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CLARETT SCORES ANTITRUST TOUCHDOWN: CLEARS PATH TO NFL

The National Football League ("NFL") failed to persuade the U.S. District Court for the Southern District of New York to stay its decision invalidating the league's eligibility rule for the NFL player draft (*Clarett v. Nat'l Football League*, S.D.N.Y., No. 03 Civ. 7441 (SAS), 2/11/04). In doing so, the federal district court made running back Maurice Clarett eligible to participate in the 2004 draft. Clarett, a tailback, played just one season at Ohio State, leading the Buckeyes to the 2002 national championship. He was suspended last year for accepting improper benefits from a family friend and then lying about it to investigators. The ruling also prompted Mike Williams, the all-American wide receiver that helped propel the University of Southern California to the 2003 national championship, to leave college early and apply for the NFL draft.

Maurice Clarett sued the NFL last summer to challenge the league rule that a player must be out of high school three years to be eligible for the draft. The NFL argued that its rule resulted from a collective bargaining agreement with the players and was therefore immune from antitrust scrutiny. The league also said its rule was reasonable and that Clarett could not bring such a lawsuit. Ordinarily, the best offense is a good defense, but, according to Judge Shira A. Scheindlin, none of the NFL's defenses held the line.

Judge Scheindlin's initial February 5 ruling held that Clarett could bring a lawsuit against the NFL alleging antitrust injury because he was fighting a policy that excluded all players in his position from selling their services to the only viable buyer -- the NFL. In particular, the court held that the NFL's rule violated Section 1 of the Sherman Act under the rule of reason analysis because it categorically excluded a class of players the NFL had decided was not yet ready to play. Accordingly, the rule amounted to a naked restraint of trade with no legitimate procompetitive justification. If there was a competitive reason for the rule, the court added, it still should be invalidated because there is a less restrictive alternative: testing to measure an individual player's maturity.

Furthermore, the NFL had not justified Clarett's exclusion by demonstrating that the rule enhanced competition. Indeed, the judge found Clarett alleged the very type of injury -- a complete bar to entry into the market for his services -- that the antitrust laws are designed to prevent. The court's decision was also based on findings that the nonstatutory labor exemption was inapplicable to the case and that Clarett had antitrust standing to challenge the rule.

On the NFL's application to stay the underlying decision, Judge Scheindlin weighed the relevant factors and case law and found that a stay would effectively make Clarett the losing party in the case. First, a stay would make Clarett miss the 2004 draft and prevent him from being eligible for NFL play until the 2005 draft, when he would have been eligible under the voided rule. The court also noted that Clarett might be injured if he were permitted to play college ball next year, preventing him from ever playing professional football, which is not easily remedied by monetary damages.

Second, Judge Scheindlin ruled that while the NFL would suffer some harm absent a stay, the harm would not be irreparable. If the court's decision ultimately is reversed on appeal, the worst that would happen is that the NFL would be forced to tolerate the handful of "younger" players selected in the 2004 draft. The third relevant factor also weighed against issuance of a stay because the decision invalidating the rule was based on Supreme Court precedent and well-settled legal rules. In fact, the court maintained that none of the essential holdings in its initial order were, as the NFL claimed, based on "novel legal theories".

In addition, Judge Scheindlin ruled that public interest favored the denial of a stay. The court identified the overarching public interest as the fair and efficient operation of the marketplace -- in this case, free and unfettered movement of players and open competition in the NFL. Because the NFL's deadline for the 2004 draft was March 1, 2004, the court doubted that many players would overtrain or resort to steroid use in order to be eligible for the draft. Hence, the real effects of the court's decision would not be felt until the 2005 draft, by which time the Second Circuit likely will have ruled on an appeal.

The court also decided that the other potential harms advanced by the NFL were illusory. In particular, the judge doubted the NFL's claim that it would be forced to evaluate, assess, work out, and interview a large number of prospective NFL players who had previously been deemed ineligible. In fact, the court asserted that the few college underclassmen who were likely to declare for the draft were already well-known to pro scouts.

At first blush, Judge Scheindlin's analysis appears correct, and there will be few teenagers moving to the NFL -- the departure of Williams from USC's national championship team into the top five of the draft does not even qualify as a drop in the bucket, much less a torrential downpour of underclassmen into the NFL. The NFL filed its latest appeal in this case on February 29, alleging that allowing "adolescents" to be eligible for the draft would put those youngsters' health and educational futures at risk and bring potentially tragic consequences for both themselves and society. However, if Judge Scheindlin's decisions

withstand possible appeals, they could allow a myriad of other teenage football stars to take advantage of the career and business opportunities available to young athletes in other sports such as baseball and basketball.

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6TH CIRCUIT BREATHES NEW LIFE INTO R-P ACT CASE AGAINST CIGARETTE MAKER

On January 15, the U.S. Court of Appeals for the 6th Circuit cleared the way for owners and operators of cigarette vending machines to pursue Robinson-Patman Act claims against a cigarette manufacturer that excluded them from certain promotional programs offered to convenience stores, mini-marts and gas stations. *Lewis v. Philip Morris Inc.*, 355 F.3d 515 (2004). The challenged promotional programs included manufacturer's reimbursements of discounts passed on to consumers, replenishments of packs given freely to consumers, and gifts for the stores to give consumers. In reversing the trial court's dismissal of all claims, a majority of the three-judge panel, in different and sometimes conflicting opinions, held that: (1) two vendors that purchased some cigarettes directly from the manufacturer had standing to allege price discrimination in violation of Section 2(a) of the Act (which prohibits price discrimination in the original sale to the purchaser), and (2) all of the vendors - including those who bought from wholesalers rather than directly from Philip Morris - could pursue their claims under Sections 2(d) and (e) of the Act (which outlaw discrimination in the provision of promotional

services made available to purchasers who buy for resale).

Section 2(a) Standing Confined to Direct Purchasers

The vendors alleged that Philip Morris price discriminated in violation of Section 2(a) by offering rebates and promotional allowances to convenience stores but not to vendors. In order to bring a private enforcement action under the Robinson-Patman Act, the plaintiff must be a "purchaser" or a "customer" as those terms are used in the Act. A majority of the panel ruled that the two vendors who purchased some cigarettes directly from Philip Morris (rather than a wholesaler) had standing to allege price discrimination under Section 2(a), but that the remaining eight vendors - who bought all inventory from wholesalers - lacked standing. While one of the three judges refused to apply Section 2(a) to any of the plaintiffs' claims, a second judge ruled that all of the plaintiffs had standing under Section 2(a). This made the decision turn on the third judge, who decided that standing under Section 2(a) was confined to direct purchasers of goods from the supplier alleged to have engaged in discriminatory pricing.

Under the "indirect purchaser" doctrine, retailers who purchase through wholesalers may have standing under Section 2(a) if they show that the supplier "sets or controls" the resale prices paid by the plaintiff. However, the plaintiffs made no showing that Philip Morris set or controlled the prices paid by plaintiffs to wholesalers for Philip Morris cigarettes. The court also indicated that it might have found standing had the convenience stores purchased their cigarettes

directly from Philip Morris, rather than through a wholesaler. However, this too was not the case. The vendors argued that the indirect purchaser theory (typically used to show that the disfavored retailer is a "purchaser" under Section 2(a)) may be used to show that the favored retailer (in this case the convenience stores) is a "purchaser". In support, the vendors relied on the seminal RP-Act case, *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). There, the court ruled that Section 2(d) prohibited a supplier failing to give sales promotional allowances to retailers that purchased through a wholesaler but competed directly with the purchaser who received the allowances. In refusing to apply *Fred Meyer* in the Section 2(a) context, the 6th Circuit emphasized that the focus of Section 2(a) is the discrimination in the price to the purchasers, not a discrimination in helping purchasers to sell to others. Thus, "vendors can only bring Section 2(a) claims if vendors can show that Philip Morris controlled the sale by wholesalers to the vendors." But this was something that the plaintiffs could not show. The court added that the purpose of the indirect purchaser doctrine is to prevent a manufacturer from insulating itself under the Robinson Patman Act by using a dummy wholesaler to make sales at terms actually controlled by the manufacturer. Absent any indication that the manufacturer actually controlled the terms of sale by wholesalers to vendors, there could be no claim under Section 2(a).

Standing for Claims Under Sections 2(d) and 2(e)

Two of the three judges ruled that all of the vendors - including those that purchased cigarettes through wholesalers, had standing

under Sections 2(d) and (e) to challenge Philip Morris' failure to offer to vendors the same promotional programs available to convenience stores. Section 2(d) makes it "unlawful for any person...to pay...anything of value to or for the benefit of a customer of such person...for any services or facilities furnished by...such customer...in connection with the processing, handling, sale, or offering for sale of any products...unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products..." (Section 2(e) is similar but relates to the "furnishing" of such promotional services.) In *Fred Meyer*, the Court held that the third use of "customer" in Section 2(d) includes customers who purchase through a wholesaler. In *Philip Morris* the 6th Circuit judge who wrote for the majority reasoned that this construction applied to every use of the word "customer" in Section 2(d), and not merely the third use. The judge explained that given the clear holding in *Fred Meyer* that the third use of "customer" in Section 2(d) includes customers who purchase through a wholesaler, it would take an extremely strong showing of Congressional intent to defeat the conclusion that the first use of the word "customer" in the same sentence carries the same meaning.

Adequate Showing of Competition with Convenience Stores

A plaintiff alleging a violation of Sections 2(d) or (e) of the Act must show it competes with the favored purchaser, and the competition must be in the same geographic area. The 6th Circuit found that the vendors had met their initial burden of showing that they compete with convenience stores in the sale of cigarettes.

The court rejected the manufacturer's claim that the vendors needed to provide a cross elasticity study to show competition among vendors and stores, and credited a study of 315 adult smokers which supported the plaintiffs' assertion that smokers buy cigarettes from both convenience stores and vending machines, and that a lower price may prompt consumers to favor a convenience store over a more accessible vending machine. The court similarly made it clear that "vendors do not need to show that smokers switched from vending machines to convenience store purchases on the basis of promotional programs. Such a requirement goes to injury, and the element at issue on this appeal is the existence, not the amount of damage to, competition. Vendors are also not required to show ... 'at what point an increase in the price of [vending machine] cigarettes will compel patrons of an establishment to forego the convenience of purchasing from a vending machine on site and cause them to leave this site in order to purchase their cigarettes elsewhere.'"

The 6th Circuit's ruling seems consistent with Congressional intent behind the Robinson-Patman Act, which was enacted to curb devices by which large buyers gain discriminatory preferences over smaller ones by virtue of their greater purchasing power. Assuming that the vendors can establish that they in fact compete with convenience stores, it certainly seems plausible that large convenience store chains wield considerable purchasing power in contrast to the vending machine owners and operators.

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FTC ALJ McGUIRE DISMISSES STAFF'S COMPLAINT IN RAMBUS CASE

In a much-awaited and highly debated decision, FTC Administrative Law Judge Steven McGuire dismissed FTC staff claims that Rambus, Inc. knowingly failed to disclose critical patents and patent applications in violation of FTC Act Section 5. See *In the Matter of Rambus Inc.*, Docket No. 9302. Although ALJ McGuire's 348 page Initial Decision was announced on February 17, it did not become publicly available until February 23 due to redactions to the 1665 findings of fact and extensive legal analysis, in order to prevent the disclosure of confidential information. According to McGuire, FTC staff failed to prove that Rambus' decision not to disclose certain patents and patent applications within industry digital random access memory ("DRAM") standard-setting proceedings resulted in an unlawful attempt to monopolize these markets, or (in the alternative) in anticompetitive injury.

The FTC complaint, filed in June 2002, alleged that Rambus failed to disclose to the Joint Electron Device Engineering Council ("JEDEC") patents or patent applications covering four critical technologies that were the subject of that standard-setting organization's work at the time. JEDEC was part of the Electronic Industries Association ("EIA") during the time period relevant to the allegations. JEDEC was developing standards specifically relating to synchronous DRAM, or "SDRAM," products. The initial purpose of these standards was to promote interoperability. FTC staff asserted in its complaint that disclosure of existing or pending patents and patent applications was mandated by JEDEC/EIA Guidelines, and that,

therefore, Rambus had a "good faith" duty, to disclose its relevant intellectual property interests. Consequently, Rambus' subsequent exercise of its patent rights by requesting royalties and suing DRAM manufacturers who integrated the JEDEC standards was an exercise of unlawfully-obtained monopoly power, according to the complaint. After some delay a 54-day trial began on April 30, 2003, resulting in an extensive trial record. After a number of deadline extensions, McGuire finally filed his Initial Decision this past month.

According to McGuire, DRAM manufacturers most likely had prior notice of Rambus' relevant patent interests. Moreover, McGuire found the JEDEC/EIA guidelines ambiguous with respect to whether patent disclosure was mandatory, and, as a consequence, McGuire could not conclude that Rambus had a "good faith" duty to disclose its existing or pending patent rights. McGuire found that the guidelines did not mandate or recommend the disclosure of Rambus' patent applications, which were subsequently granted to the company, and that the decision to withhold disclosure of these applications was supported by a valid business rationale relating to the protection of valuable trade secrets.

McGuire further found that Rambus' behavior did not result in any anticompetitive effects, because Rambus' technology was superior to other contemplated options, and that it was likely that JEDEC would have chosen the Rambus technology in any event, regardless of whether Rambus would have disclosed its patent rights. McGuire decided that Rambus' requested royalties for the incorporation of these technologies were fair and non-discriminatory. Additionally, McGuire noted anticompetitive

network effects were weak given the rapid technological changes in the industry.

FTC staff has filed a notice of appeal to the full Commission. Interestingly, McGuire determined that the staff's assertions had very little or no legal precedent, given that the *Allied Tube* case involved entirely different behavior in the standard-setting process, and that the *Dell Computer* consent decree held no precedential value. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 108 S.Ct. 1931 (1988); *In the Matter of Dell Computer Corporation*, FTC Docket No. C-3658. Instead, McGuire placed weight on both the Federal Circuit's and district court's assertions in their respective *Infineon* patent infringement litigation opinions that Rambus did commit fraud by not disclosing its relevant patent interests. *Rambus, Inc. v. Infineon Technologies AG*, 318 F.3d 1081 (Fed. Cir. 2003).

It remains to be seen whether the Commissioners believe the agency, as a policy matter, should play a role in creating new law in the patent area, as well as obtaining further clarity in the overlap of the antitrust and intellectual property laws. The Commissioners also must determine whether McGuire's decision truly reflects the extensive trial record as well. Although McGuire's decision is being read by those in the industry as a definitive conclusion to the saga, the story really continues now that an appeal is being made by FTC staff. Regardless of the eventual outcome of this particular case, the FTC remains interested in pursuing cases involving anticompetitive uses of intellectual property rights.

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FTC CHALLENGES CONSUMMATED HOSPITAL MERGER

On February 10th, the FTC Commissioners voted 4-1 to authorize a legal action that could force Evanston Northwestern Healthcare Corp. ("ENH") to unwind its acquisition of Lakeland Health Services Inc.'s Highland Park Hospital ("Highland Park") and the Highland Park Independent Physician Association.

According to the FTC, ENH's acquisition of Highland Park resulted in significantly higher prices charged to health insurers and violated Section 7 of the Clayton Act. The FTC's administrative complaint focuses on the fact that ENH charged higher prices after its acquisition. The complaint says the merger, which was consummated in 2000 and valued at more than \$200 million, enabled ENH to illegally raise prices charged to insurance payers by giving the hospital system a lock on hospital services in two geographic market(s): northeastern Cook County and southeastern Lake County, Illinois. The administrative complaint also alleges that Evanston merged Highland's Independent Physician Group into the ENH Medical Group.

Allegedly, the resulting physician's group negotiated rates not just for the doctors it employed, but also for hundreds of independent physicians previously affiliated with Highland. Because the independent physicians for whom ENH Medical Group negotiated prices are not financially or clinically integrated with ENH or the ENH Medical Group, the alleged conduct would constitute illegal price-fixing among competing physicians or physician groups. In addition, the FTC's complaint alleges that following the merging of the hospitals and physician groups,

ENH offered payers both hospital and physician services as a package.

ENH is expected to vigorously defend itself against the FTC's allegations. ENH will argue that the merger was legal under the antitrust laws, that Highland Park was losing money prior to the acquisition, and that ENH has invested approximately \$85 million in improvements to the hospital, thereby justifying price increases. ENH also claims that the alleged price fixing claim is a non-issue because ENH will agree to a settlement prohibiting it from continuing any practices that arguably could be construed as price fixing.

The FTC staff is seeking to force Evanston to divest Highland Park and to ban transactions between the two entities. As with all consummated mergers, the difficulty for the FTC staff, the administrative law judge, and the Commission will be in the drafting of a remedy that requires a divestiture of an entity that is already integrated into the acquiring company. The FTC staff also wants to require Evanston to notify it before undertaking any other mergers in the affected antitrust markets.

The FTC's challenge to this consummated hospital merger is noteworthy for at least two reasons. First, it is the FTC's first antitrust challenge to a hospital merger in nearly six years. Second, the FTC is continuing to send a strong message that it will challenge consummated deals if anticompetitive harm results from the acquisition.

The challenge to the consummated hospital deal is part of an announced program of the FTC to investigate and challenge hospital mergers that

have proven to be anticompetitive. The movement was started by the FTC after the federal antitrust agencies lost their last seven hospital merger cases. There were several reasons for the losses. They all took place in federal courts, where the judges were forced to make difficult predictions of the likely effect of a merger. Generally, the federal courts recognized the need for hospitals to consolidate to save costs and to reduce overcapacity. The courts also questioned whether the antitrust agencies defined the geographic markets too narrowly. Where the merging hospitals were nonprofits, courts by and large believed that nonprofit hospitals were unlikely to raise prices post merger. Whatever the reason for the losses, one thing was certain: the antitrust agencies were having a difficult time winning hospital merger cases.

The solution was for the FTC to reevaluate and challenge, through administrative litigation, consummated hospital mergers that were anticompetitive. A merger litigation task force was created in 2003 to carry out this Commission mandate. The FTC administrative litigation process is particularly suited for this since it allows the FTC staff to carefully examine the actual impact of a combination and to avoid the prospective review required by using the federal courts. A May 10 scheduling date is noted in the ENH/Highland Park matter.

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THE U.S. DEPARTMENT OF TRANSPORTATION DEREGULATES COMPUTER RESERVATION SYSTEMS

Depending on your perspective, deregulation of the U.S. airline industry in the late 1970's was

either good or bad for the industry. A similar dichotomy of views now exists with respect to the decision announced by the U.S. Department of Transportation ("DOT") in January of this year (69 Fed. Reg. 28456) to deregulate the airline computer reservation system ("CRS"), which have been regulated by DOT for the last twenty years.

The New Situation: Market Forces Will Govern Rather Than Regulations

In a significant policy shift, the DOT decided to eliminate all of the rules governing computer reservations systems, including the long-standing rules that prohibit systems from displaying airlines in a manner that is biased against certain carriers. The regulations were implemented in 1984 when the government learned that the airlines that owned the systems were abusing their ownership rights and biasing fare display options in favor of the carrier-owners. The rules have required unbiased screen displays and mandatory participation of carrier-owners in all the systems, and have prohibited discriminatory booking fee pricing by the systems.

On January 31 of this year, most of the rules governing these systems were lifted. This includes the prior rules that (a) systems charge the same prices to different airlines for having their routes and fares listed in the system, and (b) airlines that own part of a system must participate at the same level in other systems. The following three remaining rules will be phased out at the end of July 2004: 1) the bar against systems biasing flight listings in favor of some airlines to the disadvantage of others, 2) the prohibition against systems requiring an airline to show all fares, including low-cost Web-based fares, on the system as a condition of

participation in the system, and 3) the rule against requiring an airline to participate in that system at the same level (or higher) that it participates in another CRS.

These restrictions are subject to the six-month phase out period to give the market adequate time to adjust.

DOT's Rationale for Scrapping the Rules

The DOT and industry representatives that support the changes contend that the following changes in the market will protect airlines from the ills that the rules were intended to guard against:

U.S. Systems No Longer Owned By Airlines

The rules originally were imposed because the original CRS firms were owned by individual airlines, which skewed airline flight information that was presented to travel agents. The United Airlines system would list UAL flights before competing flights, thereby causing travel agents to choose UAL flights over other airlines that offered service in the same market. However, the three current U.S.-based systems, Sabre, Galileo and Worldspan, are no longer owned by any airline. A fourth CRS, Amadeus, is owned by three European airlines.

Availability of Information Over the Internet

DOT emphasizes that the development of alternative sources of information and booking capabilities on the Internet, and the airlines' control over access to their Web fares, has begun to make the system "responsive to market force discipline". In other words, DOT maintains that if a CRS engages in

discriminatory or other improper behavior, there are means by which airlines and other industry participants can financially harm the system without the need for regulatory sanctions. To some extent this has already occurred, with travel agents looking to fare information from airline websites, and travelers bypassing the systems by booking with airlines directly, or through Internet sites such as Travelocity.com. Those in support of the changes point to the fact that CRS firms already have introduced new contracts, which cut the fees that the airlines pay to list their flights, maintaining that prices are already down approximately 13%.

The Potential Impact on Airlines That Fly In or To the United States

Airlines can hope that the market forces will work and that if the systems revert to bad habits such as biasing one airline over competing carriers, the market will punish that CRS. But there can be no guarantee. The systems still wield considerable power in the market and are in business to make money. Indeed, some of the U.S. carriers are opposed to the change, maintaining that the systems still have "market power" even if not owned by airlines. (In this context, "market power" could include the ability to force airlines that want to be listed in the system to pay prices and to agree to terms that are more onerous than would be applicable if there were real competition in the market.)

As a lawyer for American Airlines testified before the DOT, "completely deregulating the CRS market in its current form...is not going to unleash new competitive forces. What it's going to do is it's going to unleash the perverse [economic] incentives that already exist in this misaligned and broken market structure."

Europe's air carriers have also expressed concern over DOT's decision, fearing that elimination of rules prohibiting bias in the display of fares data could eventually force airlines to pay the system owners for preferred display. Moreover, DOT itself found that "the systems currently still have market power over most airlines," but added that the "continuing changes in airline distribution, particularly the growing importance of the Internet for airlines, travel agents, and travelers, should continue to erode the systems' market power." In announcing the policy shift, the DOT stated:

The systems continue to have marketing relationships and other relationships with their former owner airlines... The lack of control by any U.S. airline will not eliminate the possibility that a system would agree with an airline to engage in conduct that would undermine the competitive position of the airline's rivals. Each system, after all, continues to have market power over most airlines, and each of the larger airlines dominates some local markets, primarily at its hubs. A system and such an airline might agree that the system would change its operations so as to benefit the airline while the airline would use its local dominance to strengthen the system's marketing efforts.

Furthermore, the DOT concluded that "systems are likely to bias displays in the absence of rules prohibiting such bias," but nevertheless decided to scrap the rule against display bias effective July 31. DOT reasoned that "on-going developments" in the market will reduce the systems' market power over airlines over time, and will enable travel agents and their customers to easily use alternative sources of information to an extent that it should deter the kind of display

bias that would significantly mislead travel agents and consumers.

Airlines Should Be Diligent to Protect Their Positioning in the Systems

If one airline agrees to a price premium to have its scheduled flights and fares featured more prominently in the system, the CRS will be tempted to take the money, especially where DOT will not step in. For this reason, carriers should be especially diligent in auditing how the systems are operating, and should keep in communication with their travel agency contacts, to ensure that passengers are not being directed to a competing carrier. Ultimately, if a carrier believes that it is being harmed by restrictive or discriminatory practices being undertaken by the CRS, it may need to resort to remedies under the antitrust laws of the United States (or other applicable jurisdiction), which are designed to protect competition from abuses of market power. In addition, the DOT has promised that the U.S. Department of Justice will take action against any agreements between a CRS and an airline that violate antitrust laws, and that DOT may exercise its statutory authority to take appropriate action if such contractual relationships appear to constitute unfair methods of competition.

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ANTITRUST DIVISION CRACKS DOWN ON CORRUPTION IN THE MOVING AND STORAGE AND PRINTING BUSINESSES

This past month, the Antitrust Division filed price-fixing and conspiracy charges against a moving and storage company, and a printing and graphics broker pleaded guilty to bid-rigging and

conspiracy. The Division continues to pursue white collar criminals across the spectrum of commerce.

U.S. Moving and Storage Company Charged With Price Fixing and Conspiracy to Defraud the United States

On February 18, the Division announced that the Pasha Group, headquartered in Corte Madera, California, was charged with conspiring to fix prices and to defraud the United States in connection with transportation of military and civilian household goods. In particular, the Pasha Group was charged with conspiring to increase the rates paid by the Department of Defense ("DOD") for the transportation of military and civilian household goods from Germany to the United States in 2002. The Division also filed superseding charges against Belgium-based Gosselin World Wide Moving N.V. for its role in the same conspiracy.

In recent years, the DOD has spent more than \$100 million annually to move the household goods of its military and civilian personnel from Germany to the United States. These charges resulted from an ongoing federal antitrust investigation of anticompetitive and fraudulent conduct in the industry that provides transportation to the DOD for the movement of military household goods. This continuing investigation is being conducted by the Division's National Criminal Enforcement Section with the assistance of the DOD Office of Inspector General Defense Criminal Investigative Service and the Army Criminal Investigation Division.

New York Printing Broker Pleads Guilty to Bid-Rigging and Conspiracy Charges

On February 27, 2004, James Bechand ("Bechand") of Lloyds Neck, New York, an

independent broker representing a printing company based in Ronkonkoma, New York, pleaded in U.S. District Court in Manhattan to one count of conspiracy to commit commercial bribery and mail fraud and one count of bid rigging in connection with a scheme to defraud Salomon Smith Barney, Inc. ("SSB").

According to the charges, between early 2000 and August 2001, Bechand paid more than \$35,000 in kickbacks to an unidentified SSB executive in exchange for a promise that his annual business with SSB would double from \$1 million to \$2 million. The kickbacks allegedly took the form of payments by Bechand on the SSB executive's credit card and home equity line of credit, and were used to pay off additional expenses incurred by the executive.

In addition, the charges state that on the SSB executive's instructions, Bechand submitted intentionally high "cover bids" for various SSB printing contracts, including one bid for a contract substantially in excess of \$1 million. The cover bids were allegedly designed to subvert SSB's competitive bidding requirement and to lead SSB to believe that it was receiving the best value for its money, when in fact it was not. As a result of the alleged corrupt relationship between Bechand and the SSB executive, SSB paid higher prices for printing than it would have if its executive had aggressively and honestly solicited competitive prices from other vendors.

The prosecution of Bechand is being conducted jointly by the Division's New York Field Office and the U.S. Attorney's Office for the Southern District of New York, with the assistance of the Federal Bureau of Investigation and the Internal Revenue Service Criminal Investigation.

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RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On February 27, Anthem and Wellpoint Health Networks announced that their Hart-Scott-Rodino waiting periods had expired. Anthem's acquisition of WellPoint will create the nation's largest managed care provider. The deal was investigated by the DOJ, however, the DOJ did not seek any divestitures or conditions and is allowing the deal to proceed without taking any action. The cash and stock deal was valued at \$14.3 billion when it was announced in October.
- On February 26, the DOJ filed a complaint in the U.S. District Court for the Northern District of California to block Oracle's hostile bid for PeopleSoft. The DOJ believes that the acquisition would eliminate competition between two of the three companies that develop and sell the high function integrated human resource management and financial management enterprise software applications for large clients. The DOJ alleges that the acquisition would likely result in higher prices, less innovation and fewer choices for large businesses, government agencies, and organizations that depend on enterprise applications software. Indeed, Assistant Attorney General R. Hewitt Pate, Chief of the Antitrust Division, stated in a DOJ press release that "this transaction is anticompetitive -- pure and simple. Under any traditional merger analysis, this deal substantially lessens competition in an important market." Seven state attorneys general from Hawaii, Maryland, Massachusetts, Minnesota, New York, North Dakota, and Texas joined the DOJ as plaintiffs in the case. The DOJ believes that SAP, Oracle and PeopleSoft are the only three viable suppliers of back office software applications for large organizations. Oracle is expected to argue that it competes with a broad cross section of global software vendors including Microsoft, a new entrant to the space.
- On February 5, Western Union Financial Services, Inc., a division of First Data Corp., confirmed that on February 4, it received a Civil Investigative Demand ("CID") from the DOJ. The CID, which is a request for information, was issued as part of a civil antitrust investigation regarding Western Union's contractual relationships with its money transfer agents. Western Union believes that its contractual practices reflect common industry norms.
- On February 2, the Bush Administration proposed modest increases for the FTC and DOJ antitrust enforcement agencies. The administration recommended a \$136,463,000 fiscal year 2005 budget for the DOJ's Antitrust Division, a 2.5 percent increase of \$3,330,000 over fiscal year 2004. The FTC's budget would rise \$4.4 million to \$66.6 million, a 7 percent increase. Thomas D. King, the Antitrust Division's executive officer, acknowledged a decrease in merger activity recently and indicated that the budget is sufficient to cover the Division's existing workload. As a result, the Division only sought cost of living increases to its fiscal year 2005 budget instead of any program increases.
- On January 28, the DOJ responded to a single comment received regarding the GE/Instrumentarium consent decree. According to the DOJ, Visiontec submitted a comment expressing a concern about Instrumentarium's adherence to a manufacturing agreement. The DOJ responded that the concerns raised in Visiontec's comment appear to relate to a possible contractual dispute between Visiontec and Spacelabs, a division of Instrumentarium,

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DOJ Antitrust Highlights (continued)

which is now GE. Given that Visiontec's concerns are not related to the sufficiency of the relief in the proposed Final Judgment and whether the proposed Final Judgment is in the public interest, the issues raised by Visiontec are not appropriate for action by the Antitrust Division. Thus, Visiontec's concerns do not provide any basis for establishing any conditions in connection with the divestitures required by the proposed Final Judgment nor do they warrant any other action by the United States.

- Reportedly, the Antitrust Division served subpoenas to 30 Filipino telecommunications executives in connection with an antitrust investigation over a dispute between telecommunications providers in both the Philippines and the United States. FBI agents served 30 Filipino telecom executives while they were attending a conference in Hawaii. The executives were summoned to testify before the Honolulu grand jury. The probe stems from accusations by U.S. phone companies that their Philippine counterparts illegally raised termination rates last year.

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FTC ANTITRUST HIGHLIGHTS

- On February 24, Chief Administrative Law Judge Stephen J. McGuire released the public version of his initial decision in *Rambus Inc.*, Dkt. No. 9302. The initial decision and order dismissing the complaint was announced on February 17. The complaint, issued by the Commission on June 19, 2002, charged Rambus with violating federal antitrust laws by deliberately engaging in a pattern of anticompetitive acts and practices that seemed to deceive an industry-wide standard setting organization, resulting in adverse effects on competition and consumers. Staff has filed a Notice of Appeal of the ALJ's decision. For additional information on this matter, see March 2004 issue of the *Sheppard Mullin Antitrust Review* at page 5.
- On February 19, the FTC announced a settlement with *RHI AG*, Dkt. No. C-4005, to resolve charges that RHI violated provisions of an FTC order issued in 2001. Under the terms of the settlement, RHI has agreed to pay a civil penalty of at least \$650,000 for the violations and to conduct asbestos remediation at the diverted plant, substantially beyond the remediation required in the original order. The FTC's order was issued pursuant to a 1999 consent agreement with RHI that followed the FTC's investigation of RHI's acquisition of Global Industrial Technologies, Inc., and resolved concerns that the acquisition would decrease competition in the North American markets for refractory bricks used to line steel-making equipment. The order, as drafted in 1999, required RHI to divest to Resco Products, Inc. ("Resco") two refractories plants and other assets in Canada and the United States in a manner set out in contracts between Resco and NARCO, an RHI subsidiary. However, before the order became final, the FTC determined in 2000 that NARCO had failed to divest all of the requisite assets to Resco. NARCO thereupon entered into a settlement agreement with Resco that addressed the FTC's concerns and was incorporated into the FTC's final order, which was issued in March 2001. As part of that settlement agreement, NARCO paid \$5 million to Resco.

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FTC Antitrust Highlights *(continued)*

The FTC investigated further RHI's compliance with the settlement agreement that was made part of the 2001 order. As detailed in a complaint that will be filed in federal district court in connection with the current settlement, NARCO failed to perform fully its obligations under the settlement agreement, and NARCO was late making payments to Resco under the settlement agreement. The complaint also charged that NARCO manufactured refractory bricks in violation of a patent license that was part of the order, and in violation of specific order language. In addition, the complaint alleged that NARCO breached its order obligation to pay the FTC's trustee fees on time. Finally, although the order prohibited any modification of the earlier settlement agreement with Resco without FTC approval, the complaint asserts that NARCO modified that agreement without that approval.

- On February 17-19, the Commission and the Antitrust Division of the Department of Justice conducted a three day workshop on merger enforcement. Topics included the following:
 - Hypothetical Monopolist Test
 - Concentration and Market Shares
 - Monopsony
 - Non-Price Competition/Innovation
 - Unilateral Effects
 - Coordinated Effects
 - Uncommitted Entry
 - Efficiencies/Dynamic Analysis/Integrated Analysis
 - Economists' and Lawyers' Roundtable

This workshop took place shortly after the FTC released, on February 2, a staff analysis of horizontal merger investigations for fiscal years 1996 to 2003. The merger data released contains tabulated market shares and concentration levels associated with the FTC's investigations in more than 780 markets over the last eight years. The data tabulations use the two market share concentration statistics described in the agency's Horizontal Guidelines -- the post-merger Herfindahl-Hirschman Index ("HHI") and the change in HHI -- and reflect 151 horizontal merger investigations in total.

For a subset of the investigations -- those with three or fewer markets -- the FTC staff also retrieved information on whether or not "hot documents" or "strong customer complaints" were identified during the investigation. The FTC staff has tabulated the Commission's enforcement decisions based on the presence or absence of these variables. These results are presented in tabular format. In addition, the data discuss the number of "significant competitors" with regard to decisions to seek relief in horizontal merger investigations, defining the term relative to the competitive effects theory that was the most plausible basis for the specific investigation. Data on "significant competitors" is presented for 573 relevant markets.

- On February 11, the FTC announced it closed its antitrust investigation into Caremark RX, Inc.'s proposed acquisition of Advance PCS. The transaction involves two significant providers of prescription benefit management ("PBM") services in the United States. PBM's administer prescription benefits for most U.S. consumers under

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FTC Antitrust Highlights (continued)

contracts with health plans or directly with employers. As part of the FTC's effort to provide its reasoning in its decision-making processes and to provide guidance about the application of the antitrust laws to mergers in this market, the Commission issued a 3-page statement outlining its reasons for closing the investigation. The Commission's statement analyzed the competitive effects of the Caremark/Advance PCS acquisition both from the buyers' perspective as well as from the sellers' perspective. Full service PBMs sell their services to small and large employers and full service health plans. In addition, PBMs purchase distribution services from retail pharmacy chains and community pharmacists throughout the United States and negotiate dispensing fees with these retailers. The Commission concluded that both small and large employers and health plans are not likely to encounter anticompetitive effects from the acquisition in light of the competition that exists from dozens of small, regionally-oriented PBMs, as well as the remaining independent, full-service PBMs with national scope.

Similarly, the Commission concluded that the proposed acquisition would not confer monopsony power on PBMs when they negotiate dispensing fees with retail pharmacists. The Commission stated that market concentration on the buyer side does not result in monopsony power. Shifting purchases to a lower-cost, more efficient source is not an exercise of monopsony power but an example of a pro-competitive effect when it allows the buyer to reduce its costs and decrease prices to consumers. In addition, the FTC found that characteristics of the PBM market make monopsony unlikely given that contracts between PBMs and retailers are individually negotiated at varying price levels. The Commission statement is available at <http://www.ftc.gov/opa/2004/01/caremarkadvance.htm>.

- On February 10, the FTC issued an administrative antitrust complaint against a corporation -- which owns a system of hospitals in Cook and Lake counties, Illinois -- that acquired a nearby hospital and shortly thereafter imposed allegedly anticompetitive price increases. According to the FTC, Evanston Northwestern Healthcare Corporation's ("ENH") acquisition of Highland Park Hospital resulted in significantly higher prices charged to health insurers and, therefore, in higher costs to purchasers of insurance and consumers of hospital services. The FTC's complaint asserts that the merger violated the Clayton Act, based on an analysis conducted under the Horizontal Merger Guidelines and on the actual competitive effects, in the form of higher prices actually charged by ENH after the merger. The FTC seeks a remedy to restore competition to the benefit of consumers seeking competitively-priced health care. The complaint also asserts that a physician group affiliated with the merged hospitals engaged in price fixing in violation of the FTC Act. The Commission vote to authorize staff to file the administrative complaint was 4-1, with Commissioner Pamela Jones Harbour dissenting. On February 11, Chief Administrative Law Judge Stephen J. McGuire was designated the Administrative Law Judge for the matter. For additional information on this matter, see March 2004 issue of the *Sheppard Mullin Antitrust Review* at page 7.
- On February 9, San Francisco-based Brown & Toland Medical Group, which was sued by the FTC for allegedly fixing the prices and terms under which its doctors would contract with payors to provide services for preferred provider organization ("PPO") enrollees, agreed to settle charges that its business practices violated federal antitrust laws. The terms of the proposed consent agreement with California Pacific Medical Group, Inc., doing business as Brown & Toland Medical Group, prohibits the organization from negotiating with payors on behalf of physicians, refusing to deal with payors, and setting terms for physicians to deal with payors -- unless the

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FTC Antitrust Highlights *(continued)*

physicians are clinically or financially integrated. The settlement also provides for the termination of contracts that were allegedly obtained illegally. Brown & Toland's network of physicians that contract with health maintenance organizations ("HMOs") is financially integrated and was not targeted by the FTC's litigation. Brown & Toland is a for-profit, multi-specialty independent physicians' association ("IPA") with more than 1,500 members. Historically, it has provided physician services to HMO members under capitated agreements with health plans, under which the plans pay a set rate each month per enrollee for certain services provided by the group's doctors. In 2001, with a subset of its physician members, Brown & Toland formed a PPO network and began negotiating fee-for-service reimbursement rates on behalf of its PPO network members. The proposed consent agreement, which the Commission voted 5-0 to accept, bars Brown & Toland from (1) negotiating with any payor on behalf of any physician; (2) dealing or refusing to deal with any payor based on price or other terms; and (3) jointly determining price or other terms upon which any physician deals with payors. Brown & Toland may engage in this conduct if such conduct is reasonably necessary to the formation of a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement", as defined by the order. The consent agreement also orders Brown & Toland to notify the FTC at least 60 days before entering into any arrangement with physicians or contacting any payor, except for those arrangements under which Brown & Toland will be paid a capitated amount, and contains standard recordkeeping provisions to assist the FTC in monitoring the respondent's compliance.

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FTC CONSUMER PROTECTION HIGHLIGHTS

- On February 23, 2004, the FTC issued a Request for Information ("RFI") that seeks certain technical information intended to assist with the creation of a national "Do Not E-mail" registry. The registry is mandated by the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or the "CAN-SPAM Act". The RFI describes technical requirements for certain necessary elements of any registry model to be used or implemented. Responses to the RFI must be received by March 10. Five copies of each response must be hand delivered or sent via an overnight courier service to Daniel Salsburg, Federal Trade Commission, Division of Marketing Practices, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580.
- Based on a February 18 press release, UMG Recordings ("UMG") and Bonzi Software, Inc. separately agreed to settle FTC charges that the companies violated Children's Online Privacy and Protection Act (or "COPPA") requirements by knowingly collecting information about children under the age of 13 without obtaining verifiable parental consent. UMG settled the charges as they relate to the operation of websites prompting the recording artist Lil' Romeo. Bonzi Software settled the charges as they relate to websites operated by the company that have available for free download software that displays the BonziBUDDY, an animated purple gorilla, on the PC display.

RECENT ACTIVITIES**FTC Consumer Protection Highlights (continued)**

The consent decrees in each case both require civil penalty payments and prevent the companies from violating COPPA, among other things.

- On February 18, the Bureau of Consumer Protection announced a workshop to be held on April 18, named "Monitoring Software on Your PC: Spyware, Adware, and Other Software." The workshop is intended to assist consumers with issues such as understanding the basic distinctions between spyware and adware, discussing the role that peer-to-peer network file-sharing may play, learning the effects of spyware and whether spyware raises privacy concerns, and possible consumer, regulatory and industry responses to spyware. A Federal Register notice detailing the workshop will be issued shortly.
- According to a February 17 press release, the Tenth Circuit upheld the constitutionality of the "Do Not Call" Registry. The appellate court's decision was in response to two district court opinions and two separate petitions to review an FCC order relating to the decision. The Tenth Circuit stated that the Registry was a valid commercial speech regulation because it directly advances the government's interest in preventing telemarketing abuse and safeguarding consumer privacy. Moreover, according to the Tenth Circuit, the regulations implementing the registry were reasonable in light of these government interests. The opinion is available from the website at <http://www.ftc.gov/os/2004/02/040217dncappealopinion.pdf>.
- According to a February 13 press release, telemarketer and seller compliance with the "Do Not Call" registry since its inception has been "exceptional". While 55 million telephone numbers were registered, only 150,000 possible violations occurred. Moreover, less than 45 companies were reported as having received over 100 consumer complaints. The effectiveness of the registry was reinforced by a Harris Interactive Survey, which indicated that over 57 percent of U.S. adults had registered, and 92 percent of those who signed up reported receiving fewer telemarketing calls. Twenty-five percent (25%) of those registered respondents stated that they had received no telemarketing calls whatsoever since signing up.
- The FTC cautioned by way of a February 12 notice that the "unsub.us:" website, which purports to be a registration website for the "Do Not Email" Registry, is a sham. Although the site appears like to be the "Do Not Call" registry website, it is not run by the FTC. The agency is concerned that the site is part of an unlawful effort to collect e-mail addresses or other confidential or sensitive consumer information, and urges consumers to keep all e-mail addresses and other information as safe as possible.

For more information on any of these activities, please contact June Casalmir at (202) 218-0027 or

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INTERNATIONAL ANTITRUST HIGHLIGHTS

- On February 25, European Commission ("EC") officials announced they were deciding whether to offer Microsoft Corp. the option of producing two versions of its Windows operating system, and contemplating what intellectual property rights Microsoft would have to reveal in order to allow increased competition in the server market. Apparently, currently negotiations with Microsoft are in an intensive stage, but are reportedly upbeat and amiable. The five-year-old investigation of Microsoft, which the EC said would be concluded by the end of March, centers around the company's bundling of its audio-visual software in its operating system, as well as restrictions that allegedly inhibit competitors in the low-end server market. In recent months, Microsoft proposed that competing audio-visual software, such as that marketed by Real Networks, be offered in a separate CD-ROM accompanying the sale of a new computer that contains a Windows XP operating system. However, the Commission rejected that offer in February. The latest approach would involve Microsoft marketing two different versions of its software -- one with the Windows Media player and one without. Competitors such as Sun Microsystems also complained that Microsoft restricts programming coding in the Windows operating system, allowing it to cut out competition in the low level network server market. The EC is considering an option that would allow the company to choose to reveal only portions of its code.
- The proposed acquisition of Cashcard Australia Limited by First Data Resources Asia Pacific Limited cleared Australian Competition and Consumer Commission ("ACCC") scrutiny on February 13. In its review, the ACCC examined the competitive impact of the proposed acquisition in various markets, including the switching services markets and device driving and deployment services markets. It also consulted with a range of interested parties and noted some concern regarding the proposed acquisition, but ultimately concluded that the proposed acquisition would likely intensify competition in the market and would not result in a substantial lessening of competition. First Data was formed as Austnet in the early 1980s and was acquired by Colorado-based First Data Corp. in 1992. Cashcard is a privately-owned unlisted company that provides high volume payment services across the consumer electronic payments spectrum, including ATM and EFTPOS, Direct Entry and BPAY, telephone and Internet payments.
- In early February, it was announced that, for the first time, French competition authorities referred to the concept of "yardstick competition" in a decision concerning the acquisition of a privately-owned hospital (decision Capiro Santé/Clinique des cèdres, December 4, 2003). This concept, which is used notably in Europe and under competition law in the United Kingdom within the framework of the regulation of natural monopolies, evaluates the performance of a firm by comparing it to other similar firms. The main idea is to perform a competitive calibration with regard to a "virtual" competition between firms that cannot directly compete in the relevant market, provided that (i) the players whose results are to be compared are sufficiently close or correlated, (ii) an important number of companies can be compared, and (iii) there is no collusion between compared entities. In the Capiro Santé case, the minister of the economy dismissed the application of such an analysis in view of the "infinitesimal" effect of the transaction over comparison possibilities, but took the opportunity to define the conditions of a possible application of such theory to future notifications.

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International Antitrust Highlights *(continued)*

- The Japan Fair Trade Commission ("JFTC") announced January 30 that it will make a sweeping revision of its fair trade guideline on the cross-entry of banks, insurance providers and securities companies, for the first time in 10 years. Japan's Financial Services Agency ("FSA") is putting the finishing touches on the amendment of its Securities and Exchange Law, its Banking Law, and other related statutes, in order to enable banks to start offering retail brokerage and insurance sales services later this year. The present JFTC guideline on the financial industries' cross-entry was instituted in 1993, parallel with the deregulation of banks, trust banks and securities companies for cross-entry into each other through subsidiaries. As the Ministry of Finance and FSA subsequently implemented additional deregulation measures on cross-entry, the JFTC guideline became obsolete. The new guideline would emphasize that banks do not abuse their position as lenders in marketing stocks, bonds, insurance, and other products to borrowers. The FSA plans to implement the amendment of the Securities and Exchange Law and other laws by the end of the year.

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FCC ANTITRUST HIGHLIGHTS

- On March 2, the U.S. Court of Appeals for the District of Columbia overturned key elements of the FCC's new rule governing local telephone competition, the so-called "triennial review" order. Should the decision survive further legal challenges, the government-mandated rates at which competitors lease phone networks owned by large local carriers would be jeopardized. According to the 3-0 ruling, scheduled to take place in 60 days, the FCC lacks the authority to delegate responsibility for setting those rates to individual states and territories. While proponents of regional phone giants, including the United States Telecom Association, view the decision as a restoration of "real competition" over "government-managed competition", some FCC commissioners, among others, defended the rule. In a joint statement, Commissioners Michael Copps, Kevin Martin and Jonathan Adelstein expressed their disappointment in the ruling and argued that "[w]e believe that the rules preserve competition in a manner that is lawful, and recognize the important role that states have historically played." FCC Chairman Michael Powell, though, indicated a desire to rewrite the rules in such a way that satisfies the court's criticisms, rather than appeal the decision, a process that would certainly be both lengthy and costly.
- On February 12, the FCC ruled that pulver.com's ("pulver") Free World Dialup ("FWD") offering will remain a minimally regulated competitive option for consumers. The Declaratory Ruling emphasizes the FCC's long-standing policy of keeping these consumer Internet services free from burdensome economic regulation at both the federal and state levels. Pulver's FWD allows users of broadband Internet access services to make voice over Internet Protocol or other types of peer-to-peer communications directly to other FWD members, without charge. In 2003, pulver filed a petition for declaratory ruling requesting that the FCC rule FWD to be neither a

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FCC Antitrust Highlights *(continued)*

"telecommunications service" nor "telecommunications", and therefore not subject to traditional telephone regulation. The FCC ruling grants pulver's petition and also declares FWD to be an unregulated information service that is subject to federal jurisdiction. Separately, the FCC also initiated a major proceeding to provide a measure of regulatory stability and to further promote the development of Internet Protocol ("IP") services. That proceeding, referred to as a Notice of Proposed Rulemaking, will seek public comment on a variety of issues based on the premise that Internet services should remain largely free of regulatory burdens and would apply, only where needed, discrete regulatory requirements. IP-enabled services, such as pulver's FWD and other Internet applications like it, promise significant benefits in the form of lower prices and enhanced functionality for American consumers. Additionally, these IP-enabled services will encourage more consumers to demand broadband service.

- Comcast Corp. ("Comcast") launched an unsolicited bid for media giant The Walt Disney Co. ("Disney") on February 11 in a stock swap that values the entertainment icon at \$66 billion, which includes assumption of \$11.9 billion of Disney's net debt. Comcast proposed issuing 0.78 shares of its class-A voting common stock for each Disney share. Disney shareholders would receive a premium of more than \$5 billion, based on February 10 closing prices, plus full participation in the combination benefits. Moreover, they would own 42% of the combined company. Comcast President and CEO Brian L. Roberts proposed a friendly deal earlier in the week but was rebuffed by Disney chairman Michael Eisner. As a result, in a consequent letter to Eisner, Roberts wrote, "[g]iven this, the only way for us to proceed is to make a public proposal directly to you and your board." Days later, Disney's board of directors rejected Comcast's unsolicited bid for the company as too low, issuing a vote of confidence to their beleaguered chairman Eisner but also opening the door for larger offers. Should the deal materialize, FCC chairman Michael Powell promised to "give it a ruthless and rigorous scrutiny".
- On February 9, just two days before a Senate hearing on cable rates, two consumer groups assailed the industry by alleging that market-power abuses brought on by premature deregulation generate between \$4.5 billion to \$6 billion annually in excess revenue. According to a 33-page report by the Consumers Union and the Consumer Federation of America, "[c]able's market power stems from a lack of effective competition." A National Cable & Telecommunications Association spokesman said the report ignored robust competition from EchoStar Communications Corp.'s Dish Network and DirecTV Inc. that has been recognized as a competitive check on cable by the FCC and the U.S. General Accounting Office. "By ignoring the many consumer benefits of cable's \$85 billion investment in digital-broadband technology and the unprecedented choices that consumers have in today's video marketplace, the Consumer Federation once again demonstrates that it is not a credible voice on these issues." The February 11 hearing before the Senate Subcommittee on Antitrust, Competition and Business and Consumer Rights included testimony from Insight Communications Co. Inc. vice chairman and CEO Michael Willner, NCTA president Robert Sachs, CFA research director Mark Cooper, The Precursor Group CEO Scott Cleland and Knology Inc. CEO Rodger Johnson.

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