UNITED STATES FEDERAL TRADE COMMISSION

and

UNITED STATES DEPARTMENT OF JUSTICE

SHERMAN ACT SECTION 2 JOINT HEARING

UNDERSTANDING SINGLE-FIRM BEHAVIOR: MISLEADING AND DECEPTIVE CONDUCT SESSION

WEDNESDAY, DECEMBER 6, 2006

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C O N T E N T S

P R O C E E D I N G S

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MR. DAGEN: Okay, good morning, everybody. I am Richard Dagen, Special Counsel to the Director of the Bureau of Competition and one of the moderators for this session. My co-moderator is Hill Wellford, Counsel to the Assistant Attorney General for Antitrust at the Department of Justice. Before we start, I need to cover a few housekeeping matters.

First, please turn off your cell phones, BlackBerries and any other devices. Second, the restrooms are outside the double doors and across the lobby. There are signs to guide you. Third, one safety tip, particularly for visitors, in the unlikely event the building alarms go off, please proceed calmly and quickly as instructed. If we must leave the building, exit the New Jersey Avenue exit by the guard's desk, and please follow the stream of FTC people to a gathering point and await further instruction. Finally, we request that you not make comments or ask questions during the session. Thank you.

Now, today we are honored to have assembled a distinguished panel of practitioners, consultants and professors who are well versed in the issues we will tackle today involving misleading and deceptive conduct.

The hearing will be organized as follows: First, we will hear an approximately 15-minute presentation from each panelist. We will likely break after the fourth panelist speaks, and after the break, hear from our final two speakers. After the presentations, we will have a round table discussion moderated by Hill Wellford and me.

Our panelists today are Susan Creighton, who is a partner at Wilson Sonsini Goodrich & Rosati and a former director of the FTC's Bureau of Competition; Preston McAfee, who is the J. Stanley Johnson Professor of Business Economics and Management at the California Institute of Technology; Gil Ohana, who is the Director, Antitrust and Competition, Cisco Systems; Richard Rozek, who is a senior vice president, NERA Economic Consulting; Michael Brockmeyer, who is a partner at Frommer Lawrence & Haug and an Adjunct Professor of Law at the University of Maryland School of Law; and George Cary, who is a partner at Cleary Gottlieb Steen & Hamilton and a former Deputy Bureau Director of the FTC's Bureau of Competition.

I want to thank the FTC and DOJ Section 2 staff for organizing this session. This is the last Section 2 hearing for 2006, but the hearings will continue during the first few months of 2007, so be sure to check the

agencies' web sites for updates.

Second, I want to explain why a session entitled Misleading and Deceptive Conduct is, in fact, a session about Section 2 of the Sherman Act and not a hearing being held by the FTC's Bureau of Consumer Protection. Deceptive conduct is a type of exclusionary conduct that has been the basis for antitrust liability under Section 2. The Federal Trade Commission defined deception in 1983, noting that the FTC "will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances to the consumer's detriment."

In In re Rambus, a matter involving conduct before a standard-setting organization, the Commission explained that the policy statement could be applied to a Section 2 analysis, although it did not directly equate the policy statement's definition of deception with exclusionary conduct under Section 2. Consistent with our general policy to avoid discussing cases during the hearings that are currently in litigation, and because the Rambus matter is still in administrative litigation and there has not been a final appealable judgment, we will not be discussing this case today.

There are a variety of scenarios under which deceptive and misleading conduct may form the basis of a

Section 2 antitrust violation, and this hearing is designed to address many of them. Deception also may encompass fraud, bad faith, falsehoods, misrepresentations and misleading conduct. These terms are related and sometimes used interchangeably. Such conduct can occur in both the private and public sector. Certain business torts and standard-setting activity may provide the basis of Section 2 liability.

In one recent case, Conwood versus United States Tobacco, the Sixth Circuit upheld a $1 billion treble damages award. The allegations of exclusionary conduct in Conwood included misrepresentations of sales data to retailers as well as the destruction of competitors' products and displays.

In United States versus Microsoft, the D.C. Court of Appeals found that Microsoft engaged in exclusionary conduct in violation of Section 2 when it deceived Sun Microsystems and independent software developers by offering them a set of Java implementation tools that ostensibly would enable them to develop cross-platform applications but could be executed only by Microsoft's version of the Java runtime environment for Windows.

Misleading and deceptive conduct in the context of abuse of governmental processes can also be the basis

for Section 2 liability. Such cases have included FDA Orange Book listings and fraud on the Patent Office.

Now I would like to turn it over to Hill for a few remarks.

MR. WELLFORD: Good morning. My name is Hill Wellford. I am counsel to AAG Tom Barnett. The FTC and DOJ are jointly sponsoring these hearings today to help advance development of the law concerning the treatment of unilateral conduct under the antitrust laws. This is one of the most controversial areas even within Section 2, which is controversial enough on its own, and I think we should have a very good panel today. I have seen some of these presentations that have come in, and I am very much looking forward to the remarks that will be presented by the panel. Thanks to my colleagues at the FTC and the Division for organizing this. I will hand it back over to Rich.

MR. DAGEN: So, I would like to introduce your first speaker. Susan Creighton, as I mentioned before, is a partner at Wilson Sonsini. Between 2001 and 2006, she served at the Federal Trade Commission first as Deputy Director and then as Director of the Bureau of Competition. While at the FTC, she played a key role in developing antitrust policy and made important contributions about, among other things, the

intersection of antitrust and intellectual property.

She is a frequent author of antitrust articles, including a 2005 Antitrust Law Journal article entitled "Cheap Exclusion" dealing with many of the issues we will be discussing today.

Susan?

MS. CREIGHTON: Good morning. Let's see if I can figure out how to make this thing move. That worked, okay.

So, courts and enforcers long have recognized that deception can constitute unlawful exclusionary conduct under Section 2 of the Sherman Act. With respect to deception in the context of private business arrangements, probably the two most recent prominent decisions are the D.C. Circuit decision in Microsoft and the FTC's decision in Rambus. The potential for deception in government proceedings to serve as the basis for Section 2 liability is reflected in cases stretching as far back as the Supreme Court's decision in Walker Process and more recently has been a major part of the FTC's enforcement agenda, as Rick mentioned, in cases such as UNOCAL and the Orange Book listing cases.

In my view, these cases are correct in holding that deception can constitute a basis for finding

exclusionary conduct under Section 2. Indeed, as my co-authors and I argued in the article that Rick referred to in the Antitrust Law Journal entitled "Cheap Exclusion," deception and other forms of cheap exclusion are potentially a very effective form of anticompetitive conduct and properly should be a core focus of enforcement efforts by the FTC, the Antitrust Division and the state enforcement agencies.

In particular, in our article, we highlighted three characteristics of such cheap exclusion, including deception. First, it is cheap in the sense that it costs little to the firm engaging in it. False statements made during a governmental standard-setting proceeding may be virtually costless, for example, particularly for a firm that would have participated in the regulatory proceeding in any event. These de minimus costs compare favorably to the high costs that a firm might incur, for example, through the low-cost pricing or potentially strategies such as exclusive dealing.

Second, the conduct also is cheap in the sense of lacking any redeeming virtue. Deceptive conduct unambiguously fails to enhance any party's efficiency, provides no benefits short or long term to consumers, and its economic effect produces only costs for the

victims and wealth transfers to the firms engaging in the conduct fully apart from its potential contribution to market power.

Finally, it is also cheap in the relative sense that it is a strategy where the costs are often likely to be far outstripped by the anticompetitive benefits. As the Antitrust Division explained in its business review letter, for example, "Early in the standard-setting process, standard-setting members often can choose among multiple substitute technological solutions, some of which may be patented. Once a particular technology is chosen and the standard is developed, however, it can be extremely expensive or even impossible to substitute one technology for another." Misrepresentations that enable a firm to charge higher discriminatory royalty rates after lock-in therefore may enable the firm to enjoy substantial and durable market power.

Because deceptive conduct ordinarily has no efficiency or other procompetitive benefits, other forms of cheap exclusion do not provide the same type of trade-off that we see with respect to most other forms of exclusionary conduct that have been the subject of the previous hearings, predatory pricing, bundling, exclusive dealing and the like. With respect to these

forms of conduct, it is generally recognized that they will often, maybe even overwhelmingly often, be procompetitive rather than anticompetitive. The challenge, therefore, is to distinguish the times when the conduct might be anticompetitive without unduly chilling the procompetitive conduct.

With respect to deceptive or other opportunistic conduct, however, there is no similar concern that we will be unduly chilling deception or opportunism. In fact, sort of phrased that way, I do not think we generally sort of think of being concerned about chilling deception. In this context, cheap exclusion may be viewed as something like the Section 2 analog to Section 1 price fixing; that is, we are not unduly concerned with overdeterrence of this behavior, and it is at the same time at the far end of the spectrum for Section 2 purposes from predatory pricing.

If there is a category of conduct that we are particularly concerned not to chill under Section 2, it is price cutting. With respect to misrepresentations and deception, by contrast, we have and should have no such scruples.

Screening tests designed to find the single exclusionary goat in the vast herd of procompetitive sheep, therefore, are not well suited and should not be

applied to exclusionary fraud or deception. The profit sacrifice test, for example, originally conceived as a means to screen out legitimate pricing behavior, does not work well when applied to conduct that is not legitimate, whether or not it is exclusionary.

For example, fraudulent regulatory filings that can be made at de minimus costs may have powerful exclusionary effects due to the operation of extrinsic legal schemes. At the same time, such conduct also may be profitable even if it does not result in the creation of durable market power by harming competitors and generating profits for the filing firms, yet the mere fact of the profitability of this illegitimate behavior tells us nothing about whether the behavior or the fraudulent filing is legitimate efficiency-enhancing behavior.

Now, if the balancing question typically raised regarding Section 2 conduct is not present here, what other concerns are raised regarding exclusionary fraud or deception? It seems to me that there are three concerns that are raised most frequently. The first is causation. This issue underlies a considerable portion of the Commission's legal analysis in Rambus, for example, and I'll return to that. The second is that antitrust should not be used as a kind of ex post

gap-filler for poorly written standard-setting rules or legal regulations. And the third is that we should not use antitrust where other laws, such as business torts and contract law, already can be used to reach and prohibit the conduct.

Let me address each of these three objections briefly in turn. First, with respect to causation, it seems to me that contrary to the concern about causation often expressed in this area, exclusionary deception, in fact, often occurs in circumstances where the environment is, in fact, conducive to the acquisition or maintenance of durable market power. Indeed, for deceptive conduct in the government context, it seems to me that this is often likely to be the rule rather than the exception.

The reason is simple. If the exclusion operates by force of law, the exercise of market power will not induce new entry, and the entry barriers created by the need to change laws or regulations may be formidable indeed. The UNOCAL case, for example, highlights these effects. Now, that's in the government context.

In the private context, as the Commission discussed in Rambus, profitable private ventures may also often be conducive to the use of deception to acquire or maintain durable market power. In instances

where business relations are characterized by cooperation rather than competition, for instance, the Java development program in Microsoft or in instances of private standard-setting activity, deception may be difficult to deter or counter, and the resulting lock-in, especially in network industries, may be difficult or impossible to overcome once the deception has been detected.

Now, in this regard, deceptive advertising, where the statements are both ascertainable and falsifiable, may actually be the exception rather than the rule. In Caribbean Broadcasting, for example, the alleged deceptive statement was one that was made publicly, and it would appear to be one that would be readily falsifiable. Did the company's broadcast, in fact, reach the entire Caribbean region or not? That seemed to be an answer that you probably could pretty much figure out with a couple of guys and radios.

Now, by comparison, in Conwood, if I understand the allegations correctly, the alleged deceptive statements were made in private communications to retailers. It is unclear how or when the plaintiff would have been able to learn of them, and hence, to counteract them.

One might also consider a statement that is less

readily falsifiable. For example, statements claiming patent infringement by a competitor's product without any identification of the particular patents in issue or anything sort of as formal as some kind of warning letter that would make it possible to respond to the allegation might be the kind of tipping event you could expect potentially to have a forceful impact in network industries.

Now, the second concern raised regarding exclusionary deception is what I have called the gap-filling problem. The concern here, as I understand it, is that antitrust is effectively being used in these circumstances to take care of problems that could have been solved ex ante through more careful drafting, either the Orange Book regulations or the standard-setting rules.

Now, here I raise with some trepidation as a lawyer on a panel with economists who may, in fact, provide a more subtle understanding of this point, it seems to me that the insight of transaction cost economics is applicable here, and I have up here a quote from Oliver Williamson. "The general rubric out of which transaction cost economics works is that of hazard mitigation through ex post governance. It being the case that all complex contracts are unavoidably

incomplete, the fiction of comprehensive contracting, which concentrates all of the contracting action on ex ante incentive alignment, is untenable."

Now, I have also referred in my slides here and also in the "Cheap Exclusion" article by analogy to an article written some time ago by former FTC chairman Tim Muris regarding the judicial doctrine of the duty of good faith and fair dealing. His point, as I understand it, in the article was that parties to a contract cannot adequately defend themselves ex ante against opportunistic conduct that undermines the parties' legitimate expectations, perhaps even the purpose of the contract, at least not without incurring wasteful and inefficient transaction costs of the type that Williamson was describing.

So, the judicial imposition of good faith and fair dealing is an efficient means of protecting parties against conduct that is contrary to their legitimate expectations but not necessarily contrary to the precise language of the contract.

By analogy, the antitrust laws can and should serve to protect against deceptive or opportunistic misuse, for example, of collaborative ventures such as standard-setting organizations where such conduct defeats the very purpose of such arrangements and that

which makes them acceptable under the antitrust laws. That intuition, I think, for example, is what the Supreme Court was driving at when it said in Allied Tube that, "Private standard-setting by associations is permitted under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits."

Now, although standard-setting organizations can and should exercise self-help to the extent possible, the insight of transaction cost economics is that no amount of ex ante bargaining can ever perfectly secure collaborative ventures or other government regulations, such as the Orange Book, against opportunism in circumstances where it turns the purpose of the collaboration or the regulation on its head and in a way that it threatens the creation of durable market power.

Moreover, in other contexts, such as the Java development in Microsoft, the collaboration will not even be pursuant to elaborate written contracts. In such circumstances, antitrust law in my view properly provides part of the ex post governance structure that helps ensure ex ante that such collaborations and regulations achieve their intended procompetitive purposes.

Now, finally, sometimes the question whether

deceptive exclusion should be subject to Section 2 gets posed wrongly in my view as whether the conduct at issue is a business tort, and if it is, why then do we need to subject it to the antitrust laws? I think that this asks the question through the wrong end of the telescope. The right question to ask is, is an inefficient exclusionary act that is likely to have caused market power nonetheless excused under Section 2 because it also violates another law or statute?

Now, the reason it is important to ask the right question is the old true saying, the wrong answer is what the wrong question begets. Here, asking first whether the conduct is tortious and then why do we need antitrust is likely to be misleading in at least three ways.

First, these business torts and contract rights vindicate the rights of the wrong people. In a standard-setting organization, for example, we are not concerned ultimately with the rights of the standard-setting organization or its participants, but consumers. As Ted Gephart has written about, standard-setting organizations and their participants may or may not have interests that coincide with those of consumers, but simply because they might be indifferent to the anticompetitive consequences of the

deceptive conduct, for example, because they will be able to pass through price rises to consumers, does not address what antitrust is concerned with, namely, whether the conduct harms consumers.

Now, similarly, business torts and contract law provide the wrong measures of causation and harm. A standard-setting participant who is able to pass along price increases may not have been harmed and should not be able to recover for the nonetheless real harm that consumers will have suffered.

Finally, business torts may have elements that do not fit well with the proper issue from an antitrust perspective, or conversely, may be missing elements necessary to answer the antitrust claim. The intent element in fraud, for example, may or may not be apt to the proper antitrust question in a particular factual setting.

Now, underlying this question, I think, ultimately really is a different issue, which is the hostility to private rights of action under Section 2, particularly their treble damage provisions, and a concern regarding unjustified suits. That issue, however, in my view properly should be dealt with directly and not by wrongly manipulating substantive standards under Section 2.

For the reasons that I have explained, I think that, in fact, this is an area that should be a priority, not a backwater for federal and state antitrust agencies. The importance of the substantive area should not be obscured or the barriers to effective enforcement heightened by an effort to cut off private litigation whose flaws lie elsewhere, not in their substantive antitrust claims, but rather, in procedural rules that govern private Section 2 actions.

Thank you very much.

(Applause.)

MR. DAGEN: Thank you, Susan.

Our next speaker is Preston McAfee. He's the J. Stanley Johnson Professor of Business Economics and Management at the California Institute of Technology where he teaches business strategy, managerial economics, and principles of economics. Preston is the author of over 70 articles published in scholarly economics journals and co-author of the book Incentives in Government Procurement. He served as one of four economists who edit the American Economic Review for over nine years.

Preston?

DR. McAFEE: Thank you. Thank you, Susan, for actually providing the lead-in for what I would like to

talk about today, and let me also apologize for being still on California time and so only about 60 percent awake.

So, I would like to talk about the right of private action under the antitrust laws and connect that to deception and fraud as follows. Whatever is decided about deceptive practices and the right to sue under the antitrust laws will be abused in private suits if those are permitted, and let me warm up with VeriSign. So, VeriSign is the registrar of .com and .net, and in 2003, they began redirecting mistyped addresses to their own advertising site. The ISPs objected and asked the ruler of the internet to stop the practice, and VeriSign contended that that was an illegal conspiracy. The judge threw this out, which I think was the right answer.

One thing that is a really interesting question about this particular antitrust suit is actually, what is somewhat of a principle, I guess, is it is often hard to fit modern industries into traditional economic analysis of antitrust, and this is a really nice poster child for that, because what is the quantity here? Is it the number of mistyped addresses? Well, that is something that is not affected by anyone's behavior, because that is just purely, you know, when consumers

make a mistake will determine that.

On the other hand, you might think it is the number of advertisements, or in this case, is it the number of Viagra ads that are produced? Well, here is a situation where, in fact, we would like to reduce the quantity. That is, it would be welfare-enhancing to actually reduce the quantity that is produced by the industry. It does not quite stop there.

So, another company that buys expired domains and then redirects them to its own advertising site sued VeriSign, that is, the plaintiff in the previous antitrust suit, saying that the existence of VeriSign's site finder itself violated the antitrust laws, and that suit, last time I looked, which was a week ago, seems to still be continuing. So, one thing is is that these suits concern the same behavior, that is, sitefinder.com, one saying that it was required and the other saying that it is prohibited by the antitrust laws, and so it makes for an interesting challenge.

So, here are the things I would like to talk about. I have already talked about one example, and I am going to mention a couple more. I want to then talk about some research on for what purposes are private antitrust claims brought, who has an incentive to sue, and report on some research on that, and then conclude.

The Colorado Chiropractic Council sent hospitals requests for privileges and included in their request the threat of a lawsuit if denied. Nine of the hospitals did not admit the Colorado Chiropractic Council, and these hospitals were all, in fact, sued for restraint of trade. The suit was thrown out, but the message I want to bring to this is 21 hospitals admitted them, and while it is not demonstrated, it appears that the threat of an antitrust suit was, in fact, an effective threat.

Antitrust actions outnumber or private suits outnumber government suits nine to one. Some of the reasons that they are given, I spoke with an attorney who says he tried to convert every contract suit into an antitrust suit as his first action, because it gives him access to treble damages, recovery of legal fees, and it is easier to survive summary judgment. So, private actions have grown. Canada, actually, did not permit private litigation until 1976, and they are still rare, probably because they do not have treble damages.

So, the general idea which I think Susan reflected for me is that the incentives for private antitrust litigation are not guided by consumer welfare. The firms bringing the suit, consumer welfare generally is not their goal or motivation. So, what I want to

look at is, what are the actual motives of firms engaged in private antitrust action and assess to what extent the law can be used strategically, and then hopefully that will give us some insight into crafting the laws to minimizing the damage that is actually brought.

Some of the uses to which the antitrust laws are brought -- private suits are put are harassment, harm and extortion, and harassment and harm can actually be used to induce cooperation, and this is especially effective because it is often cheaper to sue than it is to defend, and if you want to ensure cooperation, what you want is a punishment that is easy to mete out but expensive for the punished, and if it is symmetric, this is actually the economic theory of cooperation or collusion, actually, the same theory, suggests that that is the kind of punishment you would like to use. In addition, extortion reduces the returns to investment. That is clearly chilling -- chilling effect on investment.

Surveying a large number of private antitrust suits, we have come up with seven different reasons for private litigation, and I have color-coded them to what extent they are opposed to the interests of consumers. So, two quite common reasons are extorting funds from a successful rival, and I want to especially point to

follow-on suits. So, when the Government brings a suit, generally there is an entire group of people who follow on. Microsoft, of course, has been subject to many of those follow-on suits.

In addition, changing the terms of a contract, antitrust suits can be effective means of doing that on occasion, and as I said, some contract attorneys prefer antitrust suits because they think that it makes the defendant more likely to settle. Something that is speculative on our part is that it can be used to punish noncooperative behavior. Of course, no one is going to admit to this, because by and large you have then admitted to violating the antitrust laws directly, but from a theoretical perspective, that would be a reason for private antitrust litigation.

Responding to an existing lawsuit and preventing a hostile takeover are common reasons. These do not actually have any direct negative effect on competition. They depend on whether the existing lawsuit was itself pro or -- procompetitive or not or the existing hostile takeover, and I would point to those as being in some sense neutral. Where the antitrust -- where private suits turn the antitrust laws on their head is when they discourage the entry of a rival, such as in the Utah Pie case, or that they prevent a successful firm from

competing vigorously.

Now, this, of course, is one of Microsoft's defenses. I am not going to comment on that directly, but independent service organizations often bring these suits to prevent manufacturers from offering service and competing successfully. So, in that sense, they can quite turn the antitrust laws on their head.

Now, let me turn to some theoretical research. This is not based on the survey of antitrust suits. The question is, who has the incentive to actually bring a private antitrust suit that is, in fact, anticompetitive? And to assess that, we look at a procompetitive action. So, this is a cost-reducing action that will give a firm an advantage in the marketplace versus an anticompetitive action, so this is raising your rivals' costs without lowering anyone's costs, and ask, holding constant the likelihood of prevailing, who would benefit more from bringing the suits?

And we actually, in the context of the sort of standard work horse model, the Cornell model, the standard economic model that is used most frequently in antitrust evaluation, we find something I think quite surprising, which is that it is the small firm in a dispersed market who actually relatively benefits from

bringing an antitrust suit that is anticompetitive relative to a procompetitive suit, and the reason for this is the loss from a procompetitive rival's action actually gets larger as the number of firms grows, whereas the loss from an anticompetitive action decreases as the number of firms grows, so that in the limit, it is the small firm and not the large firm who tends to bring the action.

So, to conclude, antitrust laws are often used not to encourage competition -- at least private antitrust suits -- but to reduce the level of competition. Clearly an outright ban on private antitrust litigation would solve that problem, but it may create other problems that are worse. Some alternatives may actually improve the situation as it stands today.

One would be a gate-keeper, using government agencies as a gate-keeper for private litigation, but I am actually leery of that as a solution mainly because I judge the EEOC to be a failure as a gate-keeper in employment, and the gate-keeper model has not worked very well.

One could also ask the agencies to weigh in on private litigation, and that may have more of an effect. Another proposal is to allow for additional support

beyond what is already created, in particular financial support for agency litigation. That, of course, risks capture and so would be a risky strategy for different reasons. Something that -- modeling in Canada, you have a -- there is a -- is decoupling the damages from the awards. It may be that you want to have high damages as a way of deterring behavior but low awards to reduce the number of lawsuits, and there are plenty of worthy agencies who would love to have the difference between the damages and awards.

And then finally, something that from my own experience in litigation I would find useful is to provide experts to the court to reduce the uncertainty associated with antitrust suits.

Let me conclude with three remarks on deceptive practices. One is is that not every misleading statement is intentional. There are many well-intentioned corporations that make mistakes, and the law should not have zero tolerance. So, this is in some sense a counter to remarks of Susan's, that there is no downside. There are statements that are made. Generally, if you run a corporation, it is hard to ensure zero probability of a misleading statement ever being made. People have -- make errors on occasion.

One of the things I would say about Oliver

Williamson is that reading Oliver Williamson is very much like reading the Bible. When you read it selectively, he provides support for every point of view.

The second point that I would like to make is that traditional economic analysis where a market -- and by that I mean the analysis of antitrust -- where markets are either monopolies or competitive, is the sort of general situation, that kind of model is very poorly suited to evaluating deceptive practices, and there are lots of -- the problem is, often it is the case that you can have a large effect on a small number of people or a small effect on a large number of people, and then what seems like an inconsequential difference, so a small compatibility problem which is easily remedied may still be fatal if it is something that consumers will not remedy. These are situations where it is not either a monopoly or a competitive marketplace, and as a result, we in some sense need to bring new economic models to the evaluation of deceptive practices.

And then finally, I also want to say, in my view, the patent system is broken. The system itself is anticompetitive. It creates entry barriers. Many firms cannot enter because -- so, firms with a good idea, who

have invented a new technology and go and get it patented, find that because there are many patents that have some similarities, they are blocked from entry by existing patent pools. Patent pools, in addition, have the effect of encouraging collusive conduct.

With a broken patent system -- and this, I think, echos a point that Susan made -- I do not think it is appropriate to try to fix the patent system using the antitrust laws. Instead, it would be desirable to fix the patent system directly. So, let's craft antitrust laws that promote competition and a patent policy that justly rewards the efforts to innovation.

Thank you.

(Applause.)

MR. DAGEN: Our next speaker is Michael Brockmeyer. He's a partner at Frommer Lawrence & Haug, where his practice concentrates on antitrust and consumer protection law with particular emphasis on intellectual property financing agreements and the pharmaceutical industry. Before entering private practice, Michael served as chair of the Multistate Antitrust Task Force of the National Association of Attorneys General and was a chief of Maryland's Antitrust Division. He is a frequent author and lecturer on antitrust matters, and he is also an Adjunct

Professor at the University of Maryland School of Law, teaching antitrust law.

DR. BROCKMEYER: Thanks, Rick. Good morning, everyone.

For my opening remarks this morning, I want to focus on abusive governmental processes, in particular with respect to deception in the intellectual property setting, and then I am going to briefly touch on tortious conduct.

I find it helpful, however, that before going into those subjects, we should remind ourselves of certain basic principles that should apply when we look at any one of the subjects that we are talking about, and so, for example, and what we take for granted today I would assume, everyone, that aggressive competition on the merits serves consumer welfare. Even if done by a monopolist, competition on the merits is not exclusionary. If we do not permit that, then we deprive consumers the benefit of that competition.

Now, that is a principle that has become well accepted in antitrust law, but we must remember that that principle is not one that necessarily underlies certain state laws that deal with deception or tortious conduct.

The antitrust laws should not provide a remedy

for conduct that violates the common law or another statutory scheme and injures individual competitors unless the conduct substantially harms the competitive process. In my view, such conduct that violates the common law or another statutory scheme is not competition on the merits, but the question is, is whether often the conduct is sufficient enough to say that it harms the competitive process.

In my view, the principle should be that that conduct substantially harms the competitive process when it allows, permits, durable pricing above competitive levels or there exists a dangerous probability that such supra-competitive pricing will occur. In my view, when you have this sort of conduct, the competitors, the injured competitor, cannot be passive. The competitor must have attempted to counteract, must have done so in a reasonable manner evaluated in the context of what would be a competitive market, and again, the harm should be measured in the context of ability to price above competitive levels.

When deciding whether that conduct is exclusionary, that is, giving rise to a Section 2 claim, I believe that it is essential that deciding whether there is substantial harm to the competitive process must be undertaken first before any balancing against

any procompetitive justification, much as what Susan said, it is very difficult for much of this conduct to have a "procompetitive justification."

The concern from a principles standpoint is if you quickly, say under a Microsoft type analysis, shifted the burden for procompetitive justification and there was none, you may end up penalizing under the antitrust laws tortious conduct that does not substantially harm the competitive process.

Finally, when a monopolist's exclusionary conduct is subject to another regulatory scheme designed to promote competition, the antitrust laws should provide a remedy for such conduct only after taking into account the structure of the market and the significance of the regulatory scheme to the workings of the market. This is going to be particularly important when we are talking about Hatch-Waxman, as Preston was talking about in the patent arena, or even one explanation for Conwood, because we must remember that because there are virtual bans on advertising, the conduct there was such that it was difficult for Conwood to counteract the activity because it could not do so by traditional advertising in the regulatory scheme that we have with respect to tobacco advertising prohibited that.

With that, let me now first go to abuse of the

government processes through deception, and the first, of course, is Walker Process, and in the 41 or so years since Walker Process was decided, much has been said about Walker Process, and the issue with, of course, Walker Process is that we start with the principle that the patentee is immune from antitrust liability generally when the patentee seeks to enforce its patent, and so the question in Walker Process was, when would we remove that immunity, and the Court said, well, when there was fraud on the Patent Office, and if there was fraud on the Patent Office, there was not then a per se violation of the antitrust laws.

Indeed, when I read the opinion again, I believe the Antitrust Division or -- I do not know whether the Federal Trade Commission joined -- actually had urged the per se rule, which the Court rejected there; that is, that once fraud on the Patent Office is shown, the plaintiff merely is now in the door and has to show other -- an otherwise violation of the antitrust laws.

I believe the importance of Walker Process, however, is Justice Harlan's concurrence, and in particular, he wanted to make clear that this was not going to open the door or should not open the door for all sorts of plaintiffs' suits where a patent is found to be unenforceable or otherwise invalid, and thus, he

concluded that the private antitrust remedy, which the Court was allowing as a result of the Walker Process case, should not be deemed available to reach Section 2 monopolies carried on under a nonfraudulently procured patent.

Well, when we think about that sentence, I want to remind you on a little bit of history. Noerr had been decided prior to Walker Process, but California Transport had not. California Transport comes six or seven years after Walker Process, and so we end up in a situation where -- and let me just sort of finish with Walker Process for a moment -- that with Walker Process, the standard is if you do have fraud on the Patent Office, it is exclusionary conduct actionable under Section 2 on the assumption that the patentee otherwise possesses monopoly power or there is a dangerous probability that the patentee will obtain monopoly power.

One area where I would disagree with the Federal Circuit, the Federal Circuit has said that in order to bring a Walker Process case, there must have been enforcement of the patent before the claim can be brought. In my view, Walker Process, if there has been fraud on the Patent Office, a Walker Process claim should be available even if the monopolist patentee has

not attempted to enforce its patent. Now, I understand that in virtually all circumstances, knowledge of the claim and ability to bring the claim will be in the context of either a counterclaim or where there has been a cease and desist or some other letter, a declaratory judgment action being brought, such that there has been either actual or attempted enforcement. The difficulty is that there are circumstances -- and this goes a little bit to Preston's point, I believe -- where someone will come and ask for a review of the current patent law or current state of intellectual property, an opinion by a law firm may be given to say, well, your particular process will infringe. There is not knowledge of the fraud on the Patent Office, and someone who would otherwise come to market may not come to market simply because that firm does not want to risk the disruption of an enforcement action by the patentee who has procured the patent by fraud. So, in my view, the standard should not be one where Walker Process is available only when there is enforcement.

Back to where I was going with Justice Harlan, and the question becomes this, and something that I am seeing in my practice, is where there is an allegation that a patent is unenforceable by reason of inequitable conduct before the Patent Office. Now, where there is

inequitable conduct, there is intent, there is materiality, there is a weighing, but the basic issuance of the patent is not in issue; that is, in a Walker Process, where there is fraud, the patent is void ab initio, where that is not the case with respect to inequitable conduct. And here, in the Noble Pharma case, the Federal Circuit distinguished between in the case Walker Process fraud and inequitable conduct, and the key for that distinction is in a Walker Process fraud, there must be a fraud on the Patent Office, and but for the fraud, the patent would not issue.

In my view -- and my time is getting short -- the problem is that where there is inequitable conduct, there is often then a claim of sham litigation; that is, that the litigation is brought with the patentee knowing that its patent is unenforceable by reason of the inequitable conduct. In my view, the standard there should be one where the litigation must be sham, that is, meeting the PRE test, and the sham litigation itself must have substantially harmed the litigation; that is, the focus of the inquiry should be on the sham litigation and not the patentee's conduct before the Patent Office.

Let me very quickly go to the issue of listings on the Orange Book. The Orange Book, as many of you may

know, created under the Hatch-Waxman Act, a brand will list those patents that cover the branded drugs which it is marketing, and as we also know that the FDA plays only a ministerial act, meaning it lists what is presented to it.

One point that I want to make is that listing in the Orange Book does have procompetitive attributes. While listing in the Orange Book means that when a generic sues, that there is a 30-month stay before the generic can -- its ANDA can be approved by the FDA, it also has a procompetitive attribute because it will encourage the generics to sue because of the 180 exclusive for the first to file. So, we must be mindful that listings in the Orange Book do have procompetitive attributes, and where the FTC has sued in BristolMyers and Biovale, in both of those circumstances, the allegation was, in the case of BMS, it knew or could not have reasonably believed that the listing was appropriate or that Biovale was aware that the patent it listed did not cover the drug that it marketed.

In Organon, I will pass through this, there is a suit that said the court had no antitrust liability, because Arganon had a reasonable basis for submission on its patent in the Orange Book.

In my view, the standard should be that

something may be actionable exclusionary conduct under Section 2 only when the decision to list the patent was objectively baseless; that is, the test on whether to list should be objective, and it should be looking to where the brand could have reasonably believed that the listed patent could be asserted against a generic that a manufacturer would want to bring to the market.

Finally, on the tortious conduct, in my view, a monopolist's misleading and deceptive tortious conduct that's illegal in common law or another regulatory scheme could be treated, may be treated, as exclusionary, but only when the conduct is institutional, pervasive and substantially harms the competitive process.

Institutional, to me, goes to the question that Preston raised of mistakes. This must be one where the company has purposefully looked to undertake a campaign that involves misleading and deceptive conduct. It must be pervasive, that is, you measure it in the context of the relevant geographic market. We have to, you know, deal with the rogue employee who may be engaged in some tortious conduct in some area, but we should not visit antitrust liability.

It must impair the competitive process, and finally, as has been suggested, in my view, there should

be no rebuttable de minimus presumption -- I know there has been the suggestion in several -- I believe the Sixth and the Ninth Circuits have adopted the notion of a de minimus rebuttable presumption. I believe there should not be one. The plaintiff in my view has the initial burden, the initial burden being to present a prima facie case of substantial harm to competition.

Thank you.

(Applause.)

MR. DAGEN: Our next speaker is Richard Rozek. He is a senior vice president at NERA Economic Consulting. After starting his career as an Assistant Professor at the University of Pittsburgh, Richard worked for over six years in the Bureau of Economics at the Federal Trade Commission in a series of senior staff positions, including Deputy Assistant Director for Antitrust. Since joining NERA in 1987, Dr. Rozek has worked on projects affecting many different industries, including the pharmaceutical industry. His work has appeared in a number of journals.

Richard?

DR. ROZEK: Well, I want to thank Pat Schultheiss for inviting me to come here and talk today about the pharmaceutical industry. It is an industry that I spend a fair amount of my time studying, and the

work I do at NERA is focused on the pharmaceutical industry as well as other industries, but I want to begin by summarizing some of the interesting characteristics or structural characteristics of the industry that make it so interesting to study. Not only that, we live in a world with laws regarding patents, copyrights, trademarks and trade secrets that along with the effective enforcement mechanisms have contributed substantially to economic growth and development in the United States. Nowhere is this effect of the intellectual property laws more pronounced than in the health care industry, specifically for pharmaceuticals.

Innovators in the pharmaceutical industry invest hundreds of millions of dollars in research and development or R&D for new medicines that address unmet medical needs. Conducting R&D and obtaining approval from the U.S. Food and Drug Administration or FDA to sell a new medicine as a safe, effective treatment for a particular disease usually requires 10 to 15 years of research. Many research projects actually fail and do not even result in the innovators submitting a new drug application to the FDA.

For the few successful projects, the innovator has, at the end of that 15-year period, a patent that gives it exclusivity, not to be confused with monopoly

power, for components of the product. The patent may be a composition of matter, may be a process, may be a method of use. Also, the innovator has a new drug application approved by the FDA as a result of that R&D investment, but there is no guarantee that the product will be commercially successful.

The innovator must manufacture and distribute the product. The innovator must inform patients, physicians, pharmacists, and payers about the therapeutic benefits of the improved product. He must negotiate prices with specific payers, both public and private. And in the end, many pharmaceutical products may not even generate sufficient revenues to justify their investment. Those products that are successful provide resources in terms of retained earnings for the innovator to fund its ongoing R&D efforts. So that if we want to have cures for such medical problems as AIDS, Alzheimer's disease, and cancer in our lifetime, we must have public policy that provides the incentives for innovators to invest resources in pharmaceutical R&D and continue the work to solve these unmet medical problems.

Now, there have been some concerns raised about practices that innovators engage in near the end of the patent lives for their products, such issues as filing a Citizen's Petition with the FDA, introducing new,

improved versions of their products based on the original chemicals, settling patent infringement cases, introducing generic versions of their original branded products, sometimes referred to as introducing an authorized generic. These practices and others that we have heard about today with regard to Orange Book listings and so on, have been the focus of antitrust scrutiny that the pharmaceutical industry has been receiving.

This policy debate on whether or not these practices are legitimate or the incentives to engage in these practices somehow be altered are guided more by emotion, rather than analyses that demonstrate that there is actual harm to consumer welfare from these practices. As a matter of fact, there are many beneficial effects from these practices that often are not the focus of the debate.

For example, filing a Citizen's Petition with the FDA makes the FDA aware of scientific or public health questions regarding its efforts to approve additional products. Introducing a combination product that combines two active ingredients or an extended release product can actually provide benefits to patients, increase compliance one pill instead of two. Actually, for insured patients, it can result in lower

co-payments. You have to buy a single pill, pay one co-payment, instead of take two pills and make two co-payments, so there can be a cost-reducing benefit.

Settling a patent case can reduce litigation costs and can actually, in some cases, provide additional entry into a marketplace. Introducing an authorized generic product into the marketplace can obviously increase competition. So, you see that there are benefits to the practices that have been the subject of these challenges, and there appears, on the other hand, to be a lack of evidence that these actions harm consumers.

Instead of talking about these types of actions collectively, I'll talk about the authorized generic issue, which has been the subject of some debate. There has actually been legislation proposed addressing authorized generics. There have been some court decisions related to authorized generics and so on. Most recently, to spur the debate, the Supreme Court refused to hear the FTC appeal of the Schering-Plough case. The Court of Appeals for the Second Circuit denied a consumer group's request for a rehearing in the Tamoxifen matter that involved Astra Zeneca and Barr settling a patent case. Bruce Downey, the Chairman and CEO of Barr, said in response to the

Court of Appeals' decision, "We are pleased that our patent challenge settlement related to Tamoxifen citrate has been upheld as being pro-consumer and pro-competition."

In spite of these court decisions and in spite of the benefits to competition from introduction of an authorized generic, the argument has been that introducing an authorized generic is inconsistent with the intent of the Drug Price Competition and Patent Restoration Act of 1984, sometimes referred to as the Hatch-Waxman Act. Specifically, the threat to launch an authorized generic reduces the incentives provided to generic companies to challenge patents listed in the Orange Book and, thus, will reduce the number of future generic alternatives.

Now, the problem is that there is no evidence that the number of generic alternatives will be reduced or that there are a lack of profit opportunities or entry opportunities for generic firms. The Hatch-Waxman Act actually encourages both innovation to solve those unmet medical problems and competition or imitation by sellers after patent expiration. It has generally been a success because it has struck this balance between innovation and imitation, and restricting options available under the Hatch-Waxman Act to encourage

innovation, to destroy the incentives to develop new and improved medicines, will actually harm patients, physicians, pharmacists, and payers.

Now, some of the entry opportunities that exist -- and this should be of interest to the antitrust community as well, because it is an issue that is a key part of any antitrust inquiry -- is what are the entry conditions into a marketplace? Is entry encouraged or discouraged by certain actions? Well, the presence of authorized generics, for example, actually creates new entrants into the pharmaceutical marketplace. Obviously innovator companies now have an opportunity to introduce an authorized generic and enter that component of the industry, as companies such as Pfizer, Novartis and Schering-Plough have done. Pfizer has its generic entity, Greenstone, Novartis has its generic affiliate, Sandoz, and Schering-Plough has Warrick. These are firms that now sell generic products. So, innovator companies are entering the generic marketplace.

Companies that have traditionally been in the generic marketplace and have launched their own generic products or independent generics have also been involved in participating in the authorized generic portion of the industry. Mylan, Barr, Par, Watson, Ivax/Teva, which is now a single firm, have all sold authorized

generic forms of drugs under licenses from the innovator varieties. Barr, a company that actually derives most of its revenues from sales of generic drugs, has a few branded products as well, and it recently launched an authorized generic version of its brand oral contraceptive product Seasonale after Watson, a generic company, launched a generic version of the product. Bruce Downey, again, said, quote, "It is our obligation to preserve our rightful interest in this product." So, you see, even the generic companies see the benefit of launching authorized generics when they do expand into the brand or innovator segment of the industry.

Some firms have arisen to sell authorized generics only. For example, Prasco is a firm that currently sells authorized generic versions of seven branded products. It is a privately held company. It was created because of the opportunities presented to the marketplace by this ability to sell authorized generic products.

I have seen various estimates of the value of the patented products coming off patent in the next two or three years, and it could easily exceed $27 billion in 2007 and $29 billion in 2008. So, the point is that there are profit opportunities in the generic industry with authorized generics in the marketplace as well.

So, the new entrants have emerged, and future profit opportunities exist.

The issue remains, however, what is the role for antitrust policy versus competitive forces in this industry? Where in the industry should antitrust policy be focused? Should it be focused at the manufacturer level? Should it be focused at the retail level? Should it be focused at the distribution level? There are fundamental questions with regard to using antitrust policy to address issues in the pharmaceutical industry. I think there have been several mistakes in the current application of the antitrust laws to the pharmaceutical industry, broadly defined as this vertical chain from research through distribution of the products to patients.

One is that market definitions are often too narrow in this industry from an antitrust perspective. Market definitions that use a single chemical as the appropriate defining characteristic of a market, overlook the therapeutic competition that exists in the pharmaceutical industry, competition between chemical entities, Avandia competes with Actos, Fosamax competes with Actonel, ear tubes compete with antibiotics for treating otitis media. There is a lot of competition that's overlooked by taking the static view that it's

only a single chemical constitues a relevant market. Well, a fundamental flaw in current antitrust, taking a too narrow view of the market, not realizing the therapeutic competition, competition across therapies, be they pharmaceutical or surgical procedures.

Taking that narrow view of market definition causes decisions to be made that monopolies exist when, in fact, they do not, you see.

Another flaw is taking a static, as opposed to a dynamic, view of the market when you have a market environment characterized by high expenditures in R&D and new products emerging from research being done within U.S. laboratories, UK laboratories, Japanese laboratories, and even in other countries, such as India and Argentina and Brazil, countries that are developing and have recently improved their protection for intellectual property.

Competitive forces are working in health care markets, and I think a greater reliance on allowing these competitive forces to work as opposed to intervening too early with antitrust enforcement is a better solution for everyone concerned. What we need to do is to convince consumers that shopping for pharmaceutical products, such as they do for other consumer goods, is a good idea. We have to induce more

of a shopping or a searching procedure for the lowest pharmaceutical prices.

I recently conducted with one of my colleagues a survey of pharmacies in Crystal City, Virginia to purchase the product albuterol, which is an asthma treatment. We found that in a narrow geographic region within Crystal City, Virginia, the price of a canister of albuterol ranged from $8.19 to $26.49. We found out this information just by calling the pharmacy and asking them how much a canister of albuterol would cost. There is often a significant difference in price, which you can find out by just calling before you even go to the pharmacy with your prescription.

WalMart recently announced a pilot program to sell generic pharmaceutical products for $4 a prescription. K-Mart is offering a 90-day supply of a prescription for $15. The market is responding to the need to control health care costs.

So, in conclusion, I want to say that innovators in the pharmaceutical industry obtain patents and regulatory approval in the U.S. They are subject to the general U.S. antitrust laws, as are all companies, and additional specialized rules, such as the Hatch-Waxman Act, that strikes a balance between innovation and imitation. This structure creates the incentives for

both innovators and imitators to develop, manufacture and sell their products. To preserve the gains from both types of activities, public policy, including antitrust, should focus on maintaining a business environment that allows innovators and imitators the most effective means to manage their product life cycles under the existing system.

In the case of innovators introducing authorized generics and the other activities I described earlier, competition has increased and new entrants have emerged. Patients have had access to established therapies and to new therapies, and they have the mechanism in place to assure that research will be done on therapies to meet unmet medical needs in the future.

With regard to the pharmaceutical industry, a reliance on competitive forces rather than a stepped-up antitrust policy that has focused on static analysis under narrow market definitions holds greater promise for controlling health care costs in the future.

Thank you.

(Applause.)

MR. DAGEN: Before we proceed to our last two speakers, we will take about a ten-minute break. When we come back, we will hear from Gil Ohana and George Cary and then go directly from their presentations into

our round table discussion. Thank you.

(A brief recess was taken.)

MR. DAGEN: Okay, welcome back, everybody. We have two speakers remaining, and after their presentations we will follow with the round table discussion.

Gil Ohana is Director of Antitrust and Competition for Cisco Systems, a leading manufacturer of networking equipment for the internet. He writes and speaks regularly on licensing, standard-setting, patent pools and other subjects at the intersection of antitrust and intellectual property law. Before joining Cisco, Gil was a trial attorney at the Antitrust Division of the U.S. Department of Justice, specializing in antitrust issues in high technology industries.

Gil?

MR. OHANA: Thank you, Richard, and thanks to the Justice Department and the FTC for the opportunity to speak today.

Susan Creighton earlier used the term "network industries." I am in the networking industry, and in the networking industry, something the customers care about a lot is that networking products work together well and the way that we make sure they work together well is largely by participation in standard-setting.

So, we're very proud of the leading role that we've played in developing standards that many of you use every day, whether or not you realize it. To give some examples, 802.3, which is the ethernet standard; 802.11, which is the WIFI standard; TCPIP, which is the basic transmission control protocol on which the internet runs.

We also sell every year billions of dollars of products that implement a wide variety of industry standards, so both from the standpoint of participation in standards development, from the standpoint of implementation of standards in commercial products, we are passionately interested in a transparent standards development process. What do I mean by that? I mean a process that values intellectual property rights but that also recognizes, as the Justice Department did in the Vita letter, that the incorporation of a patent into a standard may confer on that patent significant market power and that, therefore, the decision to incorporate the patent into a standard should be made knowingly with access to the best information that is available at the time.

The deceptive practices in standards development, therefore, run contrary to our interests. They reduce our incentives to participate in standards

development, and they reduce our confidence that the products we ship will not infringe or that if they do infringe that we will be able to address the infringement with a payment of reasonable licensing fees.

I'd like to preface my remarks with a quote from Justice Brennan in the Allied Tube case that I am sure many of you have seen before. Historically, the antitrust scrutiny that Justice Brennan referred to was really around Section 1. More recently, the FTC in particular has brought a number of cases involving Section 2 issues in standards development, as we all know. What I'd like to talk about today is those cases without getting deeply into the facts of any of them and make a few points about them.

First of all, to suggest that despite the title of today's discussion, when we talk about deception, we really ought to be talking about exploitation and not deception. Second, that if you situate deception in the broader panoply of Section 2, you come up with some interesting conclusions, and I think Susan touched on these earlier, regarding whether the risk of over-enforcement operates as strongly in the context of deception in standards development cases as it does in Section 2 cases more generally. And last, I'd like to

comment on, since I am here in an event hosted by the Justice Department and the FTC, I'll abuse a privilege of being here by talking about how I feel the agencies can best address issues of deceptions in standards development, and I'll give you a hint, it's not just about bringing cases.

I won't spend long on this slide. Here are some examples all drawn from recent FTC decisions or investigations involving deception in standards development, and as the cases suggest, there are a fair number of fact patterns -- I didn't, for example, deal with government standard-setting here, the Orange Book cases, et cetera, but there are a fair number of fact patterns just in classic tech industry standards development.

So, to unite the theory, I thought about a kind of way of defining the issue, which is that it is a patentee's exploitation of monopoly power that results from the success of a standard for which their patent is essential, where that power is created by actions that run contrary to the rules or shared expectations of the participants in standards development.

I'd like to focus on two parts of that definition. The first is exploitation of monopoly power, and the second is resulting from the success of

the standard.

First of all, on exploitation of monopoly power, it seems to me that the analytical weakness of just focusing on deception is that you are really missing what matters, which is not the deceptive act itself, but the exploitation of the market power that that creates. Let me offer an example, as they say, ripped from the headlines, though it is a situation that people in the networking industry are aware of, as I think are some people in this building.

The hypothetical is, a patent holder discloses a patent in patent standards development, it offers to license the patent for fully paid up $1 royalty, give me a buck, use all you want. The patent holder then sells the patent to someone else. The buyer buys the patent without knowledge of the prior licensing commitment, let's assume. The buyer begins to assert the patent against companies implementing the standard, which by now has enjoyed a great deal of success, and you won't be surprised to learn that the successor is asking for more than a dollar. The rules of the standards development organization at the time did not specifically require that licensing commitments made in the context of the standards development effort, in fact, bound successors, but if you ask people who

participate in the standards development effort, that would certainly be their expectation.

What was the deception here? Well, there really wasn't any. The successor was quite up front about what they were doing. The initial patent holder did not deceive anyone, the successor did not deceive anyone, so where is the deception? It seems to me that what you are really focusing on here is the exploitation, and the exploitation begins at the moment that the successor becomes aware of the past licensing commitment and the consensus within the standards development effort that, in fact, it would bind the successor as well. At that point, failure to withdraw the claim and seek only the one dollar royalty is I guess deceptive conduct, though it seems to me more to be exploitative conduct.

Now, note in this case, the deception and the exploitation essentially merged into one in the matter of the standpoint of timing. In cases like Rambus and BroadCom, obviously there is a much longer time period between when deception occurs and when the exercise of monopoly power will occur, thereby exemplifying the point that the two may be different, they may be the same, but in any case, what you want to worry about is the second, not the first.

Listening to some of the discussion this morning

made me think of another reason why you want to focus on exploitation rather than deception. It is the question of inadvertent deception. Deception may very well be inadvertent, and it is particularly true in the standard-setting context. Where the rules of standards development organizations are not clear, people can make innocent mistakes. Exploitation is never inadvertent.

Let's move on to the second phrase I'd like to talk about, the phrase resulting from the success of the standard. Here we come to a significant difference between the FTC's series of standards cases and what I'll call kind of classic Justice Department monopoly maintenance cases, AT&T, IBM, Microsoft, all of which involve durable monopoly power and raise the question and the understandable concern that what you should really be worried about is the risk of false positives, because in those cases, you are dealing with a successful company, and you have got to tease out, a pretty difficult analytical task, tease out specific exclusionary conduct from what made that company successful as a general matter. That's not easy to do, a risk that I am sure many of you have seen the Learned Hand quote that captured this.

Now, the question I would like to pose is under what circumstances can you be sure that the deceiver in

a standards deception case is or is not what Learned Hand would call the successful competitor? It seems to me that in deception cases, the conduct and market power elements of monopolization may focus on different subjects. In other words, you may be worried about or you may be focusing on different actors. Certainly you would be focusing on whether the act of deception was anticompetitive and then whether it lacked business justification, but you would also be focusing not on whether the deceiver gained monopoly power through its actions, but whether the standard gained monopoly power, and the standard may have gained monopoly power for reasons that have very little to do with the underlying deception.

In that sense, the risk of over-enforcement is lowest when, first of all, the undisclosed intellectual property right was not core to the success of the standard. It was, in other words, nice to have. Now, this isn't an argument for counting patents. The fact that the undisclosed patent was one patent out of fifty or a hundred or a thousand should not be dispositive, because all patents are not created equal, but the other thing you should think about is, what were the rejected substitutes? First of all, did they exist? Second, were they close? And third, can you say with some

degree of assurance that they would have been selected absent the deception?

Now, that may not be the easy inquiry, but it is a whole lot easier than figuring out whether per processor licensing was the source of Microsoft's vertical monopoly in operating systems in 1984. It is a whole lot easier than figuring out whether lease practices were the reason that IBM enjoyed a leading position in mainframes for quite so long.

First of all, the time period is very compressed. In the facts of the Rambus case, the period in which Rambus gained monopoly power through the insertion of its patents in JEDEC and competitive alternatives were distorted was a matter of months. You knew what the alternatives were. You typically, because standards development activities are ostensibly documented, have a good set of evidence to look to to figure out what the alternatives were, why they were rejected. It seems like an easier exercise, and because it is an easier exercise, the risk that you are going to get it wrong it seems to me goes down.

Let's talk about moving on to the culture of standards development. First of all, standards development is not a lawyer-intensive process, which goes back to the point I made earlier about the risk of

inadvertent nondisclosure or the risk of inadvertent deception. In thinking about that, I go back to the Rambus case and the FTC's description of standards development as a cooperative effort in which the risk of deception is therefore present. I would like to think that that is right, but it raises an interesting question and one that antitrust plays a role in.

The question is, how do we get there? And it is not just an academic question for this audience. It is a question in which antitrust does not necessarily come with clean hands, not the Government, mind you, but the private enforcement. Specifically, because of the pervasive antitrust scrutiny of standards development that Justice Brennan spoke about in Allied Tube and particularly the imposition of vicarious liability on standards development organizations in Hydrolevel, standards organizations got very, very, very concerned about antitrust liability.

They do not know much about it, but they know enough to be frightened, which is kind of like what we would feel if suddenly a brilliant men appeared at these doors and told us we would be locked in this room until we came up with the next standard for high speed wireless data communications, and the way they responded to that concern was by developing rules that

systematically discouraged the discussion of what seemed like efficient things to talk about, cost, patent validity, pricing, particularly in the context of input pricing.

The standards development organizations, for whom the cost of defending that antitrust case to a motion of dismiss, let alone summary judgment, would consume multiples of their annual budget, decided we are not going there, and we are going to enforce these rules. That led to the development of what I will call a culture of standard-setting in which people can be forgiven for not having asked what seem in retrospect to be obvious questions, like, hey, I really like your technology contribution, how much is it going to cost me to practice that, and instead being satisfied with the answer, well, it will be reasonable, and also questions like, well, can you prove to me that that patent is valid? How much do -- do you have patents?

These are questions that seem, again, pretty basic from the standpoint of lawyers with the benefit of reading cases in this area but that the rules of the standards development organizations often prohibited discussion of, which suggests a role for the agencies, but not necessarily a litigation role. I don't want to dismiss the litigation role, having been at Cisco during

the Rambus case and having talked to many engineers who were following the coverage of the case in EE Times, which is a leading semiconductor trade journal, which had a full-time reporter, believe it or not, covering the Rambus case.

It did provoke a lot of interest, and cases are very useful from that standpoint, but beyond that, since antitrust in some sense played a role in creating this problem, it can also play a role, particularly the agencies, in helping address the culture of standards development by helping the agencies understand or the participants in standards development understand what they can and cannot do, and I would like to say that we are off to a good start in that, particularly with statements like Chairman Majoras' speech at Stanford last year, the recent Vita letter, and also some statements out of the European Union regarding this, but more dialogue is needed and more help from the enforcement organizations to figure out how far they can go to defend themselves from these risks, to in some sense change the culture, will nevertheless be necessary.

Thank you.

(Applause.)

MR. DAGEN: Our final speaker during the

prepared presentations is George Cary. George is a partner at the D.C. office of Cleary Gottlieb. Before joining Cleary, George served as Deputy Director of the FTC's Bureau of Competition. George also was a principal contributor to the 1997 modification of the 1992 Federal Horizontal Merger Guidelines, which incorporated consideration of efficiencies in merger assessment. He is a frequent speaker and writer on antitrust issues.

George?

MR. CARY: Thanks, Rick.

We seem to have started with some very broad principles at the beginning, through Susan's comments, and have now narrowed down through Gil's comments to a specific analysis of the standard-setting process. I am going to take it one level more narrowly, and I am going to talk about implementation of specific rules within the standard-setting context and whether violations of those specific rules ought to be treated as an antitrust issue, an issue of antitrust concern.

The particular provision that I am going to talk about is so-called FRAND licensing commitments, commitments by participants in the standard-setting process to license their technology on fair, reasonable and nondiscriminatory terms, and I am going to start by

laying out several premises that you have already heard referenced this morning but which I believe apply in this case as well.

First, standard-setting eliminates competition among alternative technologies. Companies that otherwise would be competing to promulgate proprietary standards have now gotten together and eliminated that competition by agreement. Antitrust, therefore, has a stake in policing that standard-setting activity.

Second, when proprietary technology is made an essential element of an industry standard, the owner of that technology gains market power, exclusionary power, beyond what is inherent in the patent itself. Prior to the adoption of the standard, the company can exclude others from practicing the particular innovation incorporated in the patent. After inclusion in the standard, if it is an essential patent, the patent holder can exclude firms from practicing the standard generally. That is a much broader grant of monopoly power and one, again, where antitrust has a stake in how it is exercised.

Third, the proposition that nondisclosure of patents after lock-in as part of a standard has occurred has been recognized as an antitrust concern. I think we have had a couple of references to that recognition this

morning, the Rambus case, the UNOCAL case, the Dell case, and other cases where the Commission and the courts have recognized that if you fail to disclose a patent, if you have a duty to disclose because you are part of the standard-setting body, and if, as a result, you have gained market power because the standard has now incorporated that patent, that raises antitrust concerns.

My premise here today is that if you accept those three propositions, then it naturally follows that you have to accept the proposition that violation of commitments to particular terms that the standard body sets in order to ensure that there is no hold-up after lock-in and that there is no extension of a patent monopoly to a monoply of the standard as a whole, also must raise antitrust concerns. So, violations of other rules designed to constrain exploitation of lock-in raise similar competitive problems to failure to disclose, and therefore, ought to be treated similarly under the antitrust laws.

What is a FRAND commitment? A FRAND commitment is an agreement to license on fair, reasonable and nondiscriminatory terms as a condition for including the intellectual property within the standard. The purpose of this is to avoid hold-up, the same purpose as a

requirement that patents be disclosed, and an obligation to disclose is ineffective if there is no recourse for violation of the FRAND commitment. If one can simply disclose, agree to license, and then fail to fulfill that agreement, it raises the same competitive concern as failure to disclose in the first instance.

What are the problems that FRAND is designed to address? Before the standard is adopted, companies have options. They can invent around patents. They can use alternative patented technology. After the standard is adopted, those wishing to practice the standard no longer have options. They are locked into the use of the standard, and having sunk significant investment in standard-specific resources, it creates the potential for monopoly rents, because their elasticity of demand is now much more inelastic. They need to recover the investments that they have made in that standard, and they are going to be willing to pay a higher price for the patented technology than they would have prior to the adoption of the standard.

Second, FRAND is a commitment to a common enterprise. Participating in the standard-setting body is a commitment to the efficiency and the success of that standard. That promise is that all participants in the standard, many of whom contribute intellectual

property of one form or another, have committed to each other as a matter of good faith and fair dealing to impose a mutual restraint on their exploitation of the market power created by that standard and a commitment that they will not price their intellectual property at such a level so as to make the standard itself uncompetitive or inefficient.

FRAND is designed also to ensure competitive markets downstream for products that are compliant with the standard. To accomplish this, there is a nondiscriminatory element to a FRAND commitment where a holder of intellectual property promises not to use that control to disadvantage its competitors in producing parts, equipment, networks that are compliant with that standard. These are the goals of the standard-setting process in imposing FRAND, and these goals, I would submit, inform us as to how to properly interpret FRAND in the context of an antitrust enforcement.

My next premise is that FRAND is enforceable under the antitrust laws under standard, conventional Section 2 theory. The holder of a patent included in a standard gains monopoly power. What is the definition of monopoly power under the cases? It is the power to exclude others from the marketplace and the power to control prices. If you hold a patent, if the patent is

essential to practicing the standard, and if you refuse to license that patent, you have effectively excluded competition from within the standard. If you hold a patent that is essential to practicing a standard and you charge an exorbitant royalty to competitors who are producing products compliant with the standard, you have imposed costs on your rivals, and those costs have to be passed onto consumers, and you have gained the power to control prices in that downstream market. Both of those things are the hallmarks of monopoly.

When does monopoly violate the antitrust laws? It violates the antitrust laws where it is willfully acquired; in other words, where it is not competition on the merits, when the monopoly is not based on superior products, business acumen or historical accident. A willful violation of a FRAND commitment to license on fair, reasonable and nondiscriminatory terms is, therefore, monopolization. You have a monopoly by virtue of the power to exclude and control prices. Making a commitment to FRAND that you then renege upon or do not follow through on is willful acquisition of that market power, and therefore, the two would constitute a violation of the Sherman Act with a requisite showing of competitive effects.

Antitrust courts are competent to enforce FRAND

commitments. Now, there has been some discussion about this, but again, the idea that you can have an antitrust violation by virtue of violating the essential elements of Section 2 with no antitrust recourse is one I think we would generally reject, and I think Susan articulated the principles of that very well. Some have argued that FRAND should be enforceable only under contract law or under tort law, but if it is a violation of the antitrust laws by virtue of its effect on competition, by virtue of its effect on consumers, then the public should have standing under the antitrust law and recourse to vindicate a violation of the Sherman Act. Participants in the standard-setting process may not have the requisite incentives, and in any event, there is a separate injury to consumers and to the public by virtue of the exploitation of market power that results from this kind of conduct.

Finally, if a court is capable of determining whether conduct violates FRAND in a contract or tort case, there is no reason why, as a matter of judicial administerability, it cannot do the same in an antitrust case, and there is no reason under antitrust policy why it should not do so.

I am now going to illustrate a couple of examples of FRAND violations and talk about how one

might go about proving such a violation in an antitrust case. The first is the most obvious, the extreme case of a refusal to license. If you have agreed to license, the standard has now incorporated your patent and you refuse to license, you now have the capability of monopolizing the market for standard-compliant parts and equipment and networks. That, it seems to me, is a clear violation of the FRAND commitment. It is also a violation of antitrust law, because now you have created a downstream monopoly.

Second, if you discriminate against competitors, the "ND" part of the FRAND commitment, in standard-compliant markets, again, you are taking your monopoly on essential technology and you are extending it to product markets for standards-compliant parts and equipment. The hold-up potential is very real, and antitrust law has recognized this kind of vertical integration and abuse of monopoly in one market to gain a monopoly in another in a variety of settings.

One example might be the case of a rate-regulated utility vertically integrating into a market where there is no such rate regulation and then using its market power to expel other competitors from that market, and once achieving a monopoly, charging higher prices in the unregulated market to evade

regulation in the regulated market. This is a similar kind of phenomenon where a company might agree to license on fair and reasonable terms but through discrimination that excludes competitors in compliant markets gains the ability then to charge the monopoly price in the compliant parts and equipment market.

Such discrimination also has an effect on future innovation and competition, because often in these kinds of markets, you find that the companies that are making the compliant parts are learning about how the standard works in ways that allow them to make improvements on the technology in the standard, and in the next generation of standardization, provide a competitive alternative to the firm that provided the essential technology in the first instance. Eliminating those kinds of innovators and competitors cements the position of the firm providing the technology in the first generation and potentially permits them to succeed to a monopoly in the second generation without making the kinds of commitments that a standard-setting body might otherwise require or by raising what they might be able to charge as a fair and reasonable royalty in the second round.

Again, discrimination is well known to antitrust courts. Antitrust courts look at that in the context of

the Robinson-Patman Act, of the Sherman Act, of discriminatory pricing, of predatory pricing. This is not a foreign concept, and antitrust courts have demonstrated an ability to administer these kinds of rules.

What does fair and reasonable mean? Again, we have to look at the underlying purposes of the commitment that is being made in the light of the antitrust principles that are being addressed here. Fair and reasonable means a royalty that reflects the competitive environment before lock-in. I think Gil described it very well. It is the value of the innovation separate and apart from the additional value that that innovation takes on by virtue of its incorporation in the standard and by virtue of the lock-in created by the standard.

Second, fair and reasonable means a royalty that is sufficient to allow the standard itself to be a commercial success, so that you do not have a situation where the royalties are so high that the standard is debilitated, weakened, and is not able to provide the efficiencies that the standard is designed to provide.

So, how would one determine a fair and reasonable value? One would look at the alternatives that were available to the standard-setting body before

the standard was adopted. One would compare how close those alternatives are, and one would ascribe a value based on the benefits that the chosen technology provides over and above the other alternatives. You then might adjust that royalty if you find yourself in a situation where the cumulative royalty stack is so high that it impedes the efficient adoption of the standard.

Again, antitrust courts routinely compare the but-for competitive world with the observed market when assessing constraints, and this is no different. In a price-fixing case, you would look at the price set through the illegal restraint. You would then, through economic evidence, look at what the price would have been in the but-for competitive world. You would look at the comparison, and you would say the difference is damages. Again, here, one might look at what options were available to the standard-setting body, how close those options were, what did the standard-setting body at the time think about their alternatives, and how much incremental value, separate and apart from the lock-in value, did the accepted technology provide?

Determining the fair and reasonable royalty is within the competence of courts and enforcement agencies. Courts routinely determine in the context of a patent infringement suit what would a reasonable

royalty have been. The courts have developed a standard. The Georgia Pacific case lays out a whole series of standards that might be used to do that. There are industry benchmarks that could be looked at. There are examples of the licensing of the same technology in a context outside of the standard, what kind of royalty did that patent attract where it did not have the benefit of the standard?

A comparison of royalties charged in other standards might also provide a benchmark, and a comparison of the royalty charged in a competitive market with no FRAND obligation might also be looked at. So, courts have experience in assessing those kinds of things. There is a body of case law that informs us, there is an antitrust principle that gives us a benchmark, and the courts are certainly capable of analyzing those factors.

So, in conclusion, I would cite to you Justice Ginburg's decision in the Cable and Wireless case that was cited previously, and I would just quote from Justice Ginsburg when he says, "Anticompetitive conduct can come in too many different forms and is too dependent upon context for any court or commentator ever to have enumerated all of the varieties." It does no good to shut one barn door and leave others open. It

does no good to say failure to disclose is an antitrust violation, but disclosure with commitments that you then refuse to implement cannot violate the antitrust laws. The courts are capable of looking at the factual context and coming to reasoned decisions about whether the antitrust laws have been violated because of the creation of market power and whether a particular actor's conduct should be adjusted as a result of the commitments they made.

Thank you.

(Applause.)

MR. DAGEN: And I think it is now time for a little inter-panel discussion. Each panelist -- I think we will probably go in the same order that we did the presentations, if you have any comments that you want to share addressing other panelists' presentations or questions that you want to pose to other panelists, we can try to keep track of them and either have them addressed as part of this discussion or further on down the line. We are thinking three to five minutes per person, if you have got that amount to go through, and we will see how it proceeds from there.

MS. CREIGHTON: I am not sure I have three to five minutes of things, but I had just a few points, I think one comment on what Preston had to say a couple on

what Gil had to say.

First, on Preston's observations, I found intriguing his remark by the one lawyer who quoted that he does his level best whenever he can to turn a contract dispute into an antitrust claim. I would think that typically, if people are in a contractual relationship, that means that they are probably somewhere in the vertical chain of supply, and so my guess is that those antitrust claims that he is turning his contract disputes into are a whole variety of what we would view as sort of typical arguments about vertical restrictions, and yet somehow we do not think that that problem with turning contracts into antitrust disputes means that we should invalidate all those types of Section 2 claims sort of ex ante as somehow invalidating them.

So, sort of returning to the point I had made about we need to separate the question about problems we have with private actions from the substantive antitrust analysis, I guess I would pose as a broad experiment, suppose we did away with private antitrust enforcement just for the time being. In that circumstance, I would be curious for those who have voiced concerns about bringing -- for the Government to bring an antitrust enforcement action in the context of -- I guess what I

would call opportunism. If the Government is satisfied that that conduct has, in fact, caused durable market power, why would we nonetheless still eschew government enforcement to remedy it?

With respect to Gil's point about intent, I had -- that was actually -- I think I share the concern that he does and had mentioned that one of the things that can be misleading, so to speak, about using business torts as our sort of initial predicate act for an antitrust claim is that we really are not about intent and that what you are trying to get at with a business tort is different from what we are driving at with antitrust, and so some folks had mentioned about inadvertent deception.

I guess what I have tended to think of as deception, I have been tending to think of -- I will misuse Mr. Williamson again -- I think he defined opportunism as self-interest with guile, and so I think understanding it in that context, if we have -- what we are really concerned about in antitrust is self-interest with guile that causes durable market power, and that is really what we are talking about here, not some narrow business tort that may or may not fit the particular facts of what we are concerned with, which is consumer harm created by such market power.

And then my final point, I wanted to amplify and underscore a point that I thought Gil made quite well, which was sort of going back to the causation question that people have raised with Section 2 claims in this area. I would agree with his point that it would seem that many of our more traditional antitrust cases actually do pose that causation problem more forcefully than the kind of opportunism cases that we have been focused on here. So, for example, in the cases that Gil had identified, the Microsoft case, the AT&T case, the IBM case, obviously untangling the effect of the particular exclusionary acts is a challenge, but that does not mean it is a challenge that we should forgo.

I would say, by contrast, in an Orange Book case, if you conclude that there actually was a listing that was made self-interestedly with guile and there was a patent on it that automatically excluded competitors from the market for 30 months where competition should not have been excluded, the causation issue is pretty straightforward. So, I would agree with Gil on that, that sometimes the standard-setting cases, misuse of government processes, the causation issue actually can be quite straightforward.

That was it for my comments.

MR. DAGEN: Thank you.

DR. McAFEE: Thank you.

Let me actually echo something that Gil said, which is that it would be useful for the agencies to provide guidance to the standard-setting organizations. In particular, the prohibition of talking about costs or for that matter the prohibition of negotiating prices for the use of patented technology in advance are actually quite harmful in making good decisions. It is as if you had to buy a car without knowing what the prices are, and so the inability or the fear of discussing what technologies will cost when implemented in the standard is itself something that is designed to procure standards inefficiently.

The second thing I want to say is that -- and also in response to Gil -- is when you buy a bath robe, it comes with a somewhat optimistic statement that one size fits all. One of the things that you learn in studying standard-setting organizations is that they solve very different problems from each other, and they make their decisions in a very different environment, and I think one of the things that will be a challenge for providing guidance to standard-setting organizations is that they actually -- one size will not fit all very well.

In particular, the amount of information that

they have available to them at the time that they make decisions is often very different. I know JEDEC, in particular, would discuss proposed standards, and then the individuals would go back and work in their labs and see whether or not the proposed standard was something they could actually build themselves and what problems needed to be solved in order to practice the tentative standard. They very much were not necessarily on the same page, nor did they want to get on the same page in the sense that they did not want to reveal things that they knew about the technology, because that would give them a competitive edge. Giving advice about just what they are allowed to do in such a circumstance where standards are chosen, where how the standard is going to be implemented is not yet even known, is going to be a challenge.

And then finally, I have to agree with George that it certainly is not a solution to say we can practice a RAND -- if I make a promise that I will satisfy a RAND, which there is another definition of RAND, which is research and no development, which seems appropriate in standard-setting organizations, but -- and then charge an exorbitant fee after the fact, after the standard has been adopted, that is no solution at all, and certainly the antitrust laws -- that is, I am

going to completely agree -- that certainly the antitrust laws, if they cover the deceptive conduct, must also cover the failure to provide a RAND or failure to live up to the RAND assurance. I am less confident, however, that the courts can actually effectively interpret what is reasonable.

Thank you.

DR. BROCKMEYER: I would like to comment a little bit on some of the remarks of Preston and Richard.

First of all, with respect to the issue of private enforcement, I do not believe that we should eliminate private enforcement, and indeed, I think the decisions of the court over the last 20 years or so have made it much more difficult for the plaintiff to proceed, and indeed, the argument of I guess last Monday or so in the Twombley case could also have an effect on private enforcement, albeit that case is a Section 1 case.

But I do want to touch on private enforcement in that I believe private enforcement is one way to explain the result in Conwood. While not knowing what U.S. Tobacco's presentation was before the jury with respect to the existence of monopoly power and accepting the concession that it did have monopoly power that was in

the Sixth Circuit, when we think about the evidence that was put forth and the reasonable juror sitting there, hearing about a monopolist whose salespeople are running around ripping out racks and throwing them in dumpsters and various other types of conduct with respect to I guess misleading information being provided or whatever, in my view, the result in Conwood is not particularly surprising given that it was in a private enforcement setting.

Now the question becomes, well, do we want to deter that? Well, I think one way to look at it, and maybe this is Susan's point, is does the result in Conwood somehow deter efficient conduct? Are we going to deter throwing out racks or whatever or are we going to -- whatever, and I think the end result is I do not find Conwood to be a particularly surprising case, and I think it can be explained in the context of private antitrust enforcement and a reaction of juries to evidence.

With respect to the pharmaceutical arena and Hatch-Waxman and the regulatory scheme, Richard is absolutely right. As I've mentioned in one of my principles, I think we need to take into account the structure of the industry and the regulation involved. On the other hand, when there is deception, when there

is anticompetitive conduct that disrupts the balance that is struck in Hatch-Waxman, then I think antitrust has an appropriate role to play. Indeed, I would say that the Commission's case against Bristol-Myers and the deception that was involved with Bristol-Myers is a very good example of where antitrust properly intervened in this particular setting.

MR. DAGEN: Richard?

DR. ROZEK: Well, as an economist, I was struck by the discussion this morning that raised questions of measurement. Economists like to practice their craft and measure things. It comes up a lot in the areas of misleading and deceptive conduct. One area where it comes up frequently is in the issue of false advertising. How do you measure whether an ad is really false? It could have on its face a false statement or it could be perceived as conveying a certain message that is inaccurate, and so economists can do surveys and interpret that survey result.

But in some cases, it is much harder to measure whether something is misleading or deceptive, and I think back to some of the cases I have worked on where in one situation, for example, an organization had funded some scientific research; it was concerned about the scientific and statistical merit of the research;

that is, the scientific protocol followed and the statistical tools that were used to analyze the results of that data.

So, the company raised legitimate questions, I thought, as a reviewer of an academic article would raise in commenting on the methodologies used to conduct the research, but it was criticized for doing that and for suggesting that the article not be published. To avoid bad publicity, the company just paid a large settlement. How to measure whether that was -- whether their withholding publication -- or their request to withhold publication of the article was really misleading or whether there were legitimate scientific questions that needed to be resolved before publication, was a much more difficult issue.

That brings me to the question that was raised earlier about private actions following on government settlements. When someone settles a particular case with the FTC or the Department of Justice, and they may have done a calculation at that point that settling the case was -- even if they could win, settling the case was within that company's interest, was in their interests to settle the case, but then they do not always adequately factor in the private antitrust actions that are going to follow and the damages that

are at issue in those private cases. So, they do not take a complete picture of the damage calculation and factor it in when they settle.

So, sometimes -- I have had cases like this, too, where people come to us after two or three of the private cases have gone forward and say, "we are just tired of paying all this money. We are going to fight this now." And I say, well, you know, you should have fought it at the FTC or the Department of Justice, because you could have a better case there on market definition and on entry conditions and so on. In some settlement discussions, the full impact of the private cases are not factored into those calculations.

And then I was struck by George's comments on the FRAND standards and what evidence is actually used to determine whether a royalty rate is fair and reasonable. I think the discussion of Georgia Pacific factors borrowing from the patent literature, and the wealth of information in the tax literature on applying the arm's length standard to valuing intangible property on transfers between affiliated companies such as a UK research lab and an Irish manufacturing plant, that would be very helpful to apply in the FRAND context.

Now, I was also struck by the discussions of private cases and whether or not there should be a ban

on private antitrust actions. It seems to me that not an outright ban, but maybe some reform in the process. Again, speaking to some of the cases I have been involved in from my own experience, there was no reason that the brand name antitrust litigation should have gone on as long as it did until Judge Kocoras made the decision that it was meritless. All but four pharmaceutical firms who were initially sued in that case settled. That case went on too long, and there should have been a process in place to make a decision much faster. So, there are areas where there could be reform in the private antitrust cases to at least render decisions on frivolous cases much faster.

I was struck also by Preston's comments on Canada because of the absence of private actions. I did a study of health care reform in Canada and compared it to health care reform initiatives in the United States. One of the key differences between Canadians and Americans -- residents of the United States that you see is that in Canada, they have a much greater confidence in the Government as a solver of problems, and so they trust the Government to provide their health care and to provide high-quality health care. Whereas in the United States, I think we saw it with the Clinton Health Care Reform Initiatives, there was a great deal of distrust

in the Government as a solver of problems and more the Government as a creator of problems. So, there is a fundamental difference in Canada and the U.S. just in terms of how the residents in those countries interpret the Government and government action.

I think part of the reason you do not see private antitrust cases in Canada is that, "Well, the Government will take care of it" is the solution. Those are my comments.

MR. OHANA: I'll segue on the point that the Government will take care of it. I wanted to pick up on Preston's comment regarding one size fits all and the role that I posited for antitrust agencies relative to helping standards development organizations and their participants understand what I will call the limits to self-help to avoid deception.

I agree with Preston that one size does not fit all. The point I was making maybe was a little bit different. I am not positing a role for the agencies in creating the uniform code of standards disclosure rules or standards patent licensing rules. Far from it. Standards organizations need, because of the variety that Preston mentioned, a lot of freedom in that area.

I think, nevertheless, it is useful for the agencies to do as the Antitrust Division did in the Vita

letter and as the European Commission did in the letter they wrote ETSI in June of this year, to set out what are the points that you cannot go past? For example, in ETSI, the European Telecom Standards Institute, one of the proposals was to essentially create a cap that at the start of a standards development exercise, all participants would agree that any IP disclosed would essentially be under a cap of X percent, and even if you had a very fundamental, very broad, very valuable patent, you were in there with the rest of the patents fighting for your share of X percent, and the European Commission quite rightly said that that was problematic, and it is that role that I see the agencies playing in terms of limiting what is now the considerable desire of standards development organizations to enact rules that address this problem proactively ex ante rather than ex post.

MR. CARY: Just a couple of observations. First, I think that Preston's observations about the costs of antitrust enforcement, the difficulties of administerability and perverse incentives are all points that we constantly have to keep in mind and keep guard of in terms of how one interprets and applies the antitrust laws. But having said that, I think those comments also paint with too broad a brush, and maybe

one size fits all does not apply in that context either.

I would say that for those of you who have not read it, and I am assuming that is not very many, the "Cheap Exclusion" article that Susan authored with her co-authors is a brilliant piece. The idea that one can rationally set about determining where to apply prosecutorial discretion in a systematic way in coming up with arrays of combinations of anticompetitive conduct where antitrust enforcement is likely to do as little harm as possible, is a prototype for how to make prosecutorial decisions going forward.

And using that framework and integrating the points that Michael made, I would set up an array, and I would say, for example, at one end of the deceptive conduct that we have been talking about might be false advertising or sham litigation. In sham litigation, you have a built-in control: You have a judge. And if the case is frivolous and has no reasonable basis, presumably a judge would be easily in a position to get rid of the case quickly and efficiently; and if the case is more complicated so that he cannot get rid of it quickly and efficiently; then perhaps that is correlated with the idea that there is a reasonable basis to litigate the claim, and it ought to go forward.

So, sham litigation as anticompetitive conduct

would seem to be one which has a built-in mechanism to police it, and in addition, one where the anticompetitive injury is likely to be small. Attorneys are expensive, but relative to the sizes of most business, paying an attorney is not likely to debilitate you from competing.

At the other extreme would be the standard-setting discussion that we have had where SSO's create networks, durable market power is created through lock-in, it is very, very difficult to change those networks once they are established, and the opportunities for exploitation of market power are therefore significant.

In addition, you have got antitrust concerns in participants establishing royalty rates pre-adoption of the standard which, again, puts a premium on antitrust enforcement after the fact if there is a pattern of exploitation that a participant then engages in. Maybe somewhere in between might be the Orange Book context where there is an immediate anticompetitive effect from bringing the litigation, separate and apart from the standard sham litigation (where the anticompetitive effect might flaw only as a result of paying attorneys' fees). So that is a middle ground, in light of the fact that you still have a judge who could dispense with the

case very quickly if it is truly a sham.

So, I do not think it is necessarily appropriate to say that antitrust has no role in any of these areas because of the possibility of an unintended consequence. Instead, I think you can array these things and you can apply antitrust where it is going to have the highest likelihood of procompetitive impact and the lowest possibility of making a mistake.

MR. DAGEN: Thank you.

Does anybody else have any comments they want to share before we move into our rapid-fire questioning period?

(No response.)

MR. DAGEN: Okay, we have some slides that I think we will get to in a second with some propositions and questions, but I think just since George went last, I just had a question about one of the propositions he just made.

So, in terms of your sham litigation, which you put at one end, it sounds like it would be a very strong presumption that there would be no sham litigation monopolization claims, because it either gets disposed of quickly, in which case there is no harm, or it lasts, in which case it is not sham. So, is that --

MR. CARY: Oh, I do not know that I would use

the term "presumption," because that implies a legal rule. I would say that as a matter of logic and maybe some casual empiricism, that will tend to be the case, and therefore, as a matter of prosecutorial discretion or as a matter of the kind of scrutiny that a judge might impose on such a case, it should be at the end where the plaintiff might have to demonstrate a little bit more in terms of context and effect than they might in other contexts.

MR. DAGEN: Any views from the rest of the panel?

DR. BROCKMEYER: I would like to make a quick comment about Richard and what George just said about mechanisms for quick disposal of cases. I am going to point two cases out to you and Judge Schwarzer. Judge Schwarzer attempted in the Northern District of California to impose a screen -- and I will use the word screening mechanism to shed cases quickly, limited discovery, and in an effort to determine whether there was merit to the claim. If there was not, dismissal, and you move on, okay?

There are two cases of Judge Schwarzer's in that period that went to the Supreme Court, and both were reversed, Kodak and Hartford. Those both came from Judge Schwarzer. So, while I recognize that, I do not

know how receptive the courts will be to that type of procedure.

And so as a result, you are right, George, yes, one way to say you can get rid of the sham litigation quickly. Possibly not. It may depend on the judge.

MS. CREIGHTON: Maybe if I could just pick up on George's idea, sort of to continue -- and I also thank you for the kind remarks, George -- because I agree, I think, that it is definitely not one size fits all when we are looking at this kind of conduct. Some is much more likely to arise in circumstances where there is a likelihood of causing durable market power, and I think -- and I would agree with George that at the other end, deceptive marketing claims where you are talking about -- particularly when it is sort of dueling claims about products, I think Judge Easterbrook in Sanderson versus Culligan cases correctly points out on the do no harm end of things or sort of not trying to chill procompetitive conduct.

I think the FTC for the last 20 or 30 years has been a pretty aggressive proponent of the notion that advertising is a good, and so this is one area where if you allowed claims of any -- sort of I disagree with that advertising, he said bad things about my product, that is an antitrust claim, that kind of claim can chill

procompetitive conduct and that advertising is as much a good for consumers as price competition. So, I appreciate George's refinement of my analysis, and I would agree with it.

MR. DAGEN: So, Hill, did you have anything you wanted to talk about before we move on?

MR. WELLFORD: I have one question that several people glanced over, and I think George maybe most directly, so I will start there.

What does your point about incentives say about the kind of remedies that we should look for to be procompetitive or perhaps even prohibit as the FTC tried to do in the Schering case, if you want to characterize it that way? You said, you know, certain participants in standard-setting organizations, for example, may not have the incentive to correct the -- to challenge or challenge the correct way. Perhaps some people who claim to represent the public, which was your point, some would have better incentives than others. Is there anything to that that you would like to share?

MR. CARY: Well, yeah, let me back up a bit and start from the beginning on it. You start with the question, why shouldn't a violation of these kinds of commitments be enforceable only in contract or tort? I guess a wrinkle on that would be if it is remediable in

contract or tort, why bother with antitrust, particularly when, overlaying Preston's presentation, antitrust litigation can do harm?

I was attempting to answer that question by saying that there is a harm that might extend beyond those individuals that might have standing to bring a contract claim or a fraud claim, that that harm is also a harm to consumers, and that that harm ought to be vindicated. So, for example, let's say you have someone who is not part of the original standard-setting proceeding; let's say that a particular state law of contract limits the rights of third-party beneficiaries to only those who are directly anticipated to be beneficiaries; and therefore, a nonparticipant in standard-setting would not qualify, they would not have a contract claim directly. Nonetheless, there might be a situation where a violation of the standard-setting rules would cause competitive harm, and that individual, without standing under contract, might be an appropriate party to vindicate it.

A second example might be a state fraud statute or a state common law rule of fraud which says if the representation was not made to you, you have no standing to vindicate the fraud. Again, if a misrepresentation is made about patents, for example; if the

standard-setting body for one reason or another decides not to pursue that, say, for example, the perpetrator of that misrepresentation has now stacked the standard-setting body with its own agents, representatives, network of suppliers, allies; but there is a hold-up in the sense that the failure to disclose the patent was real, and now the patent is being asserted, why wouldn't a member of the public who is paying the bill for that violation of the standard-setting body's rules have an opportunity to bring an antitrust case, claiming the antitrust damage?

It is that kind of thing that I was referring to, in saying that people with standing may not have the incentives, and people without standing may have suffered the consumer injury or the anticompetitive harm.

MR. WELLFORD: Does it follow from your analysis there that a member of the public should be limited to remedies that benefit the public or the competitive process as a whole as opposed to that particular person who has brought the lawsuit, and is that done today or can it be effectively done?

MR. CARY: I do not think that there is a necessity, just because of the standard-setting context, to revisit all of the rules of antitrust injury and

antitrust damages. So, for example, the courts have established rules as to what consumers can recover. The courts have established rules as to what competitors who are the target of the anticompetitive activity might recover.

Those rules do not need be any different in the context of standard-setting than they would be in any other monopolization case or price-fixing case or other antitrust violation. I do believe that an antitrust injury requirement is appropriate.

MR. OHANA: Just to comment, to pick up on something George said, it is by no means universal in standards development organizations' IPR policies that any implementer of the standard is given explicitly the right to sue to vindicate a disclosure or a nondisclosure made to the standards development organizations. In fact, it is extremely rare in my experience that they actually explicitly say that. So, you are going to be proceeding at that point under a third-party beneficiary theory, and a third-party beneficiary theory will vary a lot with state law. So, in that sense I agree with George that it is entirely possible that the contractual remedy will not exist.

MR. DAGEN: A couple of panelists I think mentioned the notion that the regular false advertising

sort of claim would be on the lesser end of the perspective. I wanted to try to juxtapose that with the standard-setting discussion that you were having, which was let's say you have a misrepresentation not about IP but something else within the standard-setting organization. There was a case involving Heary brothers a long time ago where there was an allegation, I believe, similar to an Allied Tube sort of thing with packing except involving misrepresentations about an alternative technology that was to be accepted or proposed for an alternative within the SSO.

Where do you think that sort of misrepresentation more or less similar to the false advertising I think that you were talking about, where would that fall, if you have any thoughts on that? Anybody?

DR. McAFEE: Theoretically, it should not actually make any difference. If I establish my technology as the standard by claiming that the alternative technology sets the atmosphere on fire and burns up the earth, it is not -- and that is fraud -- that is not true, then it has had exactly the same effect. On the other hand, it seems much less likely that in reality you are going to be able to pull that off, because by and large, the standard-setting

organizations are composed of people who know technology pretty well, and so your ability to impugn alternative technologies seems much more limited than your ability to keep secret, for example, that you have patents.

MR. OHANA: There are cases, and I am thinking of the Schachar case in the Seventh Circuit, where, if I remember the case right, there was an allegation that there was a misrepresentation made to a standards body, and I think the response of the Seventh Circuit was that the answer to bad speech is more correct speech, and I would tend to agree with that. Those cases are not going to impose a high risk of durable competitive harm and therefore are unlikely to require the intervention of antitrust agencies or courts.

MS. CREIGHTON: I thought the Commission was right in Rambus in focusing on the ability of the representation to be adequately -- both that its -- both public and rebuttable, I guess, in the sense of I think they were focused in particular on collaborative ventures where there's less ability to ferret out people where it might be making misrepresentations, but they were trying, I think, to be getting at this point about is it something that can be responded to with the contrasting speech.

So, if I could change your hypothetical, for

example, suppose the misrepresentation was that each and every member of the standard-setting organization was voting based on sort of independent assessment of the technology, but, in fact, I have gone around and paid off everybody to vote my way, so there is a representation that everyone is voting unilaterally, and, in fact, that is not true. It has been stacked.

It seems to me like that misrepresentation poses the same kind of difficult-to-get-at or ferret-out problem that misrepresentations about IP do, but they would be quite different from saying you should not use that guy's technology because it is bad and that guy is right there and he can counter.

MR. CARY: Having set up the continuum and putting that kind of conduct at one end, now let me retract just a little bit, because I do think that there are environments where sowing confusion through false representations can, in fact, be an antitrust violation. I would not say that it does not exist, and I am reminded of the good old days of pop-up windows where people who were trying to create applications software that ran on particular operating system platforms would find that when somebody went to activate that application program, a little screen would pop up saying, "you are about to go into unchartered territory,

and we cannot guarantee that your computer will not blow up if you press the button."

There are examples where that kind of activity causes consumers, who are not expert technicians, to worry about using alternative software which might, if it were allowed to grow and expand, reduce an application barrier to entry and result in more competition to the operating system. I would not say that as a matter of law one should not be allowed to pursue those claims in a well-pled complaint and beyond summary judgment if there are facts to be litigated about whether that kind of activity does, in fact, retard the growth of competing technologies.

DR. BROCKMEYER: Well, yeah, I want to agree with what George just said, and we need to be a little careful, because while I agree also with what Gil said, that often false advertising or false statements may well be -- again, continuing to use the scale here -- at very much the low end of the scale, I do not believe we should fall victim to even possibly absolutist language, which one of the cases that we looked at was a Judge Easterbrook decision involving Culligan, where he has a fairly direct sentence that says commercial speech can never be the basis of a Section 2 claim.

I believe that is wrong, and indeed, to go back

to the quotation from Judge Ginsburg that George read at the end of his presentation I think has it right, which is, yeah, we need to look at the context of the circumstances where the commercial speech or the misleading statements are made and then measure the effect of that in the context of the market in which it is made.

MR. OHANA: I would agree with that. I would just point out that in the context of ETSI section consensus-based broad participation standard-setting, it seems to me that the likelihood that a disparaging statement by the proponent of one technology about another technology is very unlikely to have competitive harm, because there are going to be a lot of other participants who are going to be eagerly awaiting the response from the proponent of the criticized technology, and there is going to be a discussion of it, and in that sense, I think the likelihood of competitive harm is very low.

What I would point to in the example that George gave, which actually I had to look at when I was at the Antitrust Division, because I think it involved a company in the Pacific Northwest and the Windows operating system, is that what was very interesting about that is that it was actually used only in the beta

of I think it was Windows 3 or Windows 3.1, and what was sort of interesting is that Microsoft then pulled it when they actually released the operating system.

The argument from the complainants was that the damage had been done, because obviously the beta test was distributed to a lot of kind of key influencers of the technology industry who were then going to write articles, create demand for the product, knowing that DRDOS, at least according to Microsoft, cannot work. That might be a context in which responsive speech may not be effective, because it has to happen in a very short time period in which a lot of demand is going to be set in a product market that is very subject to tipping, which I guess goes to Michael's point that the underlying facts matter a lot.

MS. CREIGHTON: Another fact pattern that might be worth throwing out there at some point would be in the context of something that cannot be responded to effectively potentially with responsive speech or at least some party is vaporware, saying you have got your product coming when, in fact, it is not. So, that is a deceptive statement not readily correctable.

I think Preston and Richard probably know the literature better than I do, but I think Farrell, Sloaner and others have written some articles about at

least in tipping industries the potential for such statements to have anticompetitive long-term effects.

DR. ROZEK: I think part of the discussion has to involve the sophistication of the buyer. If you are making statements to a buyer about a competing technology, the buyer has to be able to assess those statements. It may not be in every case that they can do that instantaneously. It may be a statement about reliability of the product after it is being used for two years. You would not know if that statement is true or false up front. You may have to spend a lot of money to buy the machine, let's say a medical device, a lithotripter, for example, something you have to spend a lot of money, you would not know about the reliability until after you spent the money, put it in place, trained your workers and used it for a period of time. Not all people can make those kinds of assessments.

So, I think underlying all of this in the standard-setting process, in the false advertising cases, you really have to conduct a rule of reason analysis. You have to think about the sophistication of the buyers and their ability to interpret the information in a cost-effective way, without having to make a purchase and wait two years or so to determine if the machine is going to break down or be reliable, for

example.

DR. McAFEE: I agree with that completely. In fact, standard-setting organizations are unlikely to be a place where misleading statements of that kind are going to last. They tend to have a smaller number of very well-educated individuals, and it is more -- the vaporware, in particular, which is usually a gimmick to buy time while you try to develop a product so that another product does not become a standard.

Microsoft made various promises about Windows CE as a way of trying to prevent Palm from becoming a standard, although in the end, Palm did become a standard. It did not -- the vaporware promises were not actually effective in that case. But there, that is a much more likely thing. We will eventually support this, just wait another few months, and that may be enough to buy time to prevent a competitor from entering the market.

MR. DAGEN: If we could maybe put up a few of our propositions for discussion, first, slide number 2 states, "Merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well."

I think this has been discussed a fair amount today. Is there -- I heard a lot of consensus on this,

but I wanted to know if anybody had any views contrary to that view or proposition.

MR. OHANA: I do not know if it is contrary, but let me just offer what I hope is an exacerbation. If you look at Trinko, one of the facts in Trinko is that the conduct that Bell Atlantic was accused of was in parallel the subject of an FCC regulatory proceeding that resulted in the payment by Bell Atlantic of fines to the FCC, and there is language in the opinion, if I recall, that says that essentially where you have got a regulatory system and the regulatory system is intended to vindicate competition, the existence of the regulatory system matters relative to the antitrust analysis.

Then you get this quote from Conwood, and I will not try to reconcile the two except to note that I think there is a tension there.

MR. DAGEN: Well, given -- go ahead, Susan.

MS. CREIGHTON: Though I think maybe the way to reconcile the tension was -- as I recall, Trinko said where there is another comprehensive regulatory scheme whose purpose is to promote competition --

MR. OHANA: Exactly.

MS. CREIGHTON: -- and that is a pretty important difference.

MR. DAGEN: Go ahead.

MR. WELLFORD: We have already covered the law of contract a little bit, but let me talk about the law of fraud and maybe some other areas. These areas of -- is developed in the common law over a very long period of time as the collective judgments of the courts, the common law courts anyway, has been that there is some necessity to apply heightened pleading standards or specialized pleading standards to them.

For example, in the law of fraud, you have Federal Rule 9 and 9(B), which is the rule of specificity, the rule to require justifying reliance, and the law of defamation or misleading statements about individuals in that area. You have the Supreme Court's New York Times recklessness standard for defamation. Are we at all concerned that imposing Section 2 liability, which very clearly has regular pleading standards, regular Rule 8, is at all going to be an end-run around any of those established doctrines, and does that indicate that either we may be off balance with Section 2 liability or we should have Section 2 liability but apply some different pleading standards to try to vindicate those same concerns?

DR. BROCKMEYER: Well, let me respond first, and somebody can probably tell me I am dead wrong, but I

believe, for example, in Walker Process, if you plead a Section 2 claim based on Walker Process, you are subject to Rule 9, and so you are going to have to plead with specificity, I think in the case of Walker Process and maybe in the case also of inequitable conduct, such that I really wonder whether Rule 9 is already coming into play when you need the heightened pleading standard when fraud is the predicate act for the Section 2 claim.

MR. CARY: I guess I would respond that the typical kinds of requirements under Rule 9 are not ordinarily the kind that will not be able to be met in an antitrust case of this kind. I mean, it simply asks you to identify the kinds of statements that were made and to whom they were made, and so in the standard-setting context, it would be a statement that you would agree to license on FRAND terms, for example, that you did not intend to comply with or that you represented that there were not patents when, in fact, after the fact, you revealed the patents. The so-called heightened pleading requirement I do not think is all that heightened in this context.

I think in terms of the recklessness element, there might be some room for divergence for the reasons that Gil described, that the thrust of the matter, the crux of the matter in the antitrust case is the

exploitation of market power, not the niceties of the precise statements that were made, and I think in the standard-setting context, especially one where you are a member of the body that is establishing the standard, I do not think there is scope for recklessness and then exploitation of the benefits of that recklessness after the fact.

So, maybe there is a divergence there, and maybe there is also a divergence with respect to those states that have imposed a clear and convincing standard on fraud allegations, which is by no means the majority of states, but there are some.

Again, I would say that since the crux of the matter is the exploitation rather than the deception that a clear and convincing standard would not have a place in an antitrust case, whereas it might if what you are talking about is fraud.

MR. DAGEN: Slide 4.

Given what we have just talked about in terms of the use or the nonpreclusive effect of the actions under contract or tort compared to an antitrust case, I was wondering if anybody had any thoughts about the issue raised in Trinko about the cost of false positives. I know Susan talked about it a little, I guess several panelists talked about it a little, about it not being

as significant a concern with respect to misrepresentations, but I was wondering if the panel had any additional thoughts on that question.

DR. McAFEE: I think one issue that has been brought up is that while it is true that we do not have to worry about chilling misleading statements, that is, we are pretty happy to chill as many misleading statements as we can, it was also brought up that there is a fair bit of confusion among engineers, in particular, about just what the antitrust laws entail and that the threat of antitrust actions actually scare the engineers a lot, and I think maybe the middle ground here is to provide fairly concrete guidance as to what is allowed and what is not so that we reduce that, because it would actually be somewhat of a disaster if companies instead of joining standard-setting organizations said, well, we are just going to have our own standard, let them fight it out in the marketplace, which guarantees that the standard that comes out is proprietary.

We are actually quite happy, it is quite procompetitive, to have standards that are practiced by many companies; that is, common standards that are practiced by many companies. If you thought about all batteries -- think about your digital camera, which

probably has a proprietary battery. That is a much more expensive proposition than if you have double A batteries because of the standard associated and multiple firms practicing it. So, we do not want to actually have that harm the open standards, and, in fact, we want to make sure that what we do with Section 2 is encouraging open standards, not discouraging it.

MS. CREIGHTON: I am probably just repeating what I have said before. I think maybe the one area where you would be concerned about false positives here particularly would be chilling advertising unduly, because that obviously is a positive. I agree with -- who was it -- Michael who made the comment that we are probably not concerned with chilling having racks pulled out of the shelves, you know, and we would not be unduly concerned about chilling blowing up a competitor's factory, and there is all kinds of conduct we probably would not be too concerned about chilling.

I guess more generally, on the question of this specter that is haunting Europe of sort of -- specter haunting the United States of unduly broadening Section 2 liability, you know, it is not like we have got a huge number of cases here we are talking about where people have taken a fraud claim and then tried to turn it into an antitrust claim. We have got a handful, and I am not

even sure that it is very likely that we would see very many, because usually they have to have some kind of fraudulent relationship, you have to have a relationship of trust and confidence, and the circumstances in which companies are going to be engaging in that kind of relationship would seem to be relatively discrete.

So, I guess while I agree with the Trinko statement in general, other than advertising, I am not sure that I see a big issue with chilling.

MR. CARY: I guess that brings to mind one of the points that Preston made previously about lawyers wanting to convert contract cases into antitrust cases. It seems to me that in this regard, when you are talking about allegations that essentially sound in fraud, taking that and converting it to an antitrust case is not something you would do as a matter of course in any event.

First, you would still have to prove the fraud, maybe not to a clear and convincing element, but then you would also have to prove the other elements of an antitrust case, which just expands your burden, and a fraud claim is suitable for punitive damages. So, limiting yourself to treble damages when you could get punitives in a fraud case, I am not so sure that that is necessarily the inclination most plaintiffs' lawyers

would take.

I think what that points out, again, is that there is a different role for the antitrust law than there is for the private law of tort or the private law of contract in this setting.

DR. BROCKMEYER: Yeah, I want to make a quick comment about what Preston said about engineers not understanding the antitrust laws, and over time it was not engineers, it was someone else, some other occupation who does not understand the antitrust laws, and I am not particularly sympathetic with the engineers in that setting in the sense that the antitrust laws are obviously an important segment of our body of law, and in the engineer's development of a product or technology or whatever, the engineer has to come to an understanding with the assistance of counsel or otherwise, and we proceed. Antitrust obviously at times maybe we think has gone off course, but hopefully we bring it back on course. So, I must say, I am not particularly sympathetic to engineers that are sitting out there and worrying about the antitrust laws.

DR. McAFEE: All right, I am going to make the counter case, because what we are asking engineers to do in the standard-setting situation actually flirts with directly violating the antitrust laws. So, that is to

say, we are asking competitors to get together and set a standard that they are all going to practice. So, there is a sense in which they are already exposed to risk, and as a society, we do not like the alternative, because the alternative is the companies never get together, they each promote different standards that are not compatible, and the market chooses one, much like is happening with DVDs right now.

We have multiple standards. The market chooses one of them -- actually, does not matter whether you think about old DVDs where you had plus or minus R or new DVDs where you have HD and Blu-ray. The market will choose one that will be proprietary. That is bad for society. We would be better off as a society if we have a single standard that everyone agreed on, a useful standard that all of the companies get to practice.

And so unlike other cases of antitrust law where we said these are the laws, you have to obey them, here we are asking firms to get together and do something, which certainly there is a phrase, "tickles the dragon's tail," and it certainly tickles the dragon's tail of antitrust law automatically just because the competitors are standing in the same room.

So, I would argue, then, that it is incumbent on us as a society to actually give them instruction so

that they do not just say, well, we are just not going to go down that road. We are going to stay in our own labs and never meet, because those meetings do actually result in standards that are good for society.

MR. OHANA: I agree with Preston. I would just make the point that over-emphasis on antitrust risk and the idea that in some sense standards development is so fraught that engineers cannot ask probing questions about whether technology is patented, how much it will cost to practice, et cetera, creates the risk of significant inefficiencies as well, and you have to find a balance here between recognizing the potential for Section 1 problems in standard-setting and facilitating the risk of Section 2 problems.

DR. McAFEE: I want to make an unrelated remark on something that Susan has said several times. She has referred to advertising as a good. This is -- I would say that it is actually an emerging consensus among economists, but it is hardly something -- if you went back 15 years and polled economists, you probably would not find 50 percent agreeing with that, although that number has grown dramatically, so it is actually -- and sometimes it is very cutting edge for the FTC to be promoting that as its view, is that advertising is itself a good. Everyone understood that informative

advertising is a good, but advertising which is not directly informative, some sort of brand positioning advertising and that kind of thing, to view that as a good is actually very -- looks to the future.

An example of this, I think perhaps the most extreme example, is playground equipment. There are playground equipment companies that actually advertise that their rivals' products -- and they name them -- kill children. Now, this is advertising we would not want to chill, whether it is -- well, if it is false obviously we would like to chill it, but on the other hand, you have got to have -- you have to view that as sort of a risky ad, especially because there is a sense in which all playground equipment kills children in the sense that there is stuff that you can do that will kill you if you fall off it, for example, not used as directed. This is -- the advertising here -- so, advertising in the playground equipment area is particularly extreme, and it is actually worth going and getting the brochures. It is a pretty entertaining example.

MR. DAGEN: That actually reminds me of an FTC consent that we had a few years ago which involved bullet-proof vest manufacturers having an agreement not to engage in any sort of comparative advertising, so

they -- don't tell them -- we won't tell them yours fails if you don't tell them ours fails. Similar to the playground equipment in terms of mortality rates, I think.

MR. WELLFORD: Let me ask one question, which is taking it outside the standard-setting context, which is probably special, if misleading conduct is such an anticompetitive problem, why is it so absolutely common between rivals in industries? And two examples I'll make, and then you can react -- anyone, I will throw this to Susan first perhaps -- as to whether there would be necessarily an anticompetitive problem raised.

One is competitors are attempting to discover your trade secrets by aggressive but legal means, and your response is to start putting out misinformation so that they will not. That is an extremely common fact pattern. Does that raise concerns if they are a dominant competitor? Is that part of the rough and tumble of competition?

The other is if you are a dominant maker of a particular product, are you permitted to do what lots of product makers do, Sony with the PS3 or any variety of car makers have done this, put out fake test products in the market and do fake tests with consumer groups in the hopes that your rivals will find out about the fake

tests and then try to design towards that fake thing when you have got something real?

If you are a dominant competitor, do either of those raise concerns in the fact that they are common does not necessarily make them okay, as we have seen in the cartel area?

MS. CREIGHTON: I guess I am having a hard time seeing how either would be likely to create and maintain durable market power, which I hope I was clear about, but I think that that really is the crux of -- the question is, if we have inefficient conduct that we believe causes durable market power, that is what we are trying to get at, and so we are not -- and, in fact, part of my point had been we are not trying to make torts a predicate act for antitrust. In fact, that is exactly the wrong way to think about it.

So, the fact that this is conduct that you may or may not like or might or might not be good, unless I could see some way in which it was likely to be creating durable market power, I would not care from an antitrust perspective.

MR. DAGEN: Just following up on Hill's question then, the mere fact that it raises your rivals' costs in this context would not be sufficient in your mind? They are either going down the wrong path I think was -- Hill

was suggesting or they have to counter, take some counter -- so it raises their costs in the short run potentially.

DR. McAFEE: I would actually object to that as being characterized as raising rivals' costs.

MR. DAGEN: Okay.

DR. McAFEE: The rivals who have actually chosen to investigate whatever they investigate, putting out, you know, memos that say we are investigating this, the rivals are free not to follow that, and, in fact, that is -- I would say generally, the rivals are the best informed. The general public is much more likely to be misled, which is usually damaging to the originator. So, if Sony says, well, we are going to deliver this, and then they do not, that is harmful to Sony, not so much to Microsoft.

MR. DAGEN: Why don't we head to slide 3. I think we have had a lot of discussion about a lot of these topics, and that was the purpose of this panel. So, slide 3, "The jury could have found that --" this is from Conwood -- "that USTC maintained its monopoly power by engaging in the challenged conduct," and I would like to focus this on causation issues.

So, what kind of causal connection must be shown between misleading conduct and the creation of or

preservation of monopoly power? I think it was -- well, Michael or Gil, one of them talked about what you would have to show, and we would like to consider that issue a little more.

DR. BROCKMEYER: Well, let me go first. Yeah, basically what I had said was that you would need to show -- I used the word institutional, that is, getting away from the mistakes or the rogue district manager or whatever, that is, that it was a conscious decision that was corporate policy.

Secondly, that it was pervasive, and I thought a little bit about how I would measure pervasive, and I think I would -- what I suggested on the slide is relative to the relevant geographic market. So, the question is how much was there.

And then finally, ultimately, that it harmed the competitive process, that somehow, in the case of Conwood, that the throwing away of the racks and so on and so forth harmed the competitive process among Conwood and U.S. Tobacco.

As I mentioned earlier, I think it is a classic case of what happens when you have private litigation in front of a jury in that I just think about it as myself, as I am sitting here, I am a juror and not an antitrust lawyer, and I sit there, and here I have got a

monopolist who is undertaking these acts.

Now, one key, of course, is I think you have to distinguish -- and the judge has to instruct the jury in a way to distinguish between what was deceptive or misleading and what was procompetitive. For example, responding to WalMart or whoever it was, the competition, to have a rack, or even being the category captain or whatever, you know, in and of itself, those are not necessarily deceptive at all, and it is important that the court, in instructing the jury, allowed the jury to sort that out, and, in fact, would have to.

So, to me, again, as I said earlier, I think Conwood is just a classic case of a jury's reaction to the evidence presented.

DR. McAFEE: This is also probably a good time to remember that the antitrust laws are designed to protect competition and not competitors and that that is an easy mistake for a jury to make, because it is a somewhat subtle distinction, but that deceptive act should be viewed in that light, is does this actually affect competition in the industry or does this affect just one competitor in the industry.

MR. DAGEN: I think one of the allegations in Conwood was that as category manager, they were

supplying false information about their sales and their competitors' sales, and there was some talk about whether the information maybe was in public information, easily rebuttable.

Does anybody have any sense of where that sort of conversation would occur, where on the line that would be?

DR. BROCKMEYER: Well, one -- I hate to use this word, but when I thought about that -- and I teach Conwood in my antitrust class, okay, I like Conwood for teaching students, and the word that comes to my mind -- I hate to use it -- is whether, in fact, U.S. Tobacco took on I am going to say fiduciary responsibility when it became the category captain to provide that information. Yeah, the person from Kroeger or whatever said, I made my own decision, and U.S. Tobacco was not going to sway me, but the point being is that once U.S. Tobacco took on those responsibilities, I think it had a bit of a higher standard of conduct than it would otherwise have as a competitor going in and pitching information, because it had committed to Kroeger or WalMart or whomever to provide information not only about itself, but about the competition as well, in a role different than being just a competitor in the market.

MR. OHANA: Let me maybe disagree with that a little bit having advised on category management issues over time. You always tell your clients when they have been appointed, annointed, category captain that they should provide truthful information to the retailer, but it seems to me that the retailer knows the biases of the category captain, that it is going to design a planogram that promotes its products, and if you think that the incentives of the retailer in any way parallel the consumer welfare, then the idea that the dominant company that is appointed category captain has some kind of special obligation to be truthful seems odd to me.

This is not the context like the ones the FTC identified in the Rambus case where you are talking about a cooperative enterprise. There is a fierce competition for shelf space. Everybody knows what the biases of category captain are, and if the competitors ever feel that they are being discriminated against by the behavior of the category captain filtered through the retailer, they know Kroeger's phone number.

MR. DAGEN: In terms of causation, Judge Easterbrook in Sanderson distinguishes cases from Hydrolevel and says Hydrolevel had an enforcement mechanism by virtue of codes being adopted based on the conduct in the standard-setting organization, and he

says in Sanderson there is just basically speech. Does there have to be an enforcement mechanism of some sort in either government or standards or some other means before the requisite causation can be shown in one of these misrepresentation cases?

MS. CREIGHTON: I guess I'd say no and cite U.S. v. Microsoft. In the diluted Java, for example, there was no enforcement mechanism. It was cooperative in the sense that the standard-setting process is cooperative, but the representation was come build to Microsoft Java because all the applications that you build will be interoperable with Sun's Java, and people had no reason to suspect that those representations were not true, so they went ahead and built applications using Microsoft's version of Java and then discovered that, lo and behold, they had just collectively created a library of programs that would only run on Microsoft. So, there was no enforcement mechanism there that I can identify other than the fact that it was a network market, but nonetheless, I think that that decision -- that the Justice Department was correct in pursuing that claim and the D.C. Circuit in upholding it.

MR. CARY: It seems to me that the issue is durability, not enforcement, and the question is from what does that durability derive? Does it derive from

network effects, from existing monopoly and interfaces, does it derive from enforceability, does it derive from the incorporation of a standard? It could be any of those.

MR. DAGEN: If we could go to slide 7, this states, "The Federal Trade Commission may consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." That is from Sperry and Hutchinson, 1972.

So, one of the questions that arises in connection with this agency, the FTC, is whether Section 5 gives the Commission a different role to play in policing deceptive conduct than Section 2 of the Sherman Act.

DR. ROZEK: One of the most difficult things to deal with is arbitrariness on the part of the antitrust agencies or any regulatory agency. If it is going to be difficult for both buyers and sellers to understand what the policies are going to be or the enforcement policies, just introducing some arbitrariness into the process, then I think there is a social cost to that.

For example, one of the things that is very helpful in terms of enforcement of the antitrust laws are the Merger Guidelines. You have Guidelines that tell you how the antitrust agencies are going to look at

these things, and they follow those Guidelines. They have essentially become de facto the standard for doing competition analyses even in private cases.

To the extent that there is a hidden agenda or there is a hidden policy trying to be achieved, laws are going to be applied in an arbitrary manner. I do not think that does a service to buyers or sellers or to firms or consumers.

MR. DAGEN: We talked a little bit about treble damage actions. The other remedy often available is injunctive relief. Would that influence the standard that anyone would recommend as to what sort of conduct might be actionable, whether there is simply injunctive relief or whether there is treble damages also available?

DR. BROCKMEYER: Is your question in the context of Section 5 or generally?

MR. DAGEN: More generally.

DR. BROCKMEYER: Okay.

MR. OHANA: Bringing it back to the context of Section 5, I have the blessing and curse, as does Susan, of being a California admitted lawyer where we have the experience of private actions for injunctive relief under 17-200 recently, and I note this is a cautionary tale, narrowed significantly by state ballot referendum,

and the pattern in those cases is that the fact that you can only get an injunction and not money damages did not inhibit the creativity of people in using that law for some truly bizarre ends.

MR. DAGEN: Anybody else?

DR. McAFEE: There has been a little boom in sending out cease and desist letters for spurious copyright violations, for example. So, if I mention a company's name and mention their product, they may send me a cease and desist letter saying you are not allowed to mention our name because it is a copyright or it is trademarked, and that seems to be a case where something beyond -- and these are not necessarily antitrust issues, but agency action beyond the promote the First Amendment, for example, might be called for, and so insofar as other laws have a bearing on this, you might want to be selective about enforcement or go beyond. That is, I am going to agree, at least in principle, that going beyond the letter of the antitrust laws might be actually desirable in some circumstances, especially as technologies move very rapidly.

MS. CREIGHTON: And just going back to your Section 5 point, I guess I would say that I think inefficient conduct that causes durable market power is actionable under Section 2, is actionable under Section

5, and I do not think we need to extend or should extend Section 5 to go beyond that to reach other kinds of conduct.

MR. CARY: I guess I would slightly disagree with Gil also as a California admitted lawyer.

MR. OHANA: Oh, sorry.

MR. CARY: I think it does make a difference that 17-200 is limited to injunctive relief in terms of what kind of damage it can cause to pursue the more frivolous claims. I think the ability to get a motion to dismiss on the damage claims granted, leaving only a 17-200 claim, is significant and to some degree I think addresses some of the anticompetitive motives of bringing antitrust litigation that Preston has mentioned, and it leaves you in a position of simply litigating before a judge and not a jury a novel theory, which I do not think is quite so bad as facing the barrel of treble damages.

MR. OHANA: This may be an area where the perspective of inside and outside counsel may differ to some degree. We do not enjoy 17-200 cases even though there is no ultimate risk of damages because litigating them is expensive, time-consuming and difficult, and yes, it is somewhat better that there is no risk of damages, let alone treble damages, at the end, but that

does not make the conversation with your general counsel over how much you have spent on what is a completely baseless action any easier.

MR. CARY: One man's cost is another man's revenue.

MR. OHANA: I guess that's right.

MR. DAGEN: Turning to a variation on the subject, are there any safe harbors in the area of misleading or deceptive conduct that the panel would suggest or panelists?

While you are pondering that, I will pose the follow-up, which is what about in specific conduct areas, the context of SSOs or false advertising or patent abuse?

MR. CARY: I have got one example. I would go back to the sham litigation example. It would seem to me that if you are within Federal Rule of Civil Procedure 11, which requires a reasonable basis for the pleading, that being sued as an antitrust defendant for sham litigation ought to be dismissed as a matter of law. There ought to be a safe harbor if you have met appropriate pleading standards. There should not be a heightened standard for what might constitute sham litigation.

DR. McAFEE: What if it is 200 sham litigations?

That is, it is not one, but we have sued 200 different -- so, I am thinking about the Recording Industry Association of America. We have sued hundreds of different defendants. So, we are doing it over and over and over again. It is not clear to me that, especially when it is against small defendants, that there should be a safe harbor. I agree about one, but I am not so sure I agree with many.

MR. CARY: Well, I think you are back to the question of whether the lawsuit is reasonably calculated to yield the result that you are seeking in the case or whether it is calculated to reach some other result, and I am not sure the number should make a difference if each one of them independently would be deemed a reasonable assertion of a copyright or a patent.

MR. OHANA: This is the first time anyone from Silicon Valley defends the RIAA, but it seems to me if they bring 200 cases against 200 accused copyright infringers, those are all fair cases.

MS. CREIGHTON: I think what Preston is talking about is the kind of case that would meet what is referred to as the pattern exception to Noerr, where it is filed without regard to whether it is true or not, and so, you know, you are going to have a coin toss chance of it being true or not, but -- actually I am

blanking on the name of the Second Circuit case where they challenged each and every satellite certificate.

MR. CARY: Right.

MS. CREIGHTON: Primetime. So, it seems to me that if you could satisfy the pattern exception in Noerr, that would also stand up in antitrust law.

MR. CARY: Potentially it does under current law in the Second Circuit and perhaps in the Ninth Circuit, but I am questioning whether it should, especially in the case of intellectual property where one of the requirements for protecting the intellectual property is that you have zealously protected that intellectual property. The idea that then you could be charged with an antitrust violation for having done what the patent law requires you to do or the copyright law requires you to do is problematic, and I think the key goes back to your predicate, which is "without regard to the merits."

There is a distinction between bringing a case which satisfies Rule 11, because you have a case that is reasonably litigable on the one hand; and one that you bring with no basis, which would violate Rule 11, in which case if it has the requisite competitive effect, there should be an antitrust remedy.

DR. BROCKMEYER: George, I need to give a small refinement to your point, and I am not disagreeing with

you, but I am aware of circumstances where the initial bringing of the suit met Rule 11, but during discovery, it then, at that point during discovery, the plaintiff learned that there was no basis for the suit such that at that point then obviously if it pursues the case after that, then I think there is an issue for sham litigation. Now, whether that piece of litigation is exclusionary, that I do not know, but I would not agree that the safe harbor is, well, if you are okay at the initial filing of the suit, you are okay, because, again, of the circumstances I have discussed with you.

MR. CARY: Yeah, I think I recognize that distinction, and I do not totally disagree with that. I think it gets very complicated, though, because in that context, now you are talking about work product and attorney-client privileged communications, and it gets very complicated to assess at what point you are obligated to drop that kind of lawsuit.

DR. BROCKMEYER: Well, but the problem is in the patent arena you may learn during discovery of the fraud.

MR. CARY: Fair enough.

DR. BROCKMEYER: Okay?

MR. CARY: Yeah.

MS. CREIGHTON: I think I would probably

disagree with you, George, about the adequacy of Rule 11 sufficiently to guard against that anticompetitive effect, because I think what you are proposing -- well, usually my understanding of Rule 11 is an objective standard, and so if you file every lawsuit and then it turns out half of them are meritless, you get half of them dismissed, but you have still raised rivals' costs, and that is just sort of the willy-nilly filing, and to your earlier point about a judge being able to serve as an adequate gate-keeper, I do not think a judge typically can serve as an adequate gate-keeper to that kind of pattern of filing.

DR. McAFEE: Gemstar is alleged to be an example of that.

MR. DAGEN: In terms of a kind of the safe harbor, there is a Sixth Circuit case involving podiatrists which looked at a multipart test and said to survive summary judgment on a Section 2 case, you have to show at least that there is a factual dispute, that the statements were clearly false, and two, that they were difficult or costly for plaintiff to counter. Is that something that panelists would agree with?

DR. BROCKMEYER: Well, the problem with that decision was that the Sixth Circuit adopted what I indicated in my slides we should not have, which is

there was a rebuttable presumption, and George or someone said this earlier, we are now getting somewhat into procedural law. I do not think it is appropriate to have the rebuttable presumption. So, in the first instance, I would disagree with that case, and I think they filed a Ninth Circuit case as well.

MR. DAGEN: Another statement in that case was that there is no liability if the statements are simply misleading as opposed -- and that court talks about Matsushita and what we have talked about earlier with Verizon and the danger of chilling procompetitive conduct, and the Sixth Circuit is saying if it is simply misleading, and I think they mean by that not intentionally, if you cannot show from the beginning that it was an intentional misrepresentation, but if it is just a statement that turns out to mislead people, then they would dismiss the case on those grounds.

MR. CARY: In the Walker Process context, that kind of distinction is an important one. In patent litigation, there is always something in the file, especially if it is a complicated product deserving of a patent, something in the file that one can point to as being slightly irregular or perhaps not as articulate as it might have been or using a term of art in a particular way that is distinct from how some future

juror might interpret that.

Those kinds of technical issues that may or may not give rise to inequitable conduct, it seems to me that the judge does have an obligation to keep those kind of, quote unquote, "simply misleading statements" away from a jury and that some greater showing should be required before a Walker Process fraud allegation could be sustained.

MS. CREIGHTON: I guess I would repeat what I have said before, which is I think the -- sort of the intent element that seems implicit there maybe is a bit misleading. I keep -- this analogy may be more confusing than helpful, but I have tended to think of like opportunism in contract. If a taxi driver picks me up at the airport and says, you know, ten bucks, and then pulls away and, you know, two miles later pulls over to the side of the road and says, you know, I will either let you out here or it will be a hundred bucks, is probably not that relevant to me whether he thought about that at the time he picked me up or only after we left the airport, you know, it is still robbery.

And so in the same way, I do not know that it would have mattered to my analysis if a Microsoft said, go ahead and create, you know, applications using Microsoft Java, it will interoperate, and at the time

the person said that, he meant it and was sincere, went back home, and somebody said, well, actually, that is not true, all these people are only going to be able to write applications that work on our product, and he said, oh, yeah, that is a pretty nice fact, why don't we just keep that ourselves?

I am not sure that the intent at the time of the statement is really -- for antitrust purposes, that may sometimes be more confusing.

MR. CARY: Yes, I completely agree with that, and I think this goes back to Gil's distinction between exploitation and deception in the first instance. One can imagine, for example, a scenario where someone in good faith enters into a FRAND obligation, and then a year later, the CEO changes, and there is pressure on the stock, and he comes up with a brilliant idea, why don't we just increase the royalties on these patents? It would seem to me that that kind of exploitation is just as much an antitrust violation as one with the deceptive intent in the first instance.

MR. OHANA: And since we are in the world of patent trolls and nonproducing entities, the fact pattern that George just described is not one that is unfamiliar to many of us where incentives change after a patent is disclosed subject to a RAND obligation, and

what you thought was RAND based on what you perceived to be the incentives of the party making the declaration turns out to be quite wrong, often with significant economic consequences.

At that point, I don't really care a whole lot about whether the initial statement was made with guile or opportunism. What I care about is the economic consequence at the end.

DR. ROZEK: I think when you are talking about safe harbor as being a more objective standard to apply, like again, using the Merger Guidelines as an example, with the Herfindahl Index standards in the Merger Guideline. It is a more direct standard, easy to apply. By contrast, whether something is misleading or not misleading is difficult to determine with a bright line rule. It would be harder in this context to have a safe harbor as compared to the merger standard.

MR. DAGEN: Well, it is now approximately 1:00. There are many other issues that we could have covered today, but I think we have covered a lot of ground, and I wanted to thank both the panelists and again the FTC staff and DOJ staff who put pretty much all of this together, and thank Hill. I would like to thank everybody for being here, the panelists especially for taking time out to educate us today, and I would like to

ask the audience to give one final round of applause.

(Applause.)

(Whereupon, at 1:02 p.m., the hearing was concluded.)

C E R T I F I C A T I O N O F R E P O R T E R.

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I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 12/20/2006

SUSANNE BERGLING, RMR-CLR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

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