TESTIMONY OF RICHARD G. PARKER

BEFORE THE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

HEARING ON H.R.__, THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2014"

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Thank you for inviting me to testify today. I am a partner at O'Melveny & Myers LLP, where I lead the Antitrust and Competition Law Group. I have practiced in the antitrust area for more than 25 years, handling litigation against the government and private parties, criminal and civil investigations, including merger investigations and litigation. I served at the Federal Trade Commission ("FTC") from 1998 to 2001 as Senior Deputy Director and then Director of the Bureau of Competition. During my tenure, I tried merger cases for the FTC. I have also tried merger cases against the FTC in private practice.

I strongly believe in the agency's mission in enforcing both competition and consumer protection laws. The FTC has very strong litigation capabilities. Agency lawyers perform very well in court and the United States benefits significantly from the FTC's enforcement efforts. I am not here to criticize the role of the Commission or its enforcement agenda, both of which I strongly support. I testify for the much more narrow purpose of suggesting that the FTC be held to the same standard in merger injunctions in federal court as the Antitrust Division of the Department of Justice ("DOJ"). I believe that this is good competition policy, and more broadly, good public policy.

The proposed Act, "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014," appears to remedy the disparity between the DOJ standard and the FTC standard to enjoin pending mergers and to that extent is sound policy. I feel that way for several reasons.

1. The FTC is an outstanding litigation agency and can perform in court very effectively under this standard. The FTC needs no special rule or advantage in court.

2. The FTC and DOJ each cover different industries. For example, the FTC addresses issues in the oil and gas industry and the DOJ does the same in the airline industry. The division of industries between the agencies generally is a reflection of historical experience and in some cases can be somewhat arbitrary. It is fundamentally unfair and serves no legitimate enforcement objective for an

> "FTC industry" to have a more difficult time in court than a "DOJ industry." As would be expected, and as I know from experience representing clients, that is a very hard point to explain, much less defend, to an executive whose company happens to be an FTC industry for merger review purposes.

The FTC and the DOJ both are charged with enforcing Section 7 of the Clayton Act, which prohibits mergers in which "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. To obtain a preliminary injunction in federal district court, the DOJ must show "a reasonable likelihood of success on the merits" and that the equities balance in favor of the government. *See* 15 U.S.C. § 25, DOJ preliminary relief authority; *see, e.g.*, United States v. Siemens Corp., 621 F.2d 499, 505-06 (2d Cir. 1980), United States v. Gillette Co., 828 F. Supp. 78, 80-81 (D.D.C. 1993). In most cases, the parties stipulate to combine the preliminary injunction with the permanent into a single trial. Thus, the court is asked to decide the case on the merits.

The FTC seeks preliminary relief to stop a merger pending an administrative trial before an FTC Administrative Judge with the right to appeal to the Commission and ultimately the courts. As a result, the preliminary and permanent injunctions cannot be combined. Thus, the FTC seeks preliminary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which requires a federal court to determine whether "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." Requiring the FTC to show a likelihood of success at trial is both logical and fair, but some recent court decisions have found that the FTC meets this standard merely if it can show that a transaction raises questions so "serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation" by the FTC. This diverges from an assessment of the "likelihood of success" that the DOJ must prove in order to obtain preliminary relief.

The general test for preliminary injunctions is based in longstanding principles of equity and requires a showing of:

(1) likelihood of success on the merits;

(2) irreparable harm;

(3) a balancing of harms; and

(4) the public interest.

In DOJ actions, as compared to private litigation, some federal courts apply a modified version of this traditional preliminary injunction test, and do not require that a government agency show irreparable harm once the agency shows a likelihood of success. Harm is presumed once the government shows that it is likely to prove a violation of the law. Additionally, the balancing of harms and the public interest generally are combined into one factor, the balancing of the equities. Thus, under this formulation, in DOJ cases in which preliminary relief is sought, the likelihood of success takes on increased significance. As indicated, in most cases, the DOJ and the parties agree to an expedited trial on the merits, combining the preliminary and permanent injunction into a single proceeding.

As indicated, the FTC typically does not try permanent injunctions in federal court but does so internally in administrative proceedings. Only the preliminary injunction is in federal court and the standard applied there is of great importance. Unfortunately, in FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008) ("Whole Foods") the D.C. Circuit appears to have set an unduly relaxed standard for FTC preliminary injunctions. Before Whole Foods, district courts had required at least a minimal showing of probability of success. None had allowed the FTC to obtain a preliminary injunction by simply "raising issues" for further consideration. Earlier FTC preliminary injunction victories were the result of trials ranging from five days to six weeks. Those cases generated lengthy opinions laying out in detail the FTC's likelihood of success at trial. *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998); FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000).

In Whole Foods, Judge Brown, stated "To be consistent with the § 53(b) standard, this decision [the district court's decision] must have rested on a conviction the FTC entirely failed to show a likelihood of success." 548 F.3d. at 1035. This turns the preliminary injunction standard on its head, requiring not that the FTC show likelihood of success, but that the parties prove that the FTC could not succeed on the merits. Judge Tatel in a concurring opinion writes, "Critically, the district court's task is not 'to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *Id*. at 1042 (Tatel, J., concurring) (quoting FTC v. H. J. Heinz Co. et al., 246 F.3d 708, at 714-15 (D.C. Cir. 2001)). Judge Tatel then quotes Judge Posner in stating that "One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions." *Id*. (quoting Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986)).

But the legislative history does not suggest judicial distrust or essentially abdication to the FTC was the motivation for enactment of 13(b), it suggests the opposite. Nor does the legislative language or history suggest that the FTC would not need to show a meaningful likelihood of success. Section 13(b) was not a part of the original FTC Act, but was passed in 1973 as part of the Trans-Alaska Pipeline Authorization Act. The Conference Report's discussion of Section 13(b) states in part that the amendment "is not in any way intended to impose a totally new standard of proof different from that which is now required of the

Commission," and that "[t]he inclusion of this new language is to define the duty of the courts to exercise independent judgment on the propriety of issuance of a temporary restraining order or a preliminary injunction." H.R. Rep. No. 93-624, at 31 (1973) reprinted in 1973 U.S.C.C.A.N. 2417, 2533. The Conference Report also made clear that the amendment did not impose the traditional equity standard of private litigation that required irreparable injury be proven, but it did not suggest that the likelihood of success requirement be lessened. In FTC v. Weyerhauser Co., 665 F.2d 1072 (D.C. Cir. 1981) the court, in considering the Conference Report, stated that "the case law [referenced in the Conference Report] lightened the agency's burden by eliminating the need to show irreparable harm." *Id*. at 1082. The court also, however, noted that the Conference Report emphasized the importance placed on the court's exercise of independent judgment, noting that "Independent judgment is not exercised when a court responds automatically to the agency's threshold showing." *Id*.

A federal district court in the District of Columbia found that Whole Foods mandated a lower standard for the FTC to obtain injunctive relief. FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009) ("CCC Holdings"). The court in CCC Holdings held (i) that the parties defeated the FTC's unilateral effects theory and (ii) that the coordinated effects case could go either way – i.e. the FTC had not proven a likelihood of success. Yet, the court granted the injunction. The court there held that "'likelihood of success on the merits' has a less substantial meaning than in other preliminary injunction cases." *Id*. at 36, n. 11. Granting the injunction, the court wrote, "The Defendants' arguments may ultimately win the day when a more robust collection of economic data is lain before the FTC. On this preliminary, record, however, the Court must conclude that the FTC has raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC.'" *Id.* at 67. That is a far cry from likelihood of success. In essence, the opinion states that a tie goes to the government, and that is a fundamentally different and lower standard than what the DOJ must meet in seeking preliminary relief.

Whole Foods as applied in CCC Holdings is of immense practical import. Mergers, as a practical matter, are hard to hold together pending government review and trial. The DOJ, by consolidating the preliminary and permanent injunction into a single proceeding, can generally get a case to trial relatively quickly. In the recent U.S. Airways and American Airlines merger, trial was set little more than three months from filing, with a decision expected in less than six months.

When the FTC obtains preliminary relief in federal court, the merger is effectively over. In virtually every case in which the FTC has prevailed in obtaining a preliminary injunction in federal court, the parties have abandoned the transaction. Why? The answer is timing. Under FTC Rules of Practice, the parties in CCC Holdings would not have received a Commission decision for some eight months after the preliminary injunction was entered. Court of Appeals review can easily consume another year or more. The parties already had spent more than four months litigating the preliminary injunction. And in most cases, the timeline under the FTC Rules of Practice would be longer, with administrative proceedings taking at least another 12 months.[1] Not surprisingly, the parties in CCC Holdings abandoned the merger.

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[1] In 2008, the FTC adopted interim final rules amending Parts 3 and 4 of the agency's Rules of Practice to help streamline the timeline for administrative proceedings. However, with these changes the timeline for a proposed merger under Part 3 administrative review still would involve approximately 12 months following second request merger review and federal district court proceedings, thus requiring a proposed merger to hold together for an estimated 18-24 months. Under the revised FTC rules, the evidentiary hearing must be held within five months from the date of the complaint; the administrative hearing is limited to 30 trial days; final proposed findings within 40 days after trial; initial decision within 70 days after final proposed findings; briefing before the Commission 45 days after initial decision. *See* Rules of Practice for Federal Trade Commission, 74 Fed. Reg. 20,205 (May 1, 2009) (to be codified at 16 C.F.R. pts. 3–4), and 74 Fed. Reg. 1804 (January 13, 2009).

In sum, parties whose merger is before the FTC are at a significant disadvantage to those who happen to draw the DOJ. There is no sufficient policy reason to support that result. I respectfully suggest that mergers reportable under the Hart-Scott-Rodino Improvements Act of 1976 be adjudicated by either agency in federal court under the same rules and standards.

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