



Summary of Call with Antitrust Expert Matthew Cantor Regarding Judge in TMUS/S Trial

September 24, 2019 by Blair Levin

Last week we held a call with an antitrust Lawyer Matthew Cantor, of the firm Constantine and Cannon. Not only is Mr. Cantor a distinguished antitrust lawyer with experience in telecommunications and media matters, he is also one of the few lawyers who has ever tried an antitrust case before Judge Victor Marrero, the judge who will preside over and decide the states' challenge to the TMUS/S deal.

[Attached](#), please find a transcript for that call. But first, we'd like to summarize some key points, with actual quotations edited for brevity.

The Judge's experience with antitrust and how he tries cases

The Judge has little experience with antitrust cases and the prior case was a jury case, which presents a different situation. Mr. Cantor noted about his own case that it may have been "the only antitrust case ever tried in front of him...He's had other antitrust matters but none ever went to trial. My case concerned an alleged group boycott by a number of radiologists and radiology practices. The case was a jury trial, which is a very different type of exercise. In a judge trial (as the TMUS/S trial will be), judges are often more open and expansive as to what they allow to come into evidence."

The Judge is unlikely to be active in driving a settlement. Mr. Cantor noted the Judge is "not a head-banger. That's how we refer to judges that try to force settlements. I would be surprised if he's doing that, particularly as he comes from a governmental background. I think that he would let the government try its case and there's virtually no chance of a settlement."

The Judge is likely to be open about his thoughts on the proceedings, particularly on procedural motions.

Mr. Cantor discussed in some detail how Judge Marrero dealt with a summary judgment motion in his case, by signaling his direction procedurally. Mr. Cantor described that aspect of the Judge, saying, “he’s certainly not someone who’s not going to tell you his views about the case. He does – he is open about his thoughts about the case, about the merits...So I think in this instance if there was some type of dismissal motion made by the merging parties before the preliminary injunction trial here, I think he would be just as candid with them as he was with us.” While to date a magistrate has handled the motions, at some point, the Judge will take over and that will provide greater transparency about the Judge’s own views.

The Judge is unlikely to be active in directing testimony. Mr. Cantor noted the judge is “not someone who’s going to let the parties put on ponderous examinations but, on the other hand, he’s not, again, he’s not a head-banger. He’s going to let them do what they’re going to do.” Mr. Cantor further thought the Judge was unlikely to allow either side to strike testimony, letting “the parties put on their cases.”

The Judge is efficient in writing and releasing orders. In terms of the time it will take for the Judge to rule, Mr. Cantor said, “I don’t think he’s going to take three weeks and I don’t think he’s going to take six months...He’s relatively efficient so I wouldn’t be surprised if there’s a decision out within six to eight weeks.”

The Judge is unlikely to let politics influence his decision. A major question is whether the Judge’s background and politics will direct his decision. Mr. Cantor said it will be the evidence that matters, noting, “When it comes to what his disposition is, he is a pro-government guy. He comes from a government background so I think the fact that the plaintiffs here are governments is something that is not necessarily good for the defendants but of course I don’t think he’s also going to determine in advance that government is correct. He’s going to see the evidence....A lot of investors ask, as this is a Democrat, and a liberal Democrat at that, and we’re in a very divisive time where states, particularly the state of California, who’s one of the lead plaintiffs here, and the Trump Administration see far from eye to eye. Is that going to color him because he’s a Democrat who may not like Donald Trump? I don’t think he’s going to do that. I think he’s a pretty professional guy.”

Watching the Trial

Business documents may be more important than expert testimony. Discussing what kind of evidence might prove most important, Mr. Cantor pointed to a Ninth Circuit case in which the trial judge basically dismissed expert testimony and relied heavily on internal business documents, saying “I would focus on the expert testimony but I think almost more importantly nowadays is whether or not there are hot documents from the regular course in business that support their theory...Judges more and more are becoming skeptical of some expert analysis. So when you have documentary evidence that demonstrates that you’re right, that this is how the parties thought about things during the regular course of business, I think that can be very persuasive.” Mr. Cantor further explained he was “talking about documents that are

created by the parties themselves in the regular course of business, (such as) a strategy document... Some of the best documents are prepared by outside consultants, like a McKinsey or a Bain. Those entities think like antitrust lawyers. They think about what do the markets look like, what are the alternatives available to consumers, how will this transaction play out in the end and should we assume that it will result in a price increase? So those types of documents, whether they were internally prepared or prepared with an outside consultant, can be very, very probative in an antitrust case.”

The Judge will weigh evidence about the DOJ and FCC decisions but is unlikely to defer to those federal agencies. Mr. Cantor discussed how the judge might view the DOJ and FCC approval of the merger, saying “ It’ll be part of his opinion...he’ll have to deal with it in his conclusions of law.” Mr. Cantor pointed out that the approvals did not involve judicial hearings and therefore the approvals are not “precedent that a judge must follow...He’s going to have to mention why he disagrees with those findings, particularly the DOJ findings because the FCC is not an antitrust authority. It’s a communications authority. It does deal with competition issues but it doesn’t necessarily deal with antitrust, per se...(The Judge will) consider it but he’s going to make his decision based on the evidence in front of him and the law as it’s interpreted. And of course he’ll be writing a decision, particularly if he blocks the deal, not only for the public view and not only to demonstrate why the merger is likely to substantially lessen competition but he’s writing it for the eyes of the Second Circuit” in case of an appeal.

The weakened firm defense is unlikely to help the companies. One of the issues in the case will likely involve Sprint’s economic difficulties. As to those, Mr. Cantor noted, “there’s no such thing as a weakened firm defense under the antitrust laws. The merger guidelines are very specific. You can argue that the target is a failing firm, and to be a failing firm, the firm has [to] have filed for bankruptcy and there has to be no reasonable prospect of reorganization. Sprint hasn’t filed for bankruptcy and it hasn’t filed Chapter 7 liquidation proceeding here...So this is not a failing firm under the antitrust laws and I don’t think that that type of argument that it will not be viable can be considered by the court. It can’t be considered as a matter of law and if it is considered, I think that Judge Marrero would be reversed. There’s a high threshold in merger precedent for failing firms. Sprint does not meet it.”

Ergen a wildcard as a witness. Mr. Cantor discussed the potential of Charlie Ergen taking the stand and said, “he’s a wildcard. You never know what he’s going to say at the end of the day and I would be hesitant to call him...he could say things that aren’t necessarily supportive of the companies’ case...He’s definitely a smart man. He’s a very, very smart man but, you know, he has his own business interests and I would just be hesitant to call Charles Ergen as a witness.”

Ultimate outcome: Good chance deal is blocked. Mr. Cantor opined on the ultimate outcome by saying “I think there’s a good chance that the deal’s going to be blocked.” Mr. Cantor also noted that the Second Circuit has little, if any, precedent on Clayton Act merger cases and would have to rely on the decisions of

other circuits on appeal. He pointed out that while the Second Circuit is liberal on some things, its most recent antitrust decision – which was not about mergers – would be classified as conservative. Mr. Cantor suggested the earliest one could get a Court of Appeals decision would be Q1 2021.

Prospects for a DISH/DirecTV deal

As Mr. Cantor was part of the team that successfully opposed the 2002 DISH and DirecTV merger bid, we asked him about the prospects for antitrust approval now.

It is still difficult to obtain approvals and states may sue here as well. He said, “the key issue there...is whether streaming is really a competitor to multi-channel video platforms. As laissez-faire as this Justice Department has been in some senses, when it comes to telecommunications, they still have been holding to traditional views of the market, for example with broadcast TV in assessing some of the deals that have recently happened, like the Nextstar deal that just occurred. So my gut is that the deal would not pass antitrust muster...If the Justice Department tried to give it a pass, (the states) would sue over the deal. Even if (streaming) is a competitor, it’s likely a competitor in certain regions, in certain higher-income areas,...than it is in others and the key issues here will always be how is steaming utilized in the rural markets...You have depressed areas here that really can’t pay for these services in addition to your basic cable services. And if that’s the case, what you’re going to get is a merger-to-monopoly.”

But better to try now than wait until a new Administration might be in office. He also noted, “if I were DirecTV, if I were AT&T now and I was thinking about selling to EchoStar and I wanted to try to do this deal, I’d tried to do it right now because you don’t know what’s going to happen in 2020. Donald Trump could be reelected president but he could not be reelected president and you could be facing a President Warren and I can say, and I think we all would agree, that if President Warren comes into the office—even if President Biden comes into the office—the odds of getting that deal through will be lower. So I wouldn’t be surprised if they try to get this deal through now.

Marrero to rule on Trump tax case. Finally we note that Judge Marrero was just appointed to rule on the case brought by [President Trump’s lawyers to block Manhattan District Attorney Cyrus Vance](#) effort to obtain Trump’s tax returns. We don’t the believe the Judge’s decision in that case is likely to provide any insight into how he will rule in the antitrust case, but we would guess a ruling for Trump will be seen as a positive for TMUS and S stock while a ruling against would have the opposite effect. But that effect, in our view, will be based on a false bit of logic (that the decision will be politically based) and will be short-lived.

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