"Acing Antitrust"
Remarks of FTC Chairman Jon Leibowitz
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Thank you, Dean Treanor, for that kind introduction, and thanks to everyone at the Georgetown Law Center for inviting me back to this event. And thanks also to the Law Center for allowing us to borrow two of your wonderful professors, Howard Shelanski, who was a Deputy Director in the Bureau of Economics, and David Vladeck, who is the Director of the Bureau of Consumer Protection.

A year ago on this stage, I delivered a report card that evaluated how well the Federal Trade Commission measured up to its mission of protecting consumers and promoting competition, and I invited the audience to weigh in, especially if anyone felt we deserved a higher grade. That invitation is still open by the way.

Last year, the beginning of my daughters' school year got me thinking about grades and report cards. This year, another perennial September event – the U.S. Open – shapes my thoughts about the FTC and our performance.

I started watching tennis in what I think of as the beginning of its modern era, the 1970s and '80s, when the first wave of truly professional players were pushed aside by stronger, younger competitors who played with innovative new strategies and an undisguised ferocity. For example, the comparatively genteel play of Rod Laver and Ken Rosewall gave way to the tantrums of John McEnroe, the grunts of Jimmy Connors, and the blistering two-handed backhand of Bjorn Borg.

Each new grand slam champion changed, and today still changes, the game with a new stroke, new training regime, new serve speed. But what it takes to win at tennis stays essentially the same: the speed to get to the ball and the technical skill to make the shot.

The FTC's work on antitrust can be seen in the same light. The legal and factual questions we face continue to change and become more complex in industries that move faster than ever. And we need to resolve these questions on-time with an ever tightening set of resources. But we are, I believe, up to the task. As a bi-partisan consensus-driven agency, neither a creature of Congress nor of any administration, our agenda is shaped by the issues we confront as well as the continuing dialog between the staff and the Commissioners. While each Chairman changes the game in subtle ways, we all learn from our colleagues and build on those who served before us.

And this past year, we have improved the fundamentals of our game. We are keeping our eye on the ball, focusing on the facts. We have developed technical expertise sometimes equal to or greater than those we face across the net. And we have sped up our serve, resolving litigation and investigations in a timely manner.

I. Consistency and Consensus

At the FTC, our policies develop organically through the interaction of staff and the Commissioners. A Chairman cannot walk into the Commission on the first day, proclaim, as in Orwell's 1984, that "we have always been at war with Eastasia," and expect the rest of the Commission and staff to start marching.

In the case of our competition mission, this means that, although our priorities may change from time to time, there is a powerful continuity in what we do.

Let me give you a few examples.

Clarifying the state action doctrine, and limiting its anticompetitive excess, has been a Commission priority from the Muris administration in 2001 to today. As most of you know, the state action doctrine ensures that federal antitrust laws apply even to conduct by state agencies, except where the state clearly articulates policies that supplant competition with some other regime, usually regulation.

Earlier this year, in the *North Carolina Board of Dental Examiners* case,[1] the Commission unanimously rejected the Board's motion to dismiss the case on state action grounds. To us, it seemed that the fact that the Board was composed of members of the very profession they were regulating changed the character of the Board from a purely state government agency, which needs no supervision to protect consumers, to an association of competitors, which does. This is not a fully established area of law in the circuits, but important for our purposes, it is an area that has been part of the Commission's agenda for the last decade. The opinion, which was written by Bill Kovacic – we are going to miss him enormously when he leaves in October – received unanimous support from Commissioners from both sides of the aisle.

We also recently unanimously challenged Phoebe Putney's proposed acquisition of its rival hospital in Albany, Georgia;[2] alleging that the parties in that case structured the deal – seemingly a merger to monopoly – to try to use a local hospital authority as a straw man to shield it from federal antitrust scrutiny under the state action doctrine. Stay tuned: This case may very well reach the Supreme Court.

Of course the real issue is that the deal could raise prices for medical care in one of the poorest areas in the country. Just as with the *South Carolina Dental* case that we brought during the Muris administration,[3] where a restriction made it more expensive for impoverished children in South Carolina to obtain dental hygiene services, most of our state

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[1] N.C. Bd. of Dental Examiners, 151 F.T.C. 607 (2011), *available at* http://ftc.gov/os/adjpro/d9343/110208commopinion.pdf.

[2] Phoebe Putney Health Sys., 2011 F.T.C. LEXIS 64 (2011), *available at* http://www.ftc.gov/os/adjpro/d9348/110420phoebecmpt.pdf.

[3] S.C. State Bd. of Dentistry, 138 F.T.C. 229 (2004), *available at* http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf.

action cases are really about increasing choices and keeping costs down for real people with real problems.

Another example is our policy engagement with innovation, standard-setting, and patents. Over the past decade and a half, the Commission has made a number of contributions in this area. We began during the Pitofsky administration with the *Dell* consent.[4] And our commitment to this mission continued through the Muris, Majoras, and Kovacic administrations with cases like *Unocal*,[5] *Rambus*,[6] and *N-Data*,[7] and with a major Report on competition and patent law that we issued in 2003.[8] This year we issued another significant patent study,[9] this time focusing on damages and notice, held a workshop (which might lead to a report) on patents and standard-setting – and we continue to investigate cases relating to standard-setting. This is a complicated area, and not everything we do gets the unanimous support of the courts or even in the Commission, but our commitment here has been long-standing and bi-partisan, and has had a beneficial effect, ensuring that firms with patents behave better at standard setting organizations.

A final example, close to my heart, is the Commission's pay-for-delay agenda, which began under Chairman Pitofsky during the Clinton Administration, received the continuous support of all three Republican chairmen throughout the second Bush Administration, and is a focus of the Commission's work today. For the two of you in the room who have not heard me talk about this issue, the problem arises when a brand pharmaceutical company pays a generic competitor to drop a patent challenge and stay out of the market – behavior that costs consumers billions of dollars in higher drug prices and would be *per se* illegal if there weren't a patent dispute.

We continue to bring cases in district court and we hope to get a case to the Supreme Court, and – starting when Debbie Majoras was Chairman – we also lobbed the issue to Congress in hopes they could just put it away with a clean legislative smash.

Although we face opposition from both the brand and the generic industry – they usually fight about everything, but they are in agreement supporting these sweetheart deals –

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[4] Dell Computer Corp., 128 F.T.C. 151 (1999), *available at* http://www.ftc.gov/os/1999/08/9823563c3888dell.htm.

[5] Union Oil Co. of Cal., 140 F.T.C. 123 (2005), *available at* http://www.ftc.gov/os/adjpro/d9305/index.shtm.

[6] Rambus Inc., 2007 F.T.C. LEXIS 13 (2007), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf.

[7] Negotiated Data Solutions LLC, 2008 F.T.C. LEXIS 120 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf.

[8] FTC, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[9] FTC, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (2011*), available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

we continue to build support. On Monday, the President included a provision to curb pay-for-delay settlements in his recommendations to the Joint Committee on Deficit Reduction.

So we will see – a legislative win in five sets is still possible.

Consistency is the key to making it in pro tennis – serve to serve, set to set, tournament to tournament. You don't see us changing our style – going from serve and volley to baseline play – with changes in administration. This benefits companies and consumers alike: companies recognize how they may compete regardless of the administration in power – they know where we are going because they know where we've been; and consumers benefit as we get better at enforcing the law – of course, practice make perfect.

II. Focusing on the Facts and Developing Technical Expertise

In tennis, a player must master the basics, learn from every match, and develop technical skills at least equal to the opponent he or she faces across the net. In antitrust, the Commission must master the facts, learn from every case, and develop in-house expertise at least equal to cases we see. Because we are an independent agency, created to be an expert in the industries we oversee, we have a continuing duty to know almost as much about the industries as they know about themselves. Sometimes, as with our merger retrospectives, we continue to follow the facts even after the case is over to make sure that we are learning the right lessons from the marketplace and from our actions. And we don't just rely on bringing cases to learn; we also hold workshops, write reports, and, when appropriate, bring in experts. And that's true on the consumer protection side as well.

As the American economy and the FTC portfolio becomes more and more focused on technology and e-commerce, so do the experts we hire, especially pros like our first Chief Technologist Ed Felten, who we have borrowed from Princeton for the last year. These experts change the way we do our jobs: by supplementing information we receive from dueling industry experts with analysis from our in-house experts, we can avoid being either unnecessarily skeptical or unnecessarily credulous of any party.

An example of how the Commission follows the facts where they lead is our decision to allow Google to close its deal to buy AdMob. In that case, Google, the proprietor of the major mobile platform Android and of one of the largest ad networks for mobile applications, was buying AdMob, another one of the largest ad networks for mobile applications. Because of the combined presence of the two companies in the market for what are called "performance ad networks" on mobile devices, the Commission came close to issuing a complaint challenging that merger, on a vote that would probably have been unanimous.

Instead, we voted unanimously to close.

As we noted in a statement concerning the merger,[10] during the investigation Apple acquired a large mobile ad network and emerged as a potentially strong mobile advertising network competitor. We also thought, given the developments in mobile platforms, that competition between platforms was likely to become the dominant mechanism for competition generally in the mobile space.

Much has changed in the markets in that case, from the growth of Android to the possible entrance of Google as a manufacturer of Android devices with its proposed acquisition of Motorola Mobility. And of course the rapid advance of related platforms, principally the iPad, is important as well.

So we will continue to look hard at this market to ensure that consumers are well served and companies continue to remain free to develop new products and services.

III. Resolving Difficult Legal and Factual Issues In Time to Help Consumers

Anyone who has had more than a couple of tennis lessons or played on a team has heard the coach say: "to hit the ball, you have to get to the ball." In antitrust, the same principle applies: when there is anticompetitive conduct, all the history, bipartisanship, study, and technical expertise in the world is irrelevant if we cannot resolve cases before an anticompetitive industry or practice becomes too entrenched to dislodge.

That brings us to today and our current investigation of Google, which that company has acknowledged publicly. For those of you in the audience from the press, we are going to talk, not about where we are in the investigation or what we are finding, but instead about the predilection of some of you to call this match before the end of the first set.

For example, in an otherwise thoughtful editorial by Bloomberg's new virtual editorial board, it decried "protracted rituals of antitrust" and litigation "time capsules," assuming, it seems, that any Commission action would be comparable to the Department of Justice's 15-year-long slog of an antitrust investigation of IBM.

Of course, the press has its own job to do, and, to the extent that some journalists predict that we are going to do a lousy job protecting consumers, it is up to us to prove them wrong. But there is an underlying notion in pieces like the Bloomberg editorial that needs challenging: the assumption that antitrust is too slow to have any role in protecting consumers in fast-moving, high technology industries.

It is true that older models of antitrust, let's call that old-school antitrust procedures, allowed for monopolies to exist for many years during investigation and trials. By the time a conclusion was reached in these cases, if there was a conclusion, the only remedy left was sweeping and structural or non-existent: break up the company or drop the entire case and

[10] FTC, Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031 (2010), *available at* http://www.ftc.gov/os/closings/100521google-admobstmt.pdf.

move on. Often long before that decision, the competitors had given up. The result? No one was helped – not business and not American consumers.

At the Commission, we need to balance our mission to protect consumers with a need, on the part of both firms and consumers, to do it quickly. Consumers are entitled to competitive markets, but they also deserve timely resolution of matters before the Commission. So do businesses.

The best, recent example of the need to move quickly in the high-tech area is our recent *Intel* case.[11] Our investigation of Intel started out very slowly and went on for quite some time, but once the Commission issued process and then a complaint, the litigation proceeded with alacrity and ended with a consent less than a year later.

We think the remedies in the consent do much to protect consumers while still allowing Intel to innovate, develop, and sell new products. And I am proud of the relationship that we have been able to maintain with Intel since then. Still, we might have gained more for consumers: much was lost in the years between the start of the investigation and the litigation's conclusion, and competition for CPUs and other components in personal computers might have been different had we moved faster initially. And moving quickly might have been fairer to Intel too.

As a result of what we have learned from Intel and other cases, the Commission is no longer bogged down in outmoded procedures. Much of what we've done at the Commission in recent years has been to make us better at getting to the bottom of investigations and resolving them faster to ensure that businesses get certainty and consumers get protection quickly. That was at the heart of the changes to our Part 3 rules, you get an antitrust trial, and it is implicit in every effort we make to learn more about industries and develop our internal expertise. We have also pushed to make "go/no go" decisions on investigations earlier so that they don't linger on. All this reduces expenses and, I believe, allows us to act with a lighter hand.

These improvements, for those of you not already thoroughly distracted by my continuing allusions to tennis, are a bit like the innovations in the tie-breaker rules in tennis. When the tie-breaker rules don't apply, as in the final sets of singles matches at Wimbledon, a player has to win the set by two games to win the match. That has led to matches like one last year at Wimbledon which lasted over 11 hours.

Just as the new rules at the U.S. Open have limited the number of truly marathon tennis matches, our new litigation and investigation rules and procedures have reduced the time for cases to come to closure.

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[11] Intel Corp., 2010 F.T.C. LEXIS 82 (2010), *available at* http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf.

IV. Conclusion

Tennis has centuries of history and a world's worth of fans. Though not quite as old – it's been only 97 years since our founding – the FTC is almost as well traveled. For example, as you have heard, we entered into an antitrust cooperation agreement with the Chinese agencies and have already begun to work together on cases of mutual interest. We are also training staff of the Indian competition agency and helped them finalize their merger review regulations. Next month we will mark the 20th anniversary of our cooperation agreement with the European Commission. We continue to work closely with the EC on cases and have been conducting intensive dialogues with them on unilateral conduct policy and merger review practices. And by the way: despite rumors to the contrary, we're getting along really well with our sister agency down the street.

Like my tennis heroes, the FTC has developed its antitrust game over time, working on consistency and bipartisanship. We've drilled on the basics, following facts and establishing in-house technical expertise. And we have developed the speed we need to do our job well even in a fast-moving, high-tech marketplace.

The tennis heroes of 30 years ago burst on the tennis scene with fierce physicality and intense playing styles. But it was the quieter champion of a few years before who described the sort of player we all hope the FTC can be in the realm of antitrust. The great Arthur Ashe said: "True heroism . . . is not the urge to surpass others at whatever cost, but the urge to serve others at whatever cost." If I am invited back next year – even if it's only because you still want to know what we think about Google – I hope you will be able to say we lived up to that standard.

Thank you very much. I'm happy to answer questions.