

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	.	Case No. 1:08-CV-02043
	.	(RMC)
Plaintiff,	.	
	.	Washington, D.C.
v.	.	December 3, 2008
	.	
CCC HOLDINGS, INC., ET AL.,	.	
	.	
Defendants.	.	
.	

SCHEDULING CONFERENCE
BEFORE THE HONORABLE ROSEMARY M. COLLYER
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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1 (Proceedings commenced at 5:03 p.m.)

2 THE CLERK: Civil Action 08-2043, Federal
3 Trade Commission v. CCC Holdings, Inc., et al.

4 For the plaintiff, Robert Robertson, Casey
5 Triggs and Catherine Moscatelli.

6 For the defense, Richard Parker, Andrew
7 Frackman, Michael Antalics, Stacey Mahoney and John
8 (unintelligible).

9 THE COURT: Good afternoon everyone.

10 I'm Judge Rosemary Collyer and I'm lucky
11 enough to have gotten this case at 4:15 in the
12 afternoon, on the Wednesday before Thanksgiving, but
13 I'm really glad to see you today.

14 I did get and reviewed the joint proposed
15 schedule that you had submitted, and I had a couple of
16 issues about it.

17 I understand your discovery, and you've worked
18 very nicely to give yourselves time, a little hurried
19 discovery, but time for discovery.

20 I actually had time this week to handle a TRO,
21 which is what the FTC said it wanted. You've now given
22 yourself plenty of time and squeezed me, and guess
23 what, judges don't like that.

24 So you've announced that you're going to go
25 to trial on January 8th and you're going to have seven

1 hours of trial time every day, and I'm going to tell
2 you that's not going to happen. We'll do January 8th,
3 but we're not doing seven hours of trial time a day. I
4 actually, ladies and gentlemen, have other cases too,
5 and I know this is of critical importance to all of
6 you, and it's of critical importance to me, but I have
7 other cases.

8 I just read this and I have to say I was taken
9 aback. Why was I taken aback? Are you all
10 practitioners from New York City, and this is the way
11 it happens, and I'm just being a foolish little
12 Washington D.C. judge? I've never had anybody do
13 something like this.

14 Yes, sir?

15 MR. ROBERTSON: If I can --

16 THE COURT: Yes.

17 MR. ROBERTSON: -- explain, and I certainly
18 apologize for doing that.

19 What we had told the clerk when we called, is
20 that we weren't sure when we would actually do it and
21 when we were available. We left a blank in there
22 because we actually do have a dispute over that
23 paragraph, and so we weren't trying to impose on the
24 Court and tell the Court what to do, at all.

25 I apologize if that's the way it looks, but

1 that was the way that we had --

2 THE COURT: Okay. Then --

3 MR. ROBERTSON: -- (unintelligible).

4 THE COURT: Then let's start all over again,
5 and --

6 MR. ROBERTSON: Okay.

7 THE COURT: -- and let me say, how much time,
8 hours, do you really -- because you're all talking
9 split time, so don't talk days, talk hours.

10 How many hours do you really think that the
11 FTC, knowing you haven't done your discovery yet, will
12 actually need to present its case?

13 MR. ROBERTSON: And that's where we have a
14 dispute.

15 What the defendants would like to have is a
16 full trial. If they have a full trial, obviously we
17 want to have equal time (unintelligible) Your Honor, I
18 think, has done in other cases, but in terms of what we
19 think Your Honor needs to do here, or could do here, is
20 we believe this kind of case, after Heinz, and after
21 last week's Whole Foods decision, we believe Your Honor
22 can decide this on the papers.

23 We believe they can file their briefs and
24 we'll take all the depositions, we'll have depositions
25 of every fact witness, and two experts' declarations

1 and depositions, and we have (unintelligible) already
2 in the briefs we've already supplied to the Court.

3 We think that what the Court needs to decide,
4 is whether there are serious and substantial questions
5 that the FTC can try down the street on March 31st, and
6 not have a trial here on that.

7 That's what our belief is.

8 Now, if Your Honor --

9 THE COURT: I see.

10 MR. ROBERTSON: -- decides that you want to
11 hear witnesses, obviously, I want to be fair and make
12 sure I get equal time with the other side, but that --
13 that is -- my initial argument is under the way I think
14 the law is shaping up, we don't really need to have a
15 big trial here.

16 THE COURT: Okay.

17 So, do me one favor and tell me what you
18 think Whole Foods stands for, in its most recent
19 iteration.

20 MR. ROBERTSON: In the most recent iteration,
21 Your Honor, I --

22 THE COURT: I mean, do we have a decision?

23 MR. ROBERTSON: I believe we do, and I think
24 if you look at one of the concurrences, you get the
25 impression that there's not, but if you read what Judge

1 Cavanaugh actually says, in footnote 8 at the end of
2 the brief, he says where they've agreed, it is
3 controlling, and where they've agreed on is the
4 standard. What they disagreed on is what the facts
5 were and what the Court in Whole Foods should be doing
6 in that case, and what you do with the public equities.
7 That part, they didn't have an agreement on, I think
8 that's clear, but on the standard of what the
9 likelihood of success means, which is, "Are there
10 serious and substantial questions?", both Judge Brown
11 and Judge Taylor were right on the money with each
12 other.

13 In fact, Judge Taylor starts his decision by
14 saying he agrees with that, and right there in the --
15 in footnote 8, at the end of Judge Cavanaugh's opinion,
16 explains the that the Supreme Court precedent, and also
17 the precedent in the circuit is, that part of the case
18 is controlling, and frankly, it's the same thing that
19 Heinz says, which Your Honor, I know, has used in other
20 cases.

21 That is the standard here. I don't think
22 Judge Cavanaugh liked the standard, but that's his
23 right, obviously, but the standard is, in this circuit,
24 under Heinz and under Whole Foods, and they've also
25 been following Food Town from the Fourth Circuit, that

1 is the standard, and when we have disputes, I don't
2 believe it's -- under that case, that it is -- or all
3 three cases, that it's this Court's role to try to iron
4 out all the disputes, and figure out who's right and
5 who's wrong. That's for the judge over at the FTC to
6 do.

7 THE COURT: Okay.

8 So although this is submitted as a stipulated
9 order regarding hearing arrangements, you don't
10 actually agree? You don't --

11 MR. ROBERTSON: (Unintelligible) part.
12 Everything else under there would be agreed with
13 because I think we were trying to work out a reasonable
14 schedule for discovery, and we worked very well on
15 that, and I think we agreed on every point.

16 THE COURT: Okay. Let me hear from your
17 opponents.

18 MR. ROBERTSON: Thank you.

19 MR. PARKER: Your Honor, Richard Parker on
20 behalf of Aurora.

21 Your Honor, we don't disagree with what the
22 standard is, and what the cases say, they clearly say
23 that. The question is, is what is needed for you to
24 make a fair and informed decision on that statement,
25 and we believe, very strongly, that an evidentiary

1 hearing is necessary, and we would like 15 to 17 hours
2 to be able to put our case on, and then obviously they
3 would get the same as us.

4 THE COURT: And who is "Us"? Is "Us" both of
5 the merging parties?

6 MR. PARKER: It would be us together. Both
7 defendants would be working together on that, and I
8 think if we could get, like I said, 17 -- 15 to 17
9 hours, that would be fair.

10 Now, --

11 THE COURT: And what is the nature of the
12 evidence that you would be presenting?

13 MR. PARKER: The evidence would be we would
14 call the CEOs of the company to explain to you what we
15 believe are the public equities here, which are the
16 benefits of the deal to customers and to the
17 marketplace, and why they're doing it, and some
18 discussion on the market.

19 We would call some insurance companies who
20 are purchasers, to give their important views, because
21 they would be -- obviously they're the customers, and
22 we think that they're going to benefit. FTC takes a
23 different view.

24 We would call body shops who we also believe
25 will benefit here.

1 The -- And then obviously, we would have a --
2 an economist, who would be a Dr. Janusz Ordover from
3 New York, who would then give you a view of the
4 economics, and how it all (unintelligible) together.

5 Your Honor, what I'm suggesting is as follows,
6 is that the standard is clearly what it says in Whole
7 Foods and these other cases, but there has been 15
8 years of jurisprudence in this courtroom -- courthouse
9 applying this standard, in which credibility
10 determinations have been extremely important, and just
11 as an example, Judge Bates tried a case, it was
12 approximately a two-week trial, and he found,
13 importantly, that the customer witnesses called by the
14 government were not credible or believable in what they
15 were saying. That was very important to that decision.

16 Going back to the (unintelligible), Judge
17 Hogan found serious credibility issues with the
18 economic and efficiency evidence put on by the defense.
19 It didn't hold up, and that was extremely critical to
20 his decision.

21 Now, I believe that customer testimony is
22 going to be important here. We have a unique
23 situation. I don't ever recall the FTC relying on a
24 competitor, to the extent these folks are today.
25 They're calling a competitor who tried to do the same

1 deal that we're doing (unintelligible) by us,
2 (unintelligible) Mr. Herfort's client, to say
3 (unintelligible), yes, (unintelligible) to public.

4 Well, what I'm suggesting is, is that
5 (unintelligible) heard it from him because we're gonna
6 get it through a competitor, and I think you ought to
7 hear, and I respectfully submit that you ought to hear
8 the competitor witness who they're going to call, or
9 who I suspect they would call, and determine whether or
10 not this person is credible or not.

11 THE COURT: Well, do you --

12 MR. PARKER: I think what their real
13 complaint is, they are afraid of competition, and what
14 that adds up to, Your Honor, is a trial, which we'll
15 move as fast as we can, where credibility is important.

16

17 I'm sorry to interrupt you.

18 THE COURT: That's all right.

19 Do you dispute the statements in the FTC
20 Complaint, in which it references the HHI index, have I
21 used that right, and the change that would occur if
22 these two companies were to be merged?

23 MR. PARKER: I believe that we could quibble
24 about the numbers, but there is absolutely no question
25 that there is going to be a big change in the

1 marketplace, and the HHI's say what they say, and
2 they're going to be very, very high, but under the law,
3 we're entitled to show that that had little meaning
4 because of the unique way this industry operates.

5 THE COURT: And what do you mean by that?

6 MR. PARKER: Okay, the -- For example, they
7 will -- there's no question they will have high HHI's
8 and, you know, we may have a number and they may have a
9 number, but it's going to be viewed, you know, big,
10 there's no question about that, but with -- prices
11 don't -- markets don't work by formula. They don't
12 work by formula.

13 Prices go up from concentration as a result
14 of two things. One, the two parties coordinate, kind
15 of looking out at each other, and prices go up.

16 What we're saying, the way this market works,
17 there are secret bids. This is not list prices. This
18 is not people advertising prices in the paper. This is
19 not people giving price announcements in trade
20 (unintelligible). These are secret bids, and the
21 insurers don't tell different people what the bids are
22 (unintelligible). They try. They do the best they
23 can.

24 What I'm suggesting is you can't coordinate
25 when you don't have the kind of (unintelligible) things

1 you have on list prices.

2 A case that is very important here is the
3 Heinz case, where the Court held they could coordinate,
4 and that's on baby food. I can go to Safeway in the
5 next half hour and find out what baby food is selling
6 for. You can't do that in our market.

7 The second point here is, is that when
8 somebody is so big, so huge they can just raise the
9 price and nobody can do anything about it, they have to
10 show -- Your Honor, we're going to show that that can't
11 happen. We're going to show that there's a large
12 company called "Audatex", who is going to be sitting on
13 their side of the courtroom whining about this merger,
14 is big enough to keep us from raising the price.

15 There also is a new entrant, somebody called
16 "Web-Est," a little guy, somebody who they call, in
17 their brief, "picayune."

18 Well, we're going to call him, Your Honor,
19 and you're going to see how picayune he is, and I want
20 you to hear his experience, and look at his business
21 plan, and realize that they're a serious entry in this
22 marketplace, and I would cite the Court to Baker
23 Hughes. That's the controlling case here. Huge HHI's
24 in Baker Hughes, huge.

25 Judge Ginsberg, now Justice Ginsberg; Judge

1 Thomas, now Justice Thomas; and Judge Santello found
2 that the defense won because the HHI's weren't
3 significant. Why? Because the market didn't work
4 like, for example, the (unintelligible) market did for
5 (unintelligible).

6 All I'm saying is, is don't -- it's wrong to
7 let the government get away with government by formula.
8 They can have every formula they want, and every
9 presumption they want, because at this table we have
10 the facts, and I -- and what I'm suggesting is I want
11 you to hear those facts in (unintelligible).

12 THE COURT: And what is "CCI Holdings"?

13 MR. PARKER: Well, Mr. Herfort --

14 THE COURT: Well, before Mr. Herfort comes
15 up, --

16 MR. PARKER: Yeah.

17 THE COURT: -- why don't you tell me what
18 "Aurora Equity Partners, III, L.P." is?

19 MR. PARKER: Aurora is a private equity fund,
20 and they own a company called "Mitchell International"
21 that makes the products in issue here, and for some
22 reason, under the (unintelligible) rule, they would be
23 the proper party, but the real issue is Mitchell's --
24 excuse me, is Mitchell, which is owned by Aurora,
25 and --

1 THE COURT: And Aurora is a what? I'm sorry.

2 MR. PARKER: It's a private equity firm in
3 Los Angeles.

4 THE COURT: Private equity firm. All right.

5 MR. PARKER: And they own all this -- They
6 are a publicly-traded company, and they own all the
7 stock of Mitchell. Mitchell is the company.

8 THE COURT: Okay.

9 So we have a private equity firm that owns
10 Mitchell.

11 MR. PARKER: Yes.

12 THE COURT: So Mitchell doesn't trade publicly
13 or anything, and Mitchell makes secret bids, and so you
14 can't coordinate their bids, --

15 MR. PARKER: Right.

16 THE COURT: -- and yet, they're not going to
17 be big enough, after the merger, to simply raise
18 prices?

19 MR. PARKER: Right, because we have another
20 large competitor who is really the biggest company in
21 the world, in this firm -- in this market and, as I
22 said, we're going to be making an entry argument, that
23 we have a new competitor coming in, and whatever
24 barriers there are have been eliminated, you know, for
25 reasons that we will most certainly explain, and that's

1 why I'm citing to you, Baker Hughes, which I think is
2 the case that controls this, at the end of the day.

3 THE COURT: All right. Thank you.

4 Yes, sir, and who is CCI?

5 MR. HERFORT: It's a --

6 THE COURT: Could you come to the microphone.
7 We have -- My court reporter is ill today so we're
8 doing this on a tape, which means unless you're
9 standing immediately at the microphone you're not going
10 to be heard, okay? Thanks.

11 MR. HERFORT: Good afternoon, Your Honor.

12 I'm John Herfort from Gibson, Dunn, --

13 THE COURT: Good afternoon.

14 MR. HERFORT: -- and I represent the
15 defendant, CCI Information Systems, and we are
16 obviously one of the players in an industry
17 (unintelligible) who have (unintelligible) equals
18 between my client, CCC -- CCC, excuse me, and Mitchell.

19 What --

20 THE COURT: But what is CCC Holdings? What
21 is that?

22 MR. HERFORT: That's the parent company.

23 THE COURT: Yes, but what is it?

24 MR. HERFORT: It is a company that exists to
25 hold CCC Information.

1 THE COURT: And where is CCC Information
2 located? What is it?

3 MR. HERFORT: Chicago.

4 THE COURT: And what is it?

5 MR. HERFORT: It's a -- CCC Information is a
6 company that sells various software products to the
7 (unintelligible) physical damage industry.

8 THE COURT: Okay.

9 So my question is, is either of these
10 defendants a real thing? Aurora Equity Partners is
11 just a private equity firm, and CCC Holdings is just a
12 holding company.

13 Does it hold anything other than CCC
14 Information?

15 MR. HERFORT: No, I don't believe it does,
16 but what the main defendants are, are the ultimate pair
17 of entity shareholders of the two operating companies
18 that are going to be merged, and according to the FTC,
19 creates the competitive problem that brings us here.

20 THE COURT: I actually do understand that
21 part. I promise. I read the Complaint.

22 No, I was just trying to figure out whether
23 the named defendants are real entities, or whether they
24 are just people who buy and sell money and companies,
25 and trade them around, and try to make money for a

1 small group of people, and I shouldn't really worry
2 about them because it's the real people down below them
3 who count.

4 MR. HERFORT: Well, they are real entities in
5 the sense that they --

6 THE COURT: Well, they're legal entities.

7 MR. HERFORT: (Unintelligible.)

8 THE COURT: I understand that.

9 MR. HERFORT: (Unintelligible.) They are
10 entities comprised of people who control these
11 companies. The operating employees in the businesses
12 that are the subject of this case before Your Honor,
13 are people who work for the first tier companies below
14 them.

15 Mitchell, on the one hand, and --

16 THE COURT: Right.

17 MR. HERFORT: -- CCC Information on the
18 other.

19 THE COURT: I understand that, too.

20 Again, the question really goes to somewhat a
21 question of equities and things, because if the parties
22 in interest, the ones who stand to make or lose money
23 from a merger, are merely a private equity firm and a
24 holdings company, which is made up of limited numbers
25 of holders, I assume, then it's not -- the equities

1 don't flow the same way as they do if you had two
2 living, breathing product manufacturing companies.

3 Do you see my point?

4 MR. HERFORT: Yes, I do, and I think the
5 answer to your question is that the subsidiaries, the
6 operating subsidiaries are full of living, breathing
7 people.

8 THE COURT: But they're not going to make any
9 money off --

10 MR. HERFORT: They (unintelligible) --

11 THE COURT: -- the --

12 MR. HERFORT: Some of them will, and they
13 stand to be benefitted by the outcome of this merger,
14 because they're going to -- the combined company is
15 going to be a more competitive company, it's going to
16 be hopefully a better company for customers, which we
17 would like to explain to your Honor, and it's going to
18 be a better company, in terms of returns to people who
19 are at the employee level, as well as at the parent
20 level.

21 So, I think that if -- we're talking in terms
22 of the equities, not simply a theoretical private
23 benefit to a bunch of private equity types, but we're
24 talking about benefits to employees and executives at
25 the operating company level.

1 THE COURT: I don't want you to be alarmed.
2 I really do believe in capitalism.

3 (Laughter.)

4 MR. HERFORT: Section 7 (unintelligible)
5 these are perfectly fair questions. The statute put
6 them in.

7 THE COURT: Okay.

8 And it's not a good time of year for people
9 to be making money off just equity holdings, and
10 leaving other people holding the bag.

11 MR. HERFORT: That is -- Actually, that, Your
12 Honor, is one of the reasons why we proposed, in our
13 scheduling order that Your Honor commented on earlier,
14 a quick schedule --

15 THE COURT: I don't disagree with the quick
16 schedule, I just believe that if you're going to get
17 time to be prepared, I should actually get some time
18 too.

19 MR. HERFORT: Well, we -- That's exactly what
20 we want.

21 Let me just address what you just were
22 pointing to, because I think it really does go, and
23 I'll try to be brief, to why you really do want to see
24 the witnesses here.

25 I think the FTC agrees with us that if we're

1 going to have the hearing, well, we ought to see the
2 two CEOs to explain why the businesses -- why they want
3 this deal, and the government will try to show that --
4 why there may be competitive problems with the deal, by
5 cross-examining the CEOs.

6 I think we need experts. I haven't seen a
7 Section 7 case, either private or public, that didn't
8 rely very heavily on experts to help Your Honor, not
9 only to understand the implications of the numbers, but
10 to understand the implications of the affects.

11 One of the things that I think we all can
12 agree on, when you read Heinz, is that you simply can't
13 decide a case, and this is clearly true of cases like
14 Baker Hughes, you can't decide the case on the numbers.
15 Justice Thomas said the HHI's are not enough, and he
16 was speaking for a court, as Mr. Parker pointed out,
17 that included judge -- then Justice Ginsberg, and Judge
18 Santello. The HHI is not enough.

19 The -- Most of the affidavits that the
20 government has given Your Honor are short, 3, 4-page
21 affidavits. Nobody is going to suggest that in the 3,
22 4 pages that you have, 11 of them are from insurance
23 companies, and most of the rest of them are for
24 competitors, and there are a couple of body shops.
25 Nobody is going to suggest that those affidavits, which

1 are clearly lawyers' affidavits, are going to give you
2 the kind of picture of -- the living, breathing picture
3 that you need, as to how the products at issue in this
4 case are actually marketed, sold, priced, and competed
5 against each other.

6 The only affidavits that the government has
7 given you that purport to get to the issue in any
8 detail of how these products are priced, marketed,
9 sold, bided, and out bid, how customers criticize them,
10 are two affidavits from, of all people, Audatex, and as
11 Mr. Parker pointed out, Audatex is a company which, if
12 anybody ever had an axe to grind, Audatex is it.

13 Audatex is the number one company in the
14 industry, worldwide. It's going to be a bigger
15 company, post merger, than the two of us combined.

16 It's a disgruntled bidder. It made bids to
17 take over both CCC and Mitchell. They were rejected.
18 It's a company that has -- that competes with us across
19 the board, and it's a company, to take it -- if you
20 take its affidavits at their face value, says,
21 "Notwithstanding all our (unintelligible),
22 notwithstanding our size, notwithstanding the fact that
23 we have access to the public equity market," and
24 they're in the New York Stock Exchange, "we think that
25 we are jeopardized, and we will never be able to

1 compete with these two smaller companies we tried to
2 take over."

3 If that doesn't raise any serious credibility
4 issue that I think Your Honor deserves to see,
5 firsthand, I don't know what does.

6 THE COURT: Well, but --

7 MR. HERFORT: I've never heard of a merger
8 case that rode so heavily on the testimony and writing
9 of a competitor that had a worse axe to grind than
10 anybody in the courtroom.

11 THE COURT: If the merger goes ahead, there
12 will be, in this country anyway, only two strong
13 competitors, Autotech and the merged company, right?

14 MR. HERFORT: Well, I think the --

15 THE COURT: So, wait. Wait. Wait.

16 So that ultimately it boils down to barriers,
17 and whether there really are barriers to entry, and
18 whether or not having only two companies, instead of
19 three, promotes competition, injures competition,
20 creates a duopoly, whatever you call that word, or
21 whether that is not so because the barriers to
22 competition are not as serious and high as the
23 government forecast; isn't that right?

24 MR. HERFORT: Well, I think it's -- that is
25 right, with one qualification. I think entry

1 conditions are important, and I think that you have
2 different views of entry conditions here, and one view
3 of entry conditions, and it's in some paper the
4 government has put in, is that they are pretty high.

5 The other view of entry conditions is our
6 side. I think you ought to hear people who actually
7 did the entry work themselves. You can see these human
8 beings, and they didn't, and they think they're pretty
9 low (unintelligible) the entry issue, to a large
10 extent, has been transformed.

11 This is not a three to two case anymore, it's
12 a three to three case, and there may be some argument
13 as to the new third, which is Web-Est. They think Mr.
14 -- the Web-Est company is picayune, and Picayunes used
15 to be these cigarettes from New Orleans many years ago,
16 but it's a (unintelligible).

17 I think it's -- If we're going to decide the
18 issue, and I think the government has put it in --
19 squarely in issue, as to whether Web-Est is picayune, I
20 think it's something Your Honor ought to test yourself,
21 by seeing the head of Web-Est, understanding his plans,
22 talking to the other people in the market who have been
23 dealing with Web-Est, then you can decide, based on
24 what Mr. Seidel says, and what you hear from insurance
25 company witnesses, and what you hear from the parties

1 and the economists, whether this character is picayune.

2 This may be a three to three merger. It may
3 be a three to 2.8 merger. It may be something else,
4 but I think it's something that, at the end of the day,
5 you're never going to find it to be a three to two
6 merger, you're going to find it to be three to two-
7 plus, and the degree of that plus is going to
8 critically turn on what you think of the Web-Est
9 witnesses in this plan. I don't think you can do that
10 on the paper, particularly when the -- what you're
11 hearing from the government, as to how the market
12 works, is predominantly from a company with a huge axe
13 to grind in killing the deal.

14 Now, the other thing is you say that -- "Is
15 entry an issue?" You pointed out, in your question, I
16 think quite correctly, that one of the things you want
17 to do it is to determine whether there's injury in
18 competition.

19 We all know, from what Justice Thomas wrote
20 in Baker Hughes, that injury to competition can
21 absolutely not be determined by a (unintelligible).
22 That is black letter law in this circuit, and it's
23 really black letter law in the United States.

24 So how do we determine whether there's injury
25 in competition? The way we determine whether there's

1 injury in competition is to look at entry barriers, but
2 critically, and this is under the guidelines that the
3 government purports to enforce, as to whether there are
4 either, number one, what are called unilateral affects;
5 or number two, coordinated interaction-type affects.

6 When you look at cases like Heinz, what you
7 find out is, is that the courts, and the D.C. Circuit,
8 in Heinz, approved the methodology that Judge Robinson
9 used in the district court. The courts take evidence
10 on how the products are sold, how they're priced,
11 what's the nature of the interaction between the
12 sellers and the buyers, has the bidding process worked,
13 do the methods for pricing vary from job to job, are
14 the bids highly complicated and customized, so they
15 really can't be relied upon to find anything about them
16 to predict the competitor's next bid?

17 Those are the kinds of things that I think if
18 you read the affidavits then, you get a wholly -- you
19 really don't get a picture at all, but to the extent
20 you get anything, you get a bunch of stuff from Audatex
21 which is, again, I think, a wholly incredible witness
22 because they're afraid of more competition, even though
23 they're number one in the industry.

24 So, I think if we want to decide the issue of
25 competitive injury, which I think Your Honor quite

1 correctly says is a key issue, and it's a key issue
2 when you read Heinz, which Mr. Robertson correctly says
3 is the (unintelligible) case in this circuit, and you
4 read Baker Hughes, and you read other cases that are
5 preliminary looks at mergers, Arch Coal,
6 (unintelligible), Swedish Match is one the government
7 won, and they had a long series of evidence regarding
8 the pricing, coordinating, and the unilateral affects.

9 I think you really can't do the job that you
10 want to do, by simply relying on the paper to decide
11 what Your Honor said before was injury to competition.

12 So, I think between the issue of the insurance
13 companies being witnesses, I mean, you've got to look
14 at their credibility, I think with looking at --Audatex
15 is the government's main witness on how the industry
16 operates. I think their credibility has to be assessed
17 by Your Honor, with them sitting up next to you, as
18 opposed to a bunch of dry pieces of paper, and I think
19 the economists -- the economic experts, people who,
20 rather than test them by reading what they write, I
21 think you're going to want to ask them some questions.

22 My experience in Section 7 cases, is I've
23 never had one where the judge was not an active
24 participant. The issues here, I think, if you listen
25 to us for a day, may be a little more interesting than

1 they seem now, and I think you're going to find its
2 something you want to engage yourself in to decide this
3 case.

4 THE COURT: I didn't suggest it wasn't
5 interesting, did I?

6 MR. HERFORT: No, Your Honor. Many people
7 have.

8 THE COURT: No. No. No. No.

9 MR. HERFORT: So --

10 THE COURT: It's very complicated, so that
11 makes it intrinsically interesting.

12 MR. HERFORT: So I think that the bottom line
13 here is, Your Honor, we believe that the -- that when
14 you look at the precedents in the D.C. Circuit, Baker
15 Hughes; Arch Coal; Heinz, which is critically relied
16 upon in every opinion, in Whole Foods, I think all of
17 them drag you inescapably away from having a decision
18 on the paper, and I think when you actually look at the
19 paper in this case, the degree to which it's either
20 fact paper, with lots of subparagraphs written by
21 people with an obvious axe to grind, or thin paper,
22 which look like lawyers' affidavits to me, I think you
23 want this tested. I think you want to test it before
24 yourself.

25 THE COURT: Okay. Thank you.

1 Now, you can respond if you want to, sir, but
2 it seems to me, having heard from everybody, that I
3 don't actually need to decide today, whether what we're
4 doing is driving towards a hearing or briefs, because
5 you all agree that the discovery is necessary before
6 you can do either of those things; is that right?

7 (No audible response.)

8 THE COURT: Right.

9 Okay. Everybody is nodding their head. For
10 the record, everybody nodded their heads.

11 UNIDENTIFIED SPEAKER: Yes, Your Honor, and
12 we've agreed to (unintelligible) proceeding already
13 with discovery.

14 THE COURT: All right.

15 So what I'm going to do -- what I propose to
16 do is take all these nice case citations that everybody
17 has given me, and go make myself smarter in this area
18 of the law, than I am sitting here this afternoon, and
19 issue an order that puts into place, the schedule that
20 you've given me, including a hearing date, without
21 actually committing to a hearing.

22 Yes, sir?

23 UNIDENTIFIED SPEAKER: Your Honor, --

24 THE COURT: You need to come to the
25 microphone if you want a say -- Wait. Wait. You have

1 to speak at the microphone. Don't speak away from the
2 microphone. Come right to the microphone.

3 UNIDENTIFIED SPEAKER: Your Honor, the only
4 thing I would add is, I recognize that you want to make
5 the decision, and your -- based on your review of
6 whether or not there's a hearing.

7 The dates that we -- We did talk about some
8 dates of availability, and for what they're worth, and
9 I --

10 THE COURT: Well, first, I'm going to tell
11 you what my availability is.

12 UNIDENTIFIED SPEAKER: Well, Judge, your
13 clerk had said something and --

14 THE COURT: Right.

15 I'll tell you what my availability is, and
16 then you tell me how much time you're really going to
17 need.

18 This is -- January is a strange month. You
19 know that we have Martin Luther King Day. We have an
20 inaugural.

21 We have a city full of people, and we
22 apparently aren't going to close the liquor stores or
23 the bars for the week before the inaugural. Can you
24 believe that? This is going to be a wild and crazy
25 place.

1 Anyway, we'd have to push a few things around
2 because I have some sentencings, and other things such
3 as that, that cannot, in all fairness to a defendant,
4 be readily moved. Somebody who is waiting for
5 sentencing is waiting for an important thing to happen
6 in his or her life, and we might be able to move some
7 of those to the beginning or ends of the day, but if I
8 can't, then we're going to have to break in the middle
9 of the day.

10 Since this is to the Court, I don't feel quite
11 as concerned about this. If it were a jury, I'd be
12 much more anxious about it.

13 Anyway, I don't know how many days you need.
14 You said 15 to something hours, 15 to 17 hours, which
15 is 30 to 34.

16 Well, I'm not going to have seven hours a
17 day. I just -- As I said when I got on the bench, I
18 have so many other cases that are demanding of time.

19 Trial time is usually 9:30 to 4:30, with time
20 out for lunch and two breaks. That doesn't give you
21 very much time during the day.

22 We might be able to do it -- You see, the
23 problem is, when I'm pushing everything else around, I
24 start my day at nine so that I have other hearings
25 before the trial, and then I have a 4:30, one or two

1 more hearings, so that I get other things still moving.
2 Do you see what -- This is my concern.

3 So that would be my normal schedule, would be
4 9:30 to 4:30, with an hour or an hour and a half for
5 lunch, and two 10-minute breaks.

6 MR. HERFORT: Your Honor, I think what we
7 were -- what we've heard from your clerk, was something
8 in the order of the possibility, I know Mr. Robertson
9 doesn't (unintelligible) any days --

10 THE COURT: Well, we haven't decided that
11 yet, so he hasn't lost anything yet.

12 MR. HERFORT: (Unintelligible) was January
13 8th and 12th.

14 Then we were going to be out the 13th through
15 the 16th.

16 The 19th and the 20th were impossible because
17 of Martin Luther King Day and the inauguration, and
18 then we could hopefully go the 21st, 22nd, 23rd, and if
19 we need a little more time to finish up and to give
20 Your Honor what you need to decide it, we could -- you
21 know, we would obviously be willing to do whatever Your
22 Honor wanted.

23 That's -- That was the -- That's what I was --
24 and Mr. Parker and I were kind of hoping, after we
25 talked to your clerk.

1 MR. ROBERTSON: Your Honor, I'd like to make a
2 suggestion.

3 THE COURT: Yes, sir?

4 MR. ROBERTSON: Robert Robertson on behalf of
5 the FTC (unintelligible).

6 What we could do is come in on whichever day
7 -- the first day Your Honor wanted us to come in. By
8 that time we would have finished all the depositions,
9 we have -- we'll have finished all the document
10 production, and we could have an opening argument from
11 both sides. I think Your Honor could then determine
12 whether you need to hear, or feel you need to hear any
13 additional witnesses at that time. That's one way you
14 could handle this.

15 We've done that before in other cases. I did
16 one in front of Judge Roberts, and that's -- that ended
17 it. He didn't need to have any witnesses after that,
18 and it was an antitrust case, a PI, Your Honor,
19 permanent injunction, (unintelligible) Justice
20 Department cases that -- I think Your Honor had one a
21 couple years ago, and that's a permanent injunction
22 case --

23 THE COURT: Right.

24 MR. ROBERTSON: -- this one.

25 That might be one way to handle it. Then you

1 could make a determination whether things are as simple
2 as Mr. Parker says, and if they are simple, why can't
3 we see it from the evidence we already have.

4 THE COURT: Okay. Let's do it this way.

5 I'm going to fill up your schedules because I
6 don't know what we're going to do yet, and I just want
7 to be sure that everybody's schedule is aligned.

8 We're going to do this on the 8th and 9th of
9 January, and the 12th of January. Yes, the 8th, 9th,
10 and 12th of January, and then the 21st, 22nd and 23rd.

11 As I say, I'm not sure which hours during
12 those days, because I've got other things scheduled,
13 but some of it can be redone.

14 Then, in order to give us the opportunity to
15 take up -- The proposal from the government is that
16 we're going to have oral argument on Monday, January
17 5th at 2:30 in the afternoon, and whether we're
18 actually going to do that or not all remains to be
19 seen, as to how this all comes out after I've done a
20 little more head knocking of my own, all right?

21 Does that -- Now, does everybody -- Is
22 everybody satisfied? Everybody is on the schedule
23 every which way from Sunday.

24 UNIDENTIFIED SPEAKER: I think we can all
25 agree on one thing, Your Honor, --

1 THE COURT: You have to stand at the
2 microphone.

3 UNIDENTIFIED SPEAKER: I guess, Merry
4 Christmas and Happy New Year.

5 THE COURT: Merry Christmas and Happy New
6 Year.

7 Now, let me tell you how we're going to do
8 this, in addition.

9 I'm going to issue a scheduling order, which
10 is my -- going to be my sort of customary initial
11 scheduling order for a case, which will include the
12 dates we just discussed, and the provisions that you
13 have proposed.

14 There are two other things in the scheduling
15 order that I want to draw to your attention.

16 One is a direction to counsel to conduct
17 themselves in a civil and professional manner at all
18 times. I have been at the receiving end of bullying
19 lawyers, and I hate them, and so I have made it a
20 commitment, as a judge, that if there is a lawyer who's
21 being a bully, I want to know about it so I can do
22 something about it.

23 It's really wonderful when I say that because
24 it just sort of goes away.

25 The second thing is, if you have disputes as

1 you're going through discovery, call me on the
2 telephone. I won't take a written motion to compel
3 unless we've talked about it on the phone. If you
4 don't need everybody on the phone, I'm just as happy to
5 have two people instead of 22, so that if not all sides
6 need to be there, not all sides need to be there, but
7 usually in 15 or 20 minutes it saves you enormous
8 amounts of time, it saves me enormous amounts of time,
9 and guess what, it gets things decided so that you can
10 keep going. Okay? Does everybody agree with that?
11 That will be part of the order, as well.

12 UNIDENTIFIED SPEAKER: Yes, Your Honor, and
13 for a change -- we've been friends for many years, my
14 friend over here, and so I --

15 THE COURT: You told me that. You told me
16 that on the phone. I wasn't sure how much I believed
17 it, but I did.

18 (Laughter.)

19 THE COURT: I guess I should.

20 UNIDENTIFIED SPEAKER: Well let's don't fight
21 each other --

22 THE COURT: Okay.

23 UNIDENTIFIED SPEAKER: Your Honor,
24 (unintelligible) seems to be on the other side. I'm at
25 this table.

1 THE COURT: Yes, well, that's what happens in
2 life, isn't it? Okay.

3 Well then, thank you everybody. We'll do some
4 more study at this end.

5 We'll issue the scheduling order forthwith,
6 but we may then amend it later on. If we do, we'll
7 probably have a telephone conference with you, just to
8 sort of give you a heads up about that, all right?

9 Thank you.

10 MR. HERFORT: Thank you, Your Honor.

11 (Proceedings concluded at 2:44 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings
in the above-entitled matter.

/s/ _____

December 12, 2008

STEPHEN C. BOWLES