E. Ongoing Relationships Between Merged Firm and Acquirer of the Divested Assets

Many FTC consent orders require ongoing relationships between the merged firm and the acquirer of the divested assets. Often ongoing relationships will be required, especially in pharmaceutical cases, where the acquirer has to undertake a regulatory approval process and may need an interim source of supply during that period. Although the Divestiture Report observes that these relationships can be problematic, often they are successful. The Abbott/ALZA merger illustrates where ongoing relationships may raise concerns.

Many of the FTC's recent enforcement actions have involved pharmaceutical markets. In 1999, it reviewed the proposed acquisition of ALZA Corporation by Abbott Laboratories. The investigation revealed that the proposed merger would lead to serious anticompetitive effects in the market for palliative hormone drug treatment for advanced prostate cancer.[66] At the time of the proposed merger, Abbott already had an eighty percent market share in a two-firm market. ALZA was not yet in the market but was poised to enter within a relatively short period of time, and the investigation confirmed that ALZA would provide vigorous competition after entry. ALZA was planning to enter with an innovative delivery mechanism providing longer drug deliveries for patients.[67]

Over the course of the investigation, the parties presented several settlement proposals that involved selling various assets related to Viadur, ALZA's product, which was still in development, to another pharmaceutical company. The staff had serious concerns about competition being restored based on this arrangement for several reasons. First, the completion and commercial scale-up of Viadur would depend upon the research and development know-how associated with individuals from throughout ALZA's organization for several years as Viadur and its manufacturing processes were optimized and made most efficient. Ascertaining the necessary ALZA individuals was impossible before the product or process variables were known. Second, the acquiring party was a pharmaceutical company that was not in the business of developing innovative drug delivery systems the way ALZA is; the potential acquirer had experience transferring technology associated with ongoing pharmaceutical businesses, not those still in development. Third, the acquirer would have taken several years to be approved by the FDA at its own facility after trying to replicate facilities and processes of Abbott/ALZA's that were not yet even in place and would have been dependent upon Abbott/ALZA's supplying the product for several years after it completed the development and commercial scale-up process. With Abbott controlling eighty percent of the market, and having such a critical role in the success of any buyer of the assets, it was uncertain whether any divestiture could effectively work. In addition, the length of the supply contract, which

66 Press Release, Alza Corp., Abbott Laboratories and Alza Corporation in Discussions with the Federal Trade Commission (Sept. 13, 1999).

67 Press Release, Alza Corp., Alza and Abbott Complete Merger Termination (Jan. 20, 2000).

would had to have been more than two years, posed significant competitive concerns.

An alternative upon which the acquisition might have been approved would have been for Abbott to divest its own cancer product. Such a divestiture could have resulted in something that resembled the preacquisition state of the market. Nevertheless, this was not a viable option for Abbott and the transaction was terminated by the parties.

F. Potential Competition Mergers

Increasingly, the elimination of potential competition is a concern in mergers, especially in telecommunications, energy, and grocery markets. In many cases, where the scope of potential competition is relatively modest, divestiture may be sufficient relief. For example, competitive concerns in several supermarket mergers have been resolved through the divestiture of various land sites that were purchased in order to enter new markets. In other cases, where the scope of potential competition is far more substantial, divestiture may be inadequate as illustrated by the Staples/Office Depot merger.

Staples's proposed acquisition of Office Depot in 1997 involved the two largest office supply superstore chains in the United States. In many geographic markets, the merger would have resulted in a monopoly, and at most there was only one other superstore competitor, Office Max. The parties sharply disputed that office supply superstores were a relevant market, but the district court ultimately agreed with the FTC.[68] As with the Rite Aid/Revco merger, the parties offered to divest stores in local markets where they had direct overlaps. They proposed a divestiture of sixty-three stores, primarily in merger to monopoly markets.

There were two problems with the proposed solution. First, it did not address a significant potential competition issue. Both Staples and Office Depot had been rapidly expanding into each others' geographic markets where they did not already have a store. The evidence in the case clearly showed that prices were lower in markets where there were two competing superstores, rather than a single superstore, and lower still in markets where there were three superstore competitors.[69] The merger would have eliminated the likelihood of lower prices as Staples and Office Depot continued to invade the other's backyard. In addition, the proposed divestitures were unable to remedy such a negative competitive effect.

The second problem with the parties' proposed remedy was that the most likely purchaser of the divested stores probably was Office Max, which was already in the market and could provide a basis for achieving reasonable scale economies. A divestiture to Office Max, however, would result in a duopoly in the overlap markets. It was clearly better to have three competi-

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68 FTC v. Staples Inc., 970 F. Supp. 1066 (D.D.C. 1997).

69 *Id.*