

The FTC Has Failed to Establish a Presumption

- There is a rebuttable presumption of anticompetitiveness where a merger “produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[.]” *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (1963)
- A “[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because . . . [s]ubstantiality can be determined only in terms of the market affected.” *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957)
- Finally, a cluster market must “reflect[] commercial realities[.]” *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)

The FTC Has Failed to Establish a Presumption

- The FTC has failed to establish a presumption here because their market shares are fatally flawed and do not reflect commercial realities
 - **There is no ink and toner included in the FTC's market**
 - **NOT A SINGLE CUSTOMER agrees with the FTC's market**
 - **NOT A SINGLE COMPETITOR agrees with the FTC's market**
 - **VIRTUALLY NO RFPs or CONTRACTS support the FTC's market**
- The FTC is asking the Court to make history by accepting a product market that does not exist and that NO ONE in the industry accepts
- Never before has a preliminary injunction been granted where the FTC has failed to properly define a product market

The FTC's Market Shares are Fatally Flawed

- The FTC's market ignores commercial realities (e.g., no ink and toner)
- The FTC's OWN EXPERT admits:
 - “But if you put ink and toner in, we have every reason to believe that we would end up with a considerably lower share; **and that's why we haven't done it.**” Dr. Carl Shapiro, 04-01-2016 AM Tr. at 2277:24-2278:3
 - “If you took Staples and Office Depot's market share in ink and toner, **it would be significantly lower than it is in core office supplies and paper.**” Dr. Carl Shapiro, 4/4 PM Transcript, 2783:1-5
- The FTC DID NOT get data for ink and toner

The Court Can Allow the Merger to Close

- The antitrust agencies (both FTC and DOJ) regularly challenge consummated mergers, including challenging at least **19** consummated mergers during the last two Presidential administrations:
 - *Bazaarvoice/PowerReviews* (DOJ 2013)
 - *St. Luke's Health Sys., Ltd./Saltzer Medical Group, P.A.* (FTC 2013)
 - *ProMedica Health Sys., Inc./St. Luke's Hospital* (FTC 2011)
 - *Evanston Nw. Healthcare Corp./Highland Park Hospital* (FTC 2004)
 - *Chi. Bridge & Iron Co./Pitt-Des Moines, Inc.* (FTC 2001)
 - And **MANY** more
 - e.g., *Lab. Corp. of Am./Westcliff Medical Laboratories, Inc.* (FTC 2010); *Carilion Clinic/Odyssey IV, LLC* (FTC 2009); *Microsemi Corp./Semicoa, Inc.* (DOJ 2008); *Ovation Pharm., Inc./NeoProfen* (FTC 2008); *Polypore Int'l, Inc./Microporous Holding Corp.* (FTC 2008); *Dairy Farmers of Am., Inc./Southern Belle Dairy Co., LLC* (DOJ 2003); *MSC Software Corp./Universal Analytics, Inc.* (FTC 2001)

The FTC Has Routinely Monitored Competition After Allowing Mergers

- **Google/AdMob**

- The FTC allowed Google and AdMob to merge in 2010, notably mentioning actions by Apple that should mitigate the anticompetitive effects of the acquisition
- “Though we have determined not to take action today, **the Commission will continue to monitor the mobile marketplace to ensure a competitive environment and to protect the interests of consumers.**” FTC Commission Statement, May 21, 2010

The FTC Has Routinely Monitored Competition After Allowing Mergers

- Facebook/WhatsApp
 - The FTC allowed Facebook to merge with WhatsApp in 2014
 - As part of this decision, the FTC wrote a letter to the parties noting that **“FTC staff will continue to monitor the companies’ practices to ensure that Facebook and WhatsApp honor the promises they have made to those users.”**
April 10, 2014 Letter from J. Rich to parties

The FTC Has Routinely Monitored Competition After Allowing Mergers

- **Pacificare/FHP**
 - The FTC allowed Pacificare to merge with FHP in 1997
 - In allowing the deal, the FTC noted that it would “keep a close eye on the proposed Pacificare-FHP merger **even after it is completed to check the effect on medical insurance prices and service in Southern California.**”
 - The FTC further said: “**We never close our books on these things.** Someone will make an effort to come back and look at big mergers. **It's something we're entitled to do ... to see if we got it right.**”