesting a very small piece, not what
2 was bought at the outset. In fact, most cases that's what
3 happens.

4 As far as the judge ordering other remedies, the
5 Whole Foods case, which is in the circuit there in DC,
6 actually mentions that, that the court is free to do
7 whatever remedies are equitable because it is an equitable
8 remedy that the folks here are seeing. In two cases -- and
9 what they were seeking in *LabCorp* was a whole separate, for
10 example, not even a you can't close, they were just holding
11 a separate part of the deal. In *Exxon* and in *Weyerhaeuser*
12 the court held a certain part of the case -- of the assets
13 being purchased separate. So there are all kinds of
14 remedies that could actually occur as a result of this. I
15 think just having an indication from a real federal court as
16 to how the court looks at this, that does then tell the
17 parties, including the FTC, what they need to do next. In
18 the case of *LabCorp*, the FTC dropped the entire case at the
19 end.

20 THE COURT: What I am struggling with, though, is,
21 you know, I get PI motions all the time. For example, every
22 time one executive of a Minnesota company leaves in the
23 middle of the night to go work for a competitor, we get the
24 motion for a TRO the next day. And, generally, I can look
25 at the contract. There's a non-compete clause. You look at

1 the contract, and you get affidavits. They are not that
2 factually complex. I've done many non-compete clause cases.
3 I have a pretty good intuition of how the case is going to
4 turn out. As I said, I don't even know what these things
5 look like. And we've got five different markets. You
6 violently object to the definition of all five markets
7 generally as being overbroad based upon a preview of
8 arguments to come that these spray guns don't really compete
9 with these spray guns. They are going to come back with
10 their experts that say these spray guns do compete with
11 these other spray guns, and we're going to do that over and
12 over again for five different proposed markets.

13 I tried a case last week involving the question of
14 whether a guy who was a felon shot off a shotgun around a
15 campfire with five other people present. We tried it for
16 three days. Okay? Now, I'm supposed to decide how properly
17 to define five different proposed markets, plus what the
18 extent of the -- once we define the markets what the extent
19 of the anti-competitive -- or the impact on competition is,
20 which requires me to look at things like entry barriers, the
21 number of competitors, all these kinds of things. I just
22 can't imagine how I could even get a sniff of the case in a
23 seven-day trial when I spent three days trying whether a guy
24 shot a shotgun off around a campfire.

25 MR. ROBERTSON: Fortunately, there are no shotguns

1 in this case.

2 THE COURT: That's one fortunate thing about this
3 case. We'll look for a second.

4 MR. ROBERTSON: Your Honor is already seeing some
5 of the issues that the case turns on because they are
6 elements to the case. If the FTC failed to prove one, then
7 it's done. And you mentioned market definition, for
8 example.

9 THE COURT: Well, that's one of the things I was
10 inquiring about, is I don't know if it's done or not.
11 Without knowing what I am talking about, a market in resale
12 of all products involved in finishing seems like a really
13 broad market to me just on first glance. That's my
14 question: Suppose one of these markets is properly defined
15 and suppose the merger would bring about a dramatic decrease
16 in competition within one of the five markets, do you enjoin
17 the whole merger from going forward or -- you know, I don't
18 know. But Mr. Hinderaker says I can decline to enjoin just
19 on the condition that you back out the part that's
20 anti-competitive.

21 MR. ROBERTSON: It would be extraordinarily
22 helpful to get anything from Your Honor because if you don't
23 do anything, this deal is not going to go forward.

24 THE COURT: I hope you all understand I'm not in
25 any way being critical of anybody in this room. You are

1 dealing with the realities. You are doing what you are
2 supposed to do, which is representing your clients. It's
3 just the first time I've seen this kind of a proceeding, and
4 it just seems to me like a very odd way to get decisions
5 made on billion dollar mergers.

6 MR. ROBERTSON: You can give us guidance, too, as
7 Judge Guilford did. Some judges do things differently,
8 obviously, you can tell from looking at the case. Judge
9 Collyer in D.C., we had a nine-day trial on a PI. Judge
10 Guilford gave us one day. He said this is what I want you
11 to do before you come in here, and he gave us page limits.

12 THE COURT: He must be a much smarter judge than
13 me. If it was something I knew about, like the market in
14 pizza or something, then maybe I could do that.

15 MR. ROBERTSON: That was a complicated case, too,
16 involving laboratory testing and it was not easy and neither
17 is tech software.

18 THE COURT: Maybe that's what you do, you give
19 people X number of days and you say to each side you have
20 three days, give it your best shot.

21 MR. ROBERTSON: Whatever Your Honor gives us -- if
22 you give us five minutes, I would set up an argument right
23 now. I'm concerned and we're concerned as to why we're
24 here -- just the reality is the deal won't go forward and
25 what happens at the FTC, that's a win for them. They drag

1 it out and if nothing happens, it's a win.

2 THE COURT: I understand. What I struggle with --
3 whatever flaws I have as a judge, one isn't that I am a
4 rubber stamp judge. I don't want to make a decision on
5 which a \$650 million is going to decide without feeling like
6 I have some idea what I am talking about. I'm not going to
7 rubber stamp anything. For me to have a comfort level that
8 I actually know what I am doing and exercising the judicial
9 power of the United States, it's going to take a lot of
10 work.

11 You know, as I told you in my letter, you have
12 transferred your case from one of the very least busy cases
13 (sic) in the country to one of the very most busy cases
14 (sic) in the country. It's hard to fit in this much work
15 into a schedule like I've got. So I understand. I mean,
16 there's no bad guys in this room. We're just all trying to
17 figure out how to deal with the constraints we've got here.

18 MR. ROBERTSON: Yes, sir. And I apologize for
19 that. This has happened four times in the last year and a
20 half where a case has been transferred out of where the FTC
21 or where the DOJ first filed them. It's a common thing that
22 happens. It just happened that they went into a lucky place
23 where a judge had time. It happened while in Santa Rosa and
24 -- but I understand --

25 THE COURT: There's a bill in Congress right now

1 that's called the emergency something or other. It's to add
2 new judgeships to, I think, four districts: California,
3 Arizona, I think one of the Texas districts, and Minnesota.
4 I mean, we're on the emergency list for help. We have seven
5 active judges for a state of 5.5 million people. It's an
6 extraordinarily busy court.

7 As I said in my letter -- in fact, I looked -- if
8 you called my chambers today to schedule a hearing, you
9 would get a hearing date for June 27th. That's when I have
10 got the next -- that's for a one-day -- one hearing, an
11 hour-long kind of hearing. That's what our schedules are
12 like. So I'm trying to figure out how to do a responsible
13 job for you folks in a way that honors the other commitments
14 I've got. It's just tough.

15 MR. ROBERTSON: And I perfectly understand. As
16 you know, as you said, I have to advocate for my client.
17 It's a problem. We have been going for a year down the road
18 with this, and we need some help. We need to have a judge
19 make a decision on this. We would like to do anything. And
20 not making a decision means it's a decision as a practical
21 matter because the deal will go away.

22 THE COURT: I understand.

23 MR. ROBERTSON: That's a lot of work, a lot of
24 time, a lot of people's --

25 THE COURT: I assume it can't be -- you folks have

1 to have -- when they negotiated this transaction, they have
2 to have taken into account there was a possibility of an FTC
3 challenge to it, and there has to have been some contingency
4 built in. I mean, if April 1st is really a drop-dead date,
5 it was a pretty risky transaction from the start.

6 MR. ROBERTSON: Well, let me just say two quick
7 things on that: One is that less than one percent actually
8 do get challenged, so it's hard to predict which ones. I've
9 had cases that are much worse than this that we never even
10 got a phone call. So it's hard to predict in this business
11 what's going to happen.

12 Secondly, every deal has to have some end date
13 because there is financing at stake and people's jobs at
14 stake. We're paying people to stay on for the transition.
15 So you have to have some end date. It is April 1st. I
16 think counsel has already described what we're trying to do.
17 But we don't know what we're negotiating for because we
18 don't know if we can get a hearing to hear the case. If we
19 can't get a hearing, then we don't need to be negotiating at
20 all. We need to be winding it down.

21 THE COURT: Okay. Anything else you wanted to
22 say, Mr. Robertson?

23 MR. ROBERTSON: No, Your Honor, unless you have
24 any questions, feel free.

25 THE COURT: Thank you.

1 MR. ROBERTSON: Thank you, sir.

2 THE COURT: All right. Who is going to represent
3 the FTC here? Are you Mr. Broyles?

4 MR. BROYLES: Broyles.

5 THE COURT: Mr. Broyles.

6 MR. BROYLES: Yes.

7 THE COURT: So you've sort of heard my questions.
8 Maybe I am I will just invite you, first of all -- I saw you
9 taking notes -- maybe to comment on the things you wanted to
10 comment on first.

11 MR. BROYLES: Yes, Your Honor. The defendants
12 keep referring to a year's long process at the FTC. And
13 some of the cases they cited were not in fact merger cases,
14 which are a different category of cases, and the Commission
15 treats them differently. Certainly in years past, the
16 process took a lot longer because a lot of the mergers that
17 the Commission challenged were consummated mergers. And in
18 those circumstances, because the merger has already
19 occurred, the defendants have less of an incentive to move
20 things along so there was a reason for the delay. The
21 Commission has taken a very aggressive approach to try to
22 eliminate that delay. Part of that you see in effect in
23 this case in that there is a trial already scheduled. The
24 trial date was scheduled for five months after we filed our
25 complaint on December 15th. That trial will start on May

1 15th. The trial judge is limited to a seven-week trial, and
2 he must render his opinion within 100 days after the close
3 of the record. And the Commission will issue its decision
4 on any appeal from the ALJ's decision a year after the
5 complaint was filed, which they can appeal to a federal
6 Court of Appeals in December of this year. So it's not a
7 year's long process. It is a year.

8 THE COURT: Well, it's a year at the agency, but
9 then, you know, I'm assuming judicial review could be
10 another six months or more.

11 MR. BROYLES: It would be whatever the court had
12 -- whatever time the Court of Appeals -- any Court of
13 Appeals that they chose to go to had for them, yes.

14 THE COURT: Okay.

15 MR. BROYLES: But it's not a year's time.

16 THE COURT: According to what the defendants are
17 telling me in this case, you basically never have these
18 proceedings because if the judge enjoins the merger, it goes
19 away and you don't have to have your proceeding. And if the
20 judge declines to enjoin the merger, you voluntarily go
21 away.

22 MR. BROYLES: That's not completely accurate, Your
23 Honor. Sometimes -- a lot of times when a judge enjoins the
24 merger, the parties go away because they've read the writing
25 on the wall. They've seen the judge's opinion as to the

1 legality of their merger and they decide not to pursue the
2 case in the administrative process. That's not always the
3 case. We just finished one. It was a hospital merger in
4 Toledo, Ohio, the *ProMedica* case, where we did obtain a
5 preliminary injunction blocking consummation or, actually,
6 elimination of a whole separate, which is holding apart the
7 acquired assets. The parties sought to terminate that whole
8 separate. We got an injunction that said they couldn't, and
9 we also then went through the administrative trial process
10 in a year and got an opinion on the legality of that deal.

11 THE COURT: That part I sort of understand. I
12 don't understand the flip part. Why is it that you go away,
13 according to the defendants, if the judge denies your
14 motions for a PI? I'm one guy. I would be doing this --
15 whether we do this with no hearings, days of hearings or
16 weeks of hearings, I'm doing it on very imperfect
17 information. You are the folks that have had months to
18 investigate it. You are the folks that get a seven-week
19 trial. Why would you give up just because one guy on a very
20 imperfect record decided not to enjoin the merger?

21 MR. BROYLES: Well, the reality is, is different
22 judges approach these proceedings in different ways. Some
23 have done a full blown -- we have had some of these that
24 have been seven-week trials. We have some that have been --

25 THE COURT: On a PI motion?

1 MR. BROYLES: On a PI motion. We've had some that
2 have been just oral argument. What the Commission does is
3 it takes into consideration the record that was developed in
4 the PI proceeding and they consider that evidence as well.
5 The reality is, is that the witnesses who are going to
6 testify at the PI are going to be the same witnesses who
7 testify in the par 3. And so the Commission will evaluate
8 that evidence, they'll look at the reasoning of the judge,
9 and they will make a determination. It's not a guarantee,
10 but it will depend upon their evaluation of the record that
11 was developed. And the more developed the record, the less
12 reason it seems to be to waste the resources to go in and
13 try the same issues again. But the reality is that when you
14 look at what Congress set out, judges do have a wide
15 discretion as to how they approach these proceedings.

16 THE COURT: Now, you in your papers make it sound
17 like I can do this based on very little of a hearing, mostly
18 on the affidavits, if not exclusively on the affidavits. As
19 I've already said, as I look at the case as described, it
20 seems to me to be an extremely complicated factual case
21 involving product market definition with you proposing five
22 different market definitions, the defendants saying on every
23 single one of them you are wrong, that you are either --
24 usually you are too broad or too narrow. Once we get the
25 proper markets defined, it looks to me like there's some

1 very complicated questions on what the effect on competition
2 would be within the correctly defined market, which turns on
3 things like the number of manufacturers, and the barriers to
4 entry, and so on. There's this additional layer of
5 complication about the distribution networks. I just don't
6 know enough about antitrust to know how closely tied that
7 will be to the original. I mean, I assume, just as a matter
8 of logic, the less competition there is horizontally the
9 more leverage you'd have to also lessen the competition
10 vertically, but I don't know.

11 MR. BROYLES: Well, first of all, our complaint is
12 not -- we do not allege a vertical. There's nothing
13 vertical about the argument -- the case that we're
14 presenting to both you --

15 THE COURT: I thought part of your argument is
16 that the power that Graco would get through this transaction
17 would allow it essentially to -- I'm not going to put this
18 very well, but basically to intimidate its distributors from
19 doing work for anybody else because they won't want to get
20 sideways of Graco if Graco has got it.

21 MR. BROYLES: Basically, there are two classes of
22 customers that are going to be harmed by this transaction.
23 One class are the distributors themselves. They will be
24 harmed because they will be paying -- they are the ones who
25 actually buy the products that Graco and ITW produce. And

1 then they use these products in providing the services in
2 the product that they provide to the end users.

3 THE COURT: Is that true? So the distributors
4 actually buy the --

5 MR. BROYLES: Distributors buy and they take
6 title. They are value-added resellers, is what they are.

7 THE COURT: Then they resell?

8 MR. BROYLES: What the distributors actually sell
9 to the end user -- they don't go and they don't specifically
10 sell a pump. What they go and sell is a liquid finishing
11 solution to a problem that includes the products that they
12 buy from Graco and ITW. So they are taking what Graco and
13 ITW produce, they are buying it, and they are putting it
14 into the final product, which they then present to the end
15 user.

16 THE COURT: I see.

17 MR. BROYLES: The end user buys from the
18 distributors.

19 THE COURT: So the distributor isn't like the guy
20 selling lawnmowers. It's actually doing some assembly on
21 its own?

22 MR. BROYLES: He is doing assembly. He is doing
23 design help for the customer. He is doing troubleshooting
24 for them. He is providing a source of spare parts and
25 replacement parts and service.

1 THE COURT: Is that true like in the automotive?
2 Why would Ford need a middle man? Couldn't Ford just --

3 MR. BROYLES: There is a special class of
4 customers that buy, for example, from what are called
5 integrators. Integrators -- and ITW does some integration;
6 Graco does not. What the integrators do is essentially what
7 a super distributor does. They go to a very sophisticated,
8 large automotive plant and they integrate a much more
9 sophisticated system that, again, includes the same pumps,
10 and guns, and proportioners, but they are doing it on a more
11 sophisticated and a higher-level basis. You will see some
12 of the declarations and some of the witnesses that will
13 testify in this actually do that and they do that -- and
14 they sell those directly. But for the general industrial
15 use, these are just your general plants like some autos, but
16 basically that produce other things like cans and whatnot.
17 They basically buy from the distributors, and they are the
18 ones that they rely upon.

19 So what the case is about is that the end user is
20 going to pay more because what Graco and ITW do is when
21 their distributor comes to them and says, well, I'm
22 facing -- for example, a Graco distributor comes and says,
23 I'm facing an ITW distributor who was going to offer a
24 better price, will you give me a discount, Graco generally
25 says yes, we will give you a discount to get that business.

1 So the end user benefits. But what they do at the
2 distributor level is they give them discount levels, and
3 they use those discount levels to incentivize the
4 distributors to buy their products. They, in effect, lower
5 their price to them, and they are going to eliminate that.

6 What they do with their distributors -- because
7 getting into the end user is so essential and the
8 distributor is necessary for that because --

9 THE COURT: He is the guy who has the relationship
10 with the end users.

11 MR. BROYLES: -- he has the relationships with the
12 customers, and if you can't get them not to carry -- not to
13 carry but to push your product when that distributor goes
14 into that end user and says this is what I am going to use
15 to address your problem, they are going in basically saying
16 Graco we're going in saying ITW.

17 What Graco does much more aggressively than ITW
18 does is they tell that distributor if you go into that end
19 user and you push an Exel product, for example, if you say
20 I'm going to meet your need with an Exel product, Graco says
21 I'm going to reduce your discount or I'm going to terminate
22 you. And because of the volume of business that Graco
23 accounts for, and which will almost double if they are
24 allowed to acquire ITW, none of them are going to risk
25 losing that business to carry some other supplier that the

1 end user is not as familiar with. And that's where -- so
2 there's not vertical. There is nothing vertical about this.
3 It's horizontal.

4 THE COURT: I understand what you are saying.
5 Vertical -- as I said, I don't speak the language. I just
6 proved it.

7 All right. What else did you want to say in
8 response?

9 MR. BROYLES: Under the Clayton Act, if you find
10 that this acquisition is illegal in any market -- the
11 statute says in any line of commerce in any section of the
12 country -- then that merger is illegal and it should be
13 enjoined.

14 THE COURT: My instinct, uninformed instinct, is
15 if I found it illegal in a market, I would have to enjoin
16 the merger. It would be up to them to come up with a new
17 proposal that didn't include that part.

18 MR. BROYLES: Typically what happens -- this
19 happens in a variety of ways. It can happen in a situation
20 where there has been a determination that that is illegal in
21 that market or typically during an investigation, we will
22 focus in on where the harm is and then they negotiate with
23 us to figure out how to do that transaction. And that's the
24 way these things typically happen.

25 The process that Congress set out --

1 THE COURT: Then what do you, go back into court
2 and ask the judge to lift the injunction then and enter a
3 consent decree or something?

4 MR. BROYLES: Well, essentially, the injunction
5 would be in place until the Commission's administrative
6 process ended.

7 THE COURT: I see. You would have administrative
8 --

9 MR. BROYLES: We could end that with a consent
10 decree or with a formal judgment.

11 THE COURT: I understand. I understand. Okay.

12 MR. BROYLES: What else? You know, I'm very
13 sensitive to your concern that you can't do this, you can't
14 do a full-blown antitrust trial in seven days, but what's --

15 THE COURT: I completely get that I am not
16 supposed to do a full-blown antitrust trial to decide on a
17 PI. I understand that. But, as I said, I'm not a rubber
18 stamp judge. I don't issue orders unless I truly understand
19 what I am doing and I think I have made the right decision;
20 sometimes I haven't, but I have at least tried.

21 Seeing the questions I need to answer here I can
22 just tell this is going to take me a ton of time, not
23 because I'm mixing up trying the merits with the PI
24 determinations, but when we start from me not having any
25 idea even what those products are to having to define

1 markets to having to determine -- and I realize I'm not
2 defining the market. I technically am asking whether you
3 have a likelihood of succeeding in your definition of
4 markets, so I'm using shorthand as I talk about this. To
5 looking at competitive effects, I mean, it's going to be a
6 lot of work. And whether it's work here in the courtroom
7 while you are all present and witnesses are on the stand or
8 work back there working our way through hundreds of pages of
9 exhibits, it's a ton of work. It's not something I can
10 easily fit into my schedule or easily get to in any short
11 period of time.

12 And I know you weren't responsible for bringing it
13 to Minnesota, but if quick is what you folks are about, as I
14 said, it doesn't make any sense to bring this to one of the
15 four courts in the country that's so busy that it's part of
16 an emergency bill in Congress.

17 MR. BROYLES: Well, Your Honor, all I would say on
18 that is, number one, we didn't seek to be here.

19 THE COURT: I understand.

20 MR. BROYLES: And, secondly, April 1 is not a
21 magic date to us. If the defendants are willing to wait
22 until you can render a decision, we're fine, we're happy to
23 be here.

24 Our only concern is if they will not agree to not
25 close on their transaction until the end of the preliminary

1 injunction proceeding, then we probably are going to want to
2 move this back to the District of Columbia where that judge
3 indicated that he did have some time. But from our
4 standpoint, the ball is pretty much in their court as to how
5 they want to proceed.

6 THE COURT: Yeah. I understand. It's kind of an
7 elaborate game of chicken or something. I mean, it's just
8 very hard. I explained to you what I have got on my
9 calendar between now and April 1st. I can't do the
10 impossible. I suppose it's not technically impossible. I
11 could take a bunch of other parties and a bunch of other
12 cases that have already waited months to see me and tell
13 them all, sorry, I will see you in August. But that just
14 strikes me that would be extremely unfair to the other
15 parties, especially when there's another federal court that
16 is perfectly capable of deciding this thing without causing
17 that kind of disruption to other parties. So it's a
18 difficult thing.

19 Anything else that you wanted to say, Mr. Broyles?

20 MR. BROYLES: Not that I can think of. No, Your
21 Honor.

22 THE COURT: All right. Thank you.

23 MR. BROYLES: Thank you.

24 THE COURT: Anything you wanted to add by way of
25 reply? Anybody on that side?

1 MR. HINDERAKER: I don't think so, Your Honor,
2 unless you have any additional questions.

3 THE COURT: No. All right. So this is what it
4 looks like to me: I don't think I would be comfortable
5 deciding this motion based just on the papers. I want
6 people that I can ask questions of, and I think I'm going to
7 want -- I could see where credibility, not in the sense that
8 I think you are going to have people lying or not lying, but
9 just -- when you watch expert testimony in person, you get a
10 level of confidence about the expert by watching him or her
11 that you don't get from just reading their affidavits. And
12 I would imagine that I would want some live testimony in
13 this.

14 And I'm thinking that, you know, probably of lots
15 of bad choices, the best choice would be to have some sort
16 of a hearing of four, five, six days where the time would be
17 equally split. If you each got three days, you would just
18 have to decide what to do in your three days. And I would
19 imagine that you would each pick your spots. You would pick
20 your best arguments and focus on them. If you couldn't win
21 your best arguments, you probably weren't going to win your
22 not best arguments.

23 Now, I have already told you that my schedule is
24 completely full until April 1st. This morning I sat down
25 with my law clerk and my calendar clerk. We went through my

1 calendar and so that you know I'm not making stuff up, first
2 week of April I'm out of town all week for medical treatment
3 that I can't put off. The next three weeks of April I have
4 12 major hearings. I'm not talking about sentencings. I'm
5 not talking about guilty pleas. I'm talking about hearings
6 that will take me -- between preparing for the hearing and
7 hearing the hearing, most of these are probably a day and a
8 half, give or take, a half a day. So then I'm going to have
9 numerous sentencings, and pleas, and things like that. So
10 April is pretty much booked solid; in fact, it's a little
11 overbooked.

12 I'm spending the entire month of May in trial. I
13 have a case that's now six years old. It's one of the
14 oldest pending cases in the district. It was a gift from
15 one of my colleagues when I became a judge five years ago.
16 It still exists. It involves a half billion dollars in
17 insurance coverage, 11 different insurers. I gave them a
18 date certain months ago because we have to have a dozen law
19 firms here, almost all of which are from out of town. We're
20 trying that case all during May, except for a few days when
21 I am going to be out of town. So May I'm in trial the
22 entire month. And we're being optimistic and hoping we can
23 get the case tried in a month. I have seven major hearings
24 that I am going to have to move out of May because of this
25 trial. The parties had an extensive mediation and ended up

1 further apart after the mediation than before the mediation,
2 so so much for that. And those hearings all have to be
3 moved.

4 June. I am out of town much of June, and the days
5 I'm in town I already have nine major hearings scheduled.
6 Right now I have -- as I said, if you called my chambers,
7 June 27th would be the next time I could fit a hearing in,
8 and that's not counting all the hearings from May that we're
9 going to have to dump into June and July because of the
10 trial in May.

11 I am on vacation the first two weeks of July and
12 when I come back, I have time. So you folks -- the time I
13 can actually hear your case is July 17th. So I'm going to
14 hold the week of July 16th and the week of July 23rd for
15 you. That's the soonest I can literally give you two to
16 three straight days. I'm expecting this would be more like
17 five or six or seven days, but I will let you talk to each
18 other about that. So if you want to proceed before me,
19 that's when we will start the evidentiary hearing, on July
20 17th.

21 And what I will ask you to do is to try to
22 negotiate then a pretrial, if you will, schedule about
23 discovery and all that. If you need help, you should see
24 Judge Boylan because that's what he does, is scheduling
25 stuff. If that's not going to work for substantive reasons,

1 I don't have any -- that's as early as I can get you in, is
2 July 17th. And at that point, you should move for me to
3 move it back to D.C. or if you've got some other suggestion,
4 I would be happy to hear from you. But I've just went
5 through my calendar between now and July 17th and I would
6 have trouble fitting literally a hearing in, much less a
7 several-day evidentiary hearing. So that's what you are
8 looking at.

9 So I will hold those dates for you. That will
10 mean that many of these motion hearings scheduled for May I
11 will have to move into August, instead of July, but I will
12 do that so that I can hear from you in July. So that's
13 where we're at in terms of scheduling.

14 So I don't know what more I can tell you except
15 that that's the best I can do for you and encourage you to
16 talk to each other about what that means going forward. If
17 you want to stay here, you'll have to negotiate -- try to
18 negotiate some kind of a schedule.

19 Now, I haven't addressed the issues -- you know,
20 if I hear this thing in July, by then I'm assuming the
21 administrative process is over in D.C. I don't even know if
22 I need a hearing at that point or whether I can just take it
23 on the administrative record; I don't know. Given that it's
24 going to take me some time, I don't know how long, to get
25 the order out, I don't know how much difference there would

1 be between my order and the ALJ's order. I don't know any
2 of that stuff. I will let you all think about that and
3 figure that stuff out.

4 But what I would ask you to do is just talk to
5 each other, and then if you could just some time next week
6 kind of let me know what your thoughts are on how we should
7 go forward. And if I need to, I will have you back and we
8 will talk more about that here in the courtroom. Okay?

9 Anything else that you would like to talk about
10 today?

11 MR. HINDERAKER: No, Your Honor.

12 THE COURT: Okay. Thank you, again, for your
13 help. As I said, I recognize all of you are working very
14 hard under very tight constraints, as I am. I am truly
15 sorry -- I'm not just saying this, but I'm truly sorry I
16 can't do better for you. I just described to you what my
17 calendar is like. I've got 300 other cases and a lot of
18 people waiting months to see me. I can just do what I can
19 do. So that's the best I can do for you. And I will wait
20 to hear from you next week as to what our next steps will
21 be. All right. Thanks, everybody.

22 THE CLERK: All rise.

23 (Court adjourned at 3:00 p.m.)

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I, Debra Beauvais, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Debra Beauvais
Debra Beauvais, RPR-CRR