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I. INTRODUCTION

The Federal Trade (“FTC”) Commission and the Antitrust Division of the United States Department of Justice (“DOJ”) share merger enforcement authority in the United States. The two agencies enforce the same statute, Section 7 of the Clayton Act, and they embrace the same substantive standards when it comes to mergers. Of this, there can be little debate.

The process of litigating merger challenges at the two agencies does differ. The FTC files two complaints. An administrative complaint is filed at the FTC for a full permanent injunction against the merger. The merits of that complaint are heard by the Administrative Law Judge and ultimately the Commission. A second complaint is filed with a federal district court and seeks a preliminary injunction against the merger or acquisition pending the administrative proceeding. The Department of Justice files a single complaint in federal district court. The same court decides both the motion for preliminary relief as well as the merits of the Section 7 challenge. The question after three recent FTC merger challenges—Whole Foods,² Inova,³ and CCC Holdings⁴—is whether the procedural differences between the two agencies have a meaningful impact on outcomes.

The FTC has emphasized its unique role in antitrust enforcement and its administrative proceedings in these recent cases. Its position is grounded in the text of its authorizing statutes, Congressional intent, and longstanding legal precedent. Nevertheless, the FTC has been subjected to harsh criticism by some in the defense bar, arguing that the emphasis placed on the Commission’s administrative role and the D.C. Circuit’s decision in Whole Foods place the FTC in a stronger position to challenge mergers than the DOJ. That, in turn, leads to a higher hurdle for mergers at the FTC than it at the DOJ. Some urge the FTC to treat the preliminary injunction hearing in federal court as a de facto hearing on the merits. This not only ignores the Congressional intent

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² *FTC v. Whole Foods*, 548 F.3d 1028 (D.C. Cir. 2008).

³ *FTC v. Inova Sys. Found.*, No. 1:08-cv-460 (E.D. Va. 2008).

⁴ *FTC v. CCC Holdings*, 2009 U.S. Dist. LEXIS 21784, 2009-1 Trade Cas. (CCH) ¶ 76,544 (D.D.C. 2009).

behind the FTC but it is not at all clear that expedited proceedings on the merits before lay judges is the best model to decide merger challenges.

II. LEGAL FRAMEWORK: THE FTC ACT AND SECTION 13(B)

The FTC's authority is spelled out in the FTC Act and Section 13(b). The FTC Act provides not only that the Commission shall issue a complaint when it has reason to believe that there is a violation of the FTC Act, but that the Commission shall, after a hearing, make findings of fact, determine whether the FTC Act has been violated, and enjoin any such violation.⁵ The power to review Commission decisions was given exclusively to the federal appellate courts.⁶ This was no accident. In proposing the new agency to the House of Representatives, President Wilson expressed skepticism that federal district courts were equipped "to adjust the remedy to the wrong in a way that will meet all the circumstances of the case."⁷

Section 13(b) was intended to strengthen the FTC's judicial role. The FTC struggled to order effective relief in merger cases prior to the enactment of Section 13(b) because the parties were free to close their merger pending the administrative proceeding. Chairman Gwynne highlighted the problem in testimony before the House Antitrust Subcommittee in 1956:

"A very serious loophole in the Anti-merger Act is the lack of a provision which enables the Federal Trade Commission to take action to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of administrative hearings before the Commission."⁸

Congress filled this void when it passed the Trans-Alaska Pipeline Authorization Act in 1973. Section 408(f) of that legislation amended Section 13(b) of the FTC Act to authorize the FTC to seek a preliminary injunction in federal district court and a permanent injunction "in proper cases." The purpose of the legislation was to preserve the ability of the Federal Trade Commission to order effective, ultimate relief upon completion of administrative proceedings. As the Fourth Circuit declared in an early case interpreting Section 13 (b), "the district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance. The only purpose of a proceeding under section 13 is to preserve the status quo until FTC can perform its function."⁹

Section 13(b) embraces a "public interest" standard. It provides that a preliminary injunction should issue "upon a showing that, weighing the equities and

⁵ 15 U.S.C. § 45(b); Congressional Record, Sept. 10, 1914, pp. 14931-33.

⁶ 15 U.S.C. § 45(c).

⁷ H.R. Doc. H.R. Doc. No. 625, 63rd Cong., 2d Sess. 5 (1914).

⁸ Hearings on S. 15 Before the Subcomm. On Antitrust of the House Comm. On the Judiciary, 84th Cong., 2d Sess. At 29 (1956).

⁹ *FTC v. Food Town Stores*, 539 F.2d 1339, 1342 (4th Cir. 1976).

considering the Commission's likelihood of success, such action would be in the public interest...."¹⁰ Congress explicitly eschewed the traditional equity standard for injunctive relief. The House Report states that

“The intent is to maintain the statutory or ‘public interest’ standard which is now applicable, and not to impose the traditional ‘equity’ standard of irreparable damage, probability of success on the merits, and that the balance of hardships favors the petitioner....[That standard] is not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measures the propriety and need for injunctive relief.”¹¹

This Congressional intent has been explicitly recognized by the courts. As the D.C. Circuit recognized in *Heinz*, “[i]n enacting [Section 13(b)] Congress...demonstrated its concern that injunctive relief be broadly available to the FTC.”¹²

III. THE APPLICATION OF THE SECTION 13(B) STANDARD: THE MEANING OF LIKELIHOOD OF SUCCESS.

Courts faithfully acknowledge the statutory language and the legislative history of Section 13(b). However, courts have interpreted the likelihood of success standard differently. Some courts have held that the FTC discharges its burden if “it has a fair and tenable chance of ultimate success on the merits.”¹³ Other courts have declared that in weighing the likelihood of success a district court should determine whether there are “questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance.”¹⁴ Finally some courts have held that there must be a “reasonable probability” that the challenged acquisition will substantially lessen competition.¹⁵ Yet even those courts that agree on the likelihood of success standard have not necessarily agreed on its meaning. Some courts have held the FTC to a fairly demanding standard of proof that approaches or even equals what would have to be shown at a trial on the merits.

¹⁰ 15 U.S.C. 53(b).

¹¹ H.R. Rep. No. 624, 93rd Cong., 1st Sess. 31 (1971).

¹² *FTC v. H.J. Heinz Co.*, 246 F.3d, 708, 714 (D.C. Cir. 2001) (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C.Cir. 1980)); H.R. Rep. No., 93-624, at 31 (1973), 1973 U.S. Code Cong & Admin. News 2523; *see also* *Whole Foods*, 533 F.3d at 883 (“the FTC—an expert agency acting on the public’s behalf—should be able to obtain injunctive relief more readily than private parties.”).

¹³ *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1090 (S.D. N.Y. 1977) (“We think the FTC meets its burden on the ‘likelihood of success’ issue if it shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits.”). Several recent courts have embraced the “fair and tenable” standard in the consumer protection context. *See* *FTC v. AmeriDebt, Inc.*, 373 F. Supp. 2d 558, 563 (D.Md 2005); *FTC v. Crescent Publ’g Group, Inc.*, 129 F. Supp. 2d 311, 319 (S.D.N.Y. 2001).

¹⁴ *See, e.g., Heinz*, 246 F.3d at 704; *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984); *FTC v. National Tea Co.* 603 F.2d 694, 698 (8th Cir. 1979); CCC Holdings, 2009-1 Trade Cas. (CCH) ¶ 76,544; *FTC v. Staples*, 970 F. Supp. 1066, 1071 (D.D.C. 1998); *FTC v. Lancaster Colony*, 434 F.Supp. at 1091.

¹⁵ *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *Fruehauf v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979).

The D.C. Circuit's decision in *Whole Foods* addressed the meaning of likelihood of success head-on.¹⁶ All four judges involved in the case, the three appellate judges and the district court judge, agreed that the Heinz "serious, substantial" question standard controlled. However, their interpretation of that standard varied. The district court held that the FTC had failed to establish a likelihood of success because it had failed to prove its market definition.¹⁷ The D.C. Circuit disagreed. Judge Brown held that the FTC is "entitled to a presumption against the merger on the merits and therefore does not need detailed evidence of anticompetitive effect."¹⁸ Judge Tatel agreed with Judge Brown and found that the evidence ignored by the district court was "enough to raise 'serious, substantial' questions meriting further investigation by the FTC."¹⁹

Some in the defense bar have seized on the fact that Judge Brown and Judge Tatel issued separate opinions to argue that *Whole Foods* has little or no precedential weight. As support they cite a statement issued by Judges Ginsburg and Sentelle that accompanied the denial of *Whole Foods'* request for en banc review. The two judges believed the judgment set no precedent because there were two separate opinions.²⁰ Yet that position was unsupported by the seven other judges on the panel including Judge Kavanaugh who dissented in *Whole Foods*. Indeed, as Judge Kavanaugh explained in dissent, "the mere fact that there is no majority opinion does not mean that the decision constitutes no precedent for future cases."²¹ The opinions of Judges Brown and Tatel are controlling precedent where they are the same.²² The judges agreed that the FTC had produced sufficient evidence to demonstrate a likelihood of success.

The precedential value of *Whole Foods* was confirmed in *FTC v. CCC Holdings*. The FTC challenged the merger of CCC Information Services and Mitchell International only days after the final decision in *Whole Foods*.²³ The FTC alleged that CCC and Mitchell were two of only three firms that competed in two relevant markets—an allegation that was never seriously contested in the proceedings before the district court. Instead, the fight was over whether the presumption of illegality that flowed from the structural case was an accurate predictor of the merger's likely competitive effects. The FTC's initial position in *CCC Holdings* was that the strength of the structural case alone

¹⁶ *Whole Foods*, 548 F.3d 1028.

¹⁷ *FTC v. Whole Foods*, 502 F.Supp. 2d 1, 8 (D.D.C. 2007).

¹⁸ 548 F.3d at 1035.

¹⁹ *Id.* at 1048 ("the FTC's evidence plainly establishes a reasonable probability that it will be able to prove its asserted market.").

²⁰ *FTC v. Whole Foods*, Denial of Petition for en banc Review (Nov. 21, 2008) available at <http://www.ftc.gov/os/adjpro/d9324/12192008attachmenttodissenting.pdf>

²¹ *Whole Foods*, 548 F.3d at 1061 n.8, (Kavanaugh, J. dissenting) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977); *King v. Palmer*, 950 F.2d 771, 780,783 (D.C. Cir. 1991) (en banc) ("implicit agreement" between judges can produce a "controlling" principle of law)).

²² *Whole Foods*, 548 F.3d at 1061 n.8, (Kavanaugh, J. dissenting) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977); *King v. Palmer*, 950 F.2d 771, 780,783 (D.C. Cir. 1991) (en banc) ("implicit agreement" between judges can produce a "controlling" principle of law)).

²³ *CCC Holdings*, 2009-1 Trade Cas. (CCH) ¶ 76,544.

raised “serious, substantial” questions and that the defendants’ arguments were best aired in a trial on the merits. The district court disagreed. The court held a six day hearing on the defendants’ rebuttal arguments after less than a month of pre-trial discovery.

Judge Collyer ultimately issued a preliminary injunction in *CCC Holdings*. In doing so she applied the lessons of *Whole Foods* and was careful not to decide the merits of the FTC’s case. At the same time, Judge Collyer was no rubber stamp. The court fully and thoughtfully addressed the defendants’ rebuttal arguments in a lengthy opinion. Defendants raised three arguments to rebut the presumption. First, they argued the merger would result in substantial efficiencies. Second, they argued that new entry would resolve any competitive issues. And third, they argued that there was no evidence that the merger would harm competition despite the structural presumption in highly concentrated markets. She did not seek to resolve every factual dispute on these issues but she rather focused on whether the evidence as a whole raised “serious, substantial” questions that should be resolved in a hearing on the merits. In the end she concluded there were “substantial, serious” questions that warranted further review and issued the preliminary injunction.

IV. DO THE PROCEDURAL DIFFERENCES MATTER?

Some suggest that the outcomes in *CCC Holdings* and *Whole Foods* would have been different if they were handled by the Department of Justice. That suggestion might have some merit if the DOJ had been forced to try the merits on the schedules in place in those cases. Yet if recent practice is any indication, the DOJ would have never agreed to try the merits on such expedited schedules.

The bar has championed a model that has been foisted upon the DOJ in some cases: the consolidation of the motion for a preliminary injunction with the trial on the merits.²⁴ This is not a model that the DOJ itself necessarily embraces. Consolidation is by no means automatic. For example in *United States v. UPM-Kymmene*, the government successfully opposed consolidation of its motion for a preliminary injunction with a full trial on the merits.²⁵ The defendants urged the court to consolidate the proceedings and hold a hearing on the merits less than two months after the complaint was filed. The court declined the defendants’ invitation to consolidate. The preliminary injunction standard applied by the court in that case was not altogether different from the standard

²⁴ *United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121, 125 (E.D.N.Y. 1997) (“During the hearing conducted by the Court on the plaintiff’s motion for a preliminary injunction, the parties agreed that the plenary trial of this action on the merits was to be advanced and consolidated with the hearing.”); *United States v. Rockford Mem. Hosp.*, 717 F. Supp. 1251, 1252 (N.D. Ill. 1989), *aff’d*, 898 F.2d 1278 (7th Cir. 1990) (parties stipulated to consolidation after the preliminary-injunction hearing); *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 4 n. 1 (D.D.C.), *aff’d*, 908 F.2d 981 (D.C. Cir. 1990).

²⁵ *United States’ Reply Opposing Consolidation of the Preliminary Injunction Hearing with the Trial on the Merits*, *United States v. UPM-Kymmene* 2003 U.S. Dist. LEXIS 12820 (N.D. Ill. 2003) available at <http://www.usdoj.gov/atr/cases/f209600/209693.htm>.

applied by the D.C. Circuit in *Whole Foods* and the district court in *CCC Holdings*. Indeed, it is not at all clear that the DOJ and FTC are held to different likelihood of success standards when it comes to preliminary injunctions. Nor should it be. The agencies should not be held to the same standard as private parties because they are acting in the public interest and a complaint is filed only after lengthy deliberation.²⁶

It also bears noting that the DOJ has also signaled that it will not acquiesce to pressure from defendants to try cases on the merits on extremely expedited schedules. Perhaps this is a lesson drawn from the government's experience in *United States v. Sungard*.²⁷ The DOJ agreed to try that case on a schedule that resulted in a decision from the court approximately six weeks after the complaint was filed. In *United States v. JBS S.A.*, the DOJ rejected a schedule proposed by the defendants that would have allowed for less than two months of discovery.²⁸ In arguing for a more realistic schedule in *United States v. JBS*, the DOJ emphasized the fact that "antitrust cases typically involve complex legal, factual, and economic matters."²⁹ The court agreed and adopted the DOJ's proposal for a six month pre-trial schedule.

The lesson of the recent cases at both the FTC and the DOJ is that when the agencies litigate a merger challenge they will insist on realistic schedules that conform with the relief sought. A preliminary injunction may be scheduled and heard very quickly. There does not appear to be drastic differences in the preliminary injunction standards applicable to the agencies—at least in practice. If the defendants want a full trial on the merits then they will have to acquiesce to a longer pre-trial schedule. As the DOJ reinvigorates its merger enforcement program under new Assistant Attorney General Varney, there may be fewer differences between the agencies than some have suggested.

The one difference that will remain is venue. The merits of the FTC's challenges are addressed in administrative proceedings while the merits of the DOJ's challenges are addressed in federal district court. Yet this is true for every antitrust case brought by the government. Congress made the decision nearly a hundred years ago to vest the FTC with judicial authority subject to review by the appellate courts. A decision to revisit that issue should be made by Congress, not by agency administrators or the courts.

²⁶ *Whole Foods*, 548 F.3d at 1042 (Tatel, J.) ("the FTC—an expert agency acting on the public's behalf—should be able to obtain injunctive relief more readily than private parties.").

²⁷ 172 F. Supp. 2d 172 (D.D.C. 2001).

²⁸ Plaintiffs' Opposition to Defendants Motion for Expedited Treatment, *United States v. JBS, S.A* Case No. 08-cv-5992 (N.D.Ill. 2008) available at <http://www.usdoj.gov/atr/cases/f238900/238930.pdf>.

²⁹ *Id.* at 4.