Concurring Statement of Maureen K. Ohlhausen
In the Matter of Mallinckrodt ARD Inc.

File No. 131-0172
January 18, 2017

Competition in healthcare markets, including pharmaceuticals, is vital for U.S. consumers. Thus, I have strongly supported the Commission's long-standing, bi-partisan work to protect competition in healthcare. But, as the Supreme Court has recognized "[t]he opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth."[1] Competition officials must allow a company to profit from its innovation, while preventing anticompetitive actions to unlawfully obtain or maintain a monopoly. Standing alone, a "high" pharmaceutical price is not an antitrust violation if it simply reflects a legally obtained intellectual property right. Antitrust comes into play when a firm lifts a competitive constraint on its market power, such as by acquiring a competitor or engaging in a pay-for-delay agreement. Likewise, in some circumstances, an action by a monopolist to block a nascent threat to its monopoly can violate antitrust law.[2]

I voted to accept the proposed consent in this matter because I have reason to believe that Mallinckrodt ARD Inc.—formerly known as Questcor Pharmaceuticals, Inc., and its parent company Mallinckrodt plc—violated the antitrust laws by acquiring the rights to the drug Synacthen Depot in the United States to protect its H.P. Acthar Gel monopoly. To restore competition, Questcor will divest rights to Synacthen Depot, and related assets, to a competitor committed, and already working to develop, a synthetic ACTH drug. This remedy will make a competitive drug option to Acthar more likely, thus decreasing prices and increasing availability for patients.

As part of the consent, however, Questcor also will pay more than $100 million in disgorgement. I write separately because I have concerns about that aspect of the remedy.

I remain worried that the Commission sues in federal court and seeks disgorgement in matters that do not meet the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases,[3] which the Commission withdrew over my objection in 2012.[4] In empowering the FTC to bring cases in administrative adjudication, the President and Congress

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[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).
[2] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) ("it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will.").
[3] *See* Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820 (Aug. 4, 2003).
[4] *See* Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), https://www.ftc.gov/public-statements/2012/07/statement-commissioner-maureen-k-ohlhausen-dissenting-commissions-decision.

more than 100 years ago gave the Commission a responsibility to develop our antitrust laws. I would have brought, and settled, this case in administrative adjudication rather than filing in federal court.