DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN
CARDINAL HEALTH, INC.
FILE NO. 101-0006
APRIL 17, 2015

I disagree with the majority's decision to pursue disgorgement in this matter because it is not an appropriate case for seeking that extraordinary remedy. Given the evidence presented, I do not have reason to believe that Cardinal Health, Inc. (Cardinal) committed any antitrust violation, much less a clear one. Moreover, we do not have the ability to calculate the disgorgement amount with any certainty. Finally, this case raises significant policy concerns regarding the pursuit of disgorgement in competition cases and the lack of guidance that the Commission has provided the business community about when it will seek this remedy.

I. This Is Not an Appropriate Case for Disgorgement

In 2003, following significant debate and discussion – both inside and outside the agency – the Commission issued a policy statement setting forth the criteria that would guide any decision to pursue the remedy of disgorgement in competition cases (the Policy Statement or Statement).[1] That Statement identified three determinative factors: (1) whether "the underlying violation is clear"; (2) whether there is "a reasonable basis for calculating the amount of a remedial payment"; and (3) "the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings."[2] The Statement served the important purpose of providing firms with guidance on when and where the Commission would seek the extraordinary remedy of disgorgement in antitrust cases.

Regrettably, the Commission withdrew the Policy Statement in July 2012, opting not to replace it with any guidance on when the Commission would pursue disgorgement.[3] As I noted in my dissent at the time,[4] the Policy Statement had a strong, bipartisan pedigree, having been issued by a unanimous Commission and subsequently endorsed unanimously by the Antitrust Modernization Commission.[5] I was further concerned that withdrawal of the Policy Statement runs counter to the important goal of transparency, which is an important factor in ensuring ongoing support for the agency's mission and activities. As I argued then, "In essence, we are

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[1] *See* Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820 (Aug. 4, 2003).

[2] *Id.* at 45821.

[3] *See* Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), *available at* https://www.ftc.gov/public-statements/2012/07/statement-commission-regarding-withdrawal-commissions-policy-statement.

[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), *available at* https://www.ftc.gov/public-statements/2012/07/statement-commissioner-maureen-k-ohlhausen-dissenting-commissions-decision.

[5] *Id.* at 1. *See also id.* ("Other well-respected antitrust practitioners, such as former FTC Chairman Pitofsky, also have expressed support for using disgorgement only in exceptional cases.").

moving from clear guidance on disgorgement to virtually no guidance on this important policy issue."[6]

In the two and a half years since the Commission withdrew the Policy Statement, the Commission has sought disgorgement in more cases than it did during the previous nine years the Statement was in effect. During that period, the Commission pursued disgorgement in only two cases.[7] Since the withdrawal of the Statement in 2012, however, the FTC has pursued disgorgement in three cases, including the current one.[8] Contrary to the views expressed by the majority that withdrew the Statement[9] and the majority that chose to pursue disgorgement in this case, I believe the Commission should pursue the remedy of disgorgement only in those rare cases that meet the Statement's criteria.

Even assuming liability could be established in this case – and I do not believe it could, based on the evidence presented to me – there is simply no reason why the criteria laid out in the discarded Policy Statement should not apply to this case, given that the vast majority of the alleged harm took place while the Statement was in effect. However, this case fails to meet what are clearly the two most important criteria identified in the Statement: a clear violation of the antitrust laws and the ability to calculate disgorgement with certainty.[10]

The disgorgement sought in this case appears to be based in significant part on Cardinal's acquisitions of Syncor International (Syncor) in 2003 and Geodax Technology Inc. (Geodax) in

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[6] *Id.* at 2.

[7] *See* FTC v. Ovation Pharms., Inc., Civ. No. 08-6379 (D. Minn. filed Dec. 16, 2008); FTC v. Perrigo Co., No. 1:04CV01397 (D.D.C. filed Aug. 12, 2004).

[8] *See* FTC v. AbbVie, Inc., No. 2:14-cv-05151-HB (E.D. Pa. filed Sept. 8, 2014); FTC v. Cephalon, Inc., No. 2:08-cv-2141 (E.D. Pa. Nov. 18, 2013) (FTC's response in opposition to Cephalon's motion to dismiss for lack of subject matter jurisdiction) (raising possibility of seeking disgorgement).

[9] *See* Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases, *supra* note 3, at 1.

[10] Even if the third criteria, a lack of private remedies, were satisfied here, that factor alone should never justify the seeking of disgorgement. In any case, a recent decision by the Ninth Circuit affirming the dismissal of a private lawsuit alleging facts quite similar to those in the Commission's complaint – including an exclusive distribution agreement between Cardinal and GE Healthcare for the radiopharmaceutical, Myoview – might reasonably lead one to conclude that private remedies were available in this matter, but just failed (or should fail) on the merits. *See* PharmaRx Pharma., Inc. v. GE Healthcare, Inc., No. 13-55354, slip. op. at 3 (9th Cir. Mar. 9, 2015) (affirming dismissal of Sherman Act Section 1 and Section 2 claims) ("Appellant's few specific examples of Appellee's refusal to deal with independent radiopharmacies all predate the alleged anticompetitive agreement or 'just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy.'") (citation omitted).

2004,[11] acquisitions the Commission opted not to challenge at the time.[12] Yet, the complaint identifies no evidence demonstrating that those acquisitions were anticompetitive. These two acquisitions should not serve as the basis for any *clear* violation – particularly in the absence of any allegations that Cardinal misled the Commission (and, to be clear, there are no such allegations here). Thus, this matter is easily distinguishable from the *Hearst* case,[13] which involved a merger to monopoly aided by withholding key documents from the FTC. Unless the Commission is prepared to allege a similar violation of the merger notification rules under the Hart-Scott-Rodino Act, I do not see any legitimate basis for grounding a disgorgement case on two acquisitions that the Commission decided not to pursue.

Nor, in my view, does Cardinal's alleged post-merger conduct, even if proven, represent a clear violation of the antitrust laws. Not every Sherman Act Section 2 violation, if established, is a clear violation for purposes of disgorgement. In fact, Section 2 remains one of the most vigorously debated areas of antitrust law. As previous Commissioners have counseled, we ought to reserve the use of disgorgement "for cases . . . in which the defendants have engaged in particularly egregious conduct."[14] Compared to *Mylan*,[15] which involved a conspiracy to share revenues among potential competitors in two generic pharmaceutical markets, the evidence on exclusionary effects in this matter is mixed, at best. In particular, even if the Commission could establish that Cardinal achieved some type of de facto exclusivity with both Bristol-Myers Squibb and General Electric Co. during the relevant time period (and that is less than clear), it is entirely unclear that such exclusivity – rather than, for example, insufficient demand for more than one radiopharmacy – caused the lack of entry within each of the relevant markets. That alternative explanation seems especially likely in the six relevant markets in which "Cardinal

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[11] *See, e.g.*, Complaint for Injunctive and Other Equitable Relief ¶ 18, FTC v. Cardinal Health, Inc. (S.D.N.Y.) ("Cardinal became the largest operator of radiopharmacies in the U.S. and the sole radiopharmacy operator in 25 local geographic markets by acquiring [Syncor] in 2003 and [Geodax] in 2004."); *id.* ¶ 51 (Violation Alleged) ("Cardinal willfully engaged in anticompetitive and exclusionary acts and practices to *acquire*, enhance, or maintain its monopoly power in the market for the sale and distribution of radiopharmaceuticals in the 25 geographic markets alleged herein . . . .") (emphasis added); *id.* at 12 (Prayer for Relief) (requesting the court find "[t]hat Cardinal's *acquisition* and maintenance of monopoly power in the relevant markets violated Section 5 of the FTC Act") (emphasis added).

[12] Publicly available information shows that in 2002 Cardinal anticipated an FTC investigation of the Syncor acquisition and that in 2004 the FTC granted early termination of its Hart-Scott-Rodino investigation of the Geodax investigation. *See* Cardinal Health, Inc., Investor Call Transcript, at 25-26 (Form 425) (June 14, 2002), *available at* http://www.sec.gov/Archives/edgar/data/202763/000089882202000793/calltranscript.txt (anticipating FTC review of Syncor acquisition); Granting of Request for Early Termination of the Waiting Period under the Premerger Notification Rules, 69 Fed. Reg. 45060, 45063 (July 28, 2004) (early termination of waiting period for Geodax acquisition granted on 7/2/04).

[13] *See* Complaint ¶¶ 14-30, FTC v. The Hearst Trust, No. 01-cv-00734 (D.D.C. filed Apr. 5, 2001).

[14] FTC v. Mylan Labs., Inc., FTC File No. X990015, Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson, at 4 (Nov. 29, 2000), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2000/11/mylanpitofskystatment.htm.

[15] *See* Amended Complaint ¶¶ 36-57, FTC v. Mylan Labs, Inc., No. 98-cv-03114 (D.D.C. filed Feb. 8, 1999).

remains the sole or dominant radiopharmacy,"[16] notwithstanding the fact that whatever exclusivity Cardinal may have achieved admittedly expired in early 2008.[17] The complaint provides no basis for the assertion that Cardinal's conduct during the 2003-2008 period has caused the lack of entry in those six markets during the past seven years.[18]

Further, even if causation could be proven here, the evidence of anticompetitive effects in the relevant markets at issue is significantly lacking. It is largely based on non-market-specific documentary evidence. The market-specific empirical evidence we do have implies very small (*i.e.* low single-digit) and often statistically insignificant price increases or no price increases at all. Unlike the 200 to 300 percent price increases in *Hearst*[19] or the 1,900 to 3,200 percent price increases in *Mylan*,[20] the effects evidence in this case, to the extent it exists, hardly points to a clear violation of the antitrust laws. At best, this appears to be a weak case with little or no demonstrable consumer harm.

The lack of effects evidence in this case also goes to the second factor in the Policy Statement: a reasonable basis for calculating the disgorgement amount. In some sense, the lack of reliable, market-specific data in this case is unsurprising, given the age of the alleged conduct, which took place seven to twelve years ago. In nineteen of the twenty-five relevant markets, the alleged harm stopped by 2008. The available market-specific empirical evidence points to the real possibility of no ill-gotten gains for Cardinal. Before we seek the extraordinary remedy of disgorgement, we need to be more confident that the evidence demonstrates that substantial consumer harm actually occurred.

II. This Action Raises Broader Policy Concerns

In addition to the failings of this case discussed above, the pursuit of disgorgement under these circumstances raises two broader policy concerns. First, this action highlights the lack of meaningful guidance provided by the Commission on the pursuit of this remedy. Second, with this action, the agency strays from its special mission to develop the antitrust laws.

The lack of guidance from the Commission on the use of its disgorgement authority makes any such use inherently unpredictable and thus unfair. As the U.S. Chamber of Commerce noted in its August 2012 letter regarding the withdrawal of the 2003 Statement, "with regard to antitrust policy and enforcement, perhaps above all things, the business community

[16] Cardinal Complaint ¶ 49, *supra* note 11.

[17] *See id.* ¶ 48 ("Cardinal's monopolization scheme was finally thwarted by BMS's sale of the Cardiolite brand to Lantheus in early 2008.").

[18] In fact, evidence from the Commission's investigation indicates that in one of those markets, entry by an independent radiopharmacy occurred in 2012.

[19] *See* Hearst Complaint ¶ 37, *supra* note 13.

[20] *See* Mylan Amended Complaint ¶ 29, *supra* note 15.

both values and deserves transparency and predictability."[21] Parties subject to the FTC's jurisdiction should have notice of when they may be subject to disgorgement of their profits.[22]

The Commission therefore ought to reinstate the Policy Statement – either in its original form or in some modified form that the current Commissioners can agree on – or provide some additional guidance on when it plans to seek the extraordinary remedy of disgorgement in antitrust cases. Simply saying that the agency will be guided by the case law is insufficient – particularly considering how meager the relevant case law is. Further, the majority's characterization of its view as "wholly consistent with that of the Supreme Court"[23] rings hollow. The two cases the majority cites for this proposition are wholly inapposite. One stands for the proposition that the FTC Act was designed to stop monopolies in their incipiency – a proposition that is completely irrelevant to the completed monopolization alleged in this matter.[24] The second case involves the more routine remedy of divestiture – not disgorgement.[25]

More fundamentally, the pursuit of disgorgement in this and other recent cases represents a significant departure from the agency's traditional reliance on its cease-and-desist authority in antitrust cases. Even if the FTC has statutory authority to seek disgorgement in competition cases, it is a separate and more important policy question whether the Commission ought to use such authority with increasing frequency in a broader set of circumstances, including for conduct that was not a clear violation when undertaken. Overuse of this remedy fundamentally changes the nature of the agency and the role it was designed to play.[26]

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[21] Letter from R. Bruce Josten, Exec. Vice Pres., U.S. Chamber of Commerce, to FTC Chairman Jon Leibowitz regarding FTC Disgorgement, at 1 (Aug. 22, 2012), *available at* https://www.uschamber.com/letter/letter-regarding-ftc-disgorgement.

[22] *See, e.g.*, *id.* at 2 ("Prosecutorial discretion, while important, is not a suitable substitute for policy guidance. The withdrawal of the 2003 disgorgement policy, combined with the FTC's recent about face on previous pledges to issue guidance with respect to Section 5, suggests a disturbing pattern that undermines the transparent and predictable nature of U.S. antitrust policy and enforcement.").

[23] Cardinal Health, Inc., File No. 101-0006, Statement of the Federal Trade Commission, at 3.

[24] *See id.* (citing Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941)).

[25] *See id.* (citing Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948)).

[26] I would also note that any arguments that the "unfair methods of competition" prong of Section 5 should go beyond the antitrust laws because of the agency's ability to impose only limited prospective relief (*i.e.* cease and desist orders) are undermined by frequent pursuit of disgorgement in competition cases.

Commissioner Leary cogently raised this concern in 2000 in the *Mylan* case:

> An action of this kind is almost too expedient and, dare I say, too seductive. It transforms the Commission into a prosecutor with an immensely powerful antitrust weapon. I suggest that this kind of remedy in this kind of case is hardly what Congress had in mind when it passed the Federal Trade Commission Act in 1914 or, for that matter, when it gave the Commission the power to seek injunctive relief in 1973. Our traditional role in competition matters has been to look forward rather than backward, to articulate the law where the law is uncertain, and to seek relief that is prospective and remedial rather than retrospective and punitive. As we stray progressively further away from that vision . . . we may unwittingly neglect our special mission.[27]

Here, we appear to be veering from our special mission in pursuing disgorgement in a case that involves conduct that is seven to twelve years old, mixed evidence on liability, no clearly established effects on consumers, and two acquisitions left unchallenged by the Commission.

I therefore respectfully dissent.

[27] Mylan Labs., Inc., FTC File No. X990015, Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, at 5 (Nov. 29, 2000), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2000/11/mylanlearystatment.htm.