Statement of the Federal Trade Commission[1]
In the Matter of Cardinal Health, Inc.
FTC File No. 101-0006
April 17, 2015

The Federal Trade Commission has voted to accept a settlement with Cardinal Health, Inc. ("Cardinal") to resolve allegations that Cardinal illegally monopolized the market for the sale and distribution of low-energy radiopharmaceuticals ("radiopharmaceuticals") in 25 metropolitan areas across the United States. Under the terms of the proposed Final Order and Stipulated Permanent Injunction ("proposed Order"), Cardinal is required to disgorge its ill-gotten gains by paying $26.8 million into a fund for distribution to customers injured by its conduct.[2] Cardinal also agrees to certain injunctive relief that will prevent future violations and is designed to restore competition in six markets where Cardinal remains the sole or dominant radiopharmacy. For the reasons described below, we believe this settlement appropriately remedies the alleged wrongful conduct by Cardinal and serves the public interest.

Through separate acquisitions in 2003 and 2004, Cardinal became the largest operator of radiopharmacies in the United States and the sole radiopharmacy operator in 25 relevant markets addressed by this settlement. Radiopharmacies distribute and sell radiopharmaceuticals, which are drugs containing radioactive isotopes, used by hospitals and clinics to diagnose and treat diseases. Notably, they typically derive at least of 60% of their revenues from the sale of heart perfusion agents ("HPAs"), a type of radiopharmaceutical that healthcare providers use to conduct heart stress tests. A practical consequence is that radiopharmacies cannot operate a financially viable and competitive business without access to an HPA.

Between 2003 and 2008, there were only two manufacturers of HPAs in the United States: Bristol-Myers Squibb ("BMS") and Amersham plc, which was acquired in 2004 by General Electric Co. ("GE-Amersham"). A radiopharmacy operator could therefore not enter a new market and compete effectively without obtaining the right to distribute either BMS's Cardiolite-branded HPA or GE-Amersham's Myoview-branded HPA in that market. Based on staff's extensive investigation, we have reason to believe that during this time period, after having acquired a radiopharmacy monopoly in the relevant markets, Cardinal unlawfully maintained that monopoly by employing various tactics to coerce and induce BMS and GE-Amersham to withhold HPA distribution rights from would-be radiopharmacy entrants in violation of Section 2 of the Sherman Act.

As detailed in the Complaint, we allege that Cardinal set out to punish BMS for implementing a plan to broadly license Cardiolite distributors across the country. First, Cardinal

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[1] This statement reflects the views of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny.

[2] *See* Complaint for Injunctive and Other Equitable Relief ¶¶ 46, 50, *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y. filed Apr. 20, 2015); [Proposed] Final Order & Stipulated Permanent Injunction ¶ VIII, *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y. filed Apr. 20, 2015).

threatened to, and did in fact, convert customers from Cardiolite to Myoview in multiple markets where Cardinal operated the only radiopharmacy. Second, Cardinal cancelled, or threatened to cancel, its large purchases of other radiopharmaceuticals from BMS. Cardinal then conditioned its future purchases of these products on BMS refraining from licensing other radiopharmacy operators as Cardiolite distributors in Cardinal's monopoly markets. Third, Cardinal threatened to compete against BMS as a future generic Cardiolite manufacturer if BMS granted Cardiolite distribution rights to potential radiopharmacy entrants, while offering to forgo such competition if BMS ceased granting rights. As a result of Cardinal's various tactics, BMS abandoned its plan of widely expanding the Cardiolite distribution network.

Cardinal also threatened GE-Amersham with similar forms of retaliation if GE-Amersham licensed other radiopharmacy operators as Myoview distributors in the relevant markets. First, Cardinal warned GE-Amersham that its current and future radiopharmaceutical product relationships were contingent on keeping Cardinal as its exclusive Myoview distributor. Second, Cardinal assured GE-Amersham that Cardinal would be "product neutral," meaning it would not promote BMS's Cardiolite over Myoview in the relevant markets, as long as GE-Amersham did not license potential radiopharmacy entrants in these markets.

In sum, we have reason to believe that Cardinal's actions caused both BMS and GE-Amersham to deny HPA distribution rights to numerous potential radiopharmacy entrants. This conduct allowed Cardinal to maintain and exercise monopoly power in each of the relevant markets. By excluding potential rivals, Cardinal denied its customers the benefits of competition and profited from the monopoly prices it charged for all radiopharmaceuticals, including HPAs, in the relevant markets. Importantly, there was no efficiency benefit or legitimate business justification for Cardinal simultaneously maintaining exclusive distribution rights to the only two HPAs then available in the relevant markets.

The settlement we have approved is properly tailored to prevent future violations by Cardinal, restore the competition that was lost, and ensure that Cardinal does not retain the fruits of its misconduct. Specifically, the proposed Order prohibits Cardinal from engaging in future schemes similar to that alleged in the Complaint. It also includes provisions designed to restore competition in six of the relevant markets where Cardinal continues to operate as the sole or dominant radiopharmacy. For example, Cardinal is required to allow customers to terminate their exclusive contracts to facilitate effective entry by a competing radiopharmacy operator. Finally, the proposed Order requires Cardinal to disgorge its ill-gotten gains by paying $26.8 million into a fund that will be used to compensate affected customers.

In their respective dissenting statements, Commissioners Ohlhausen and Wright assert that disgorgement is not appropriate in this case and question more broadly the propriety of the Commission's use of disgorgement as a remedy in competition cases. We respectfully disagree on both counts.[3]

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[3] We further note that there is agreement among eight circuit courts of appeal and district courts in the remaining four federal circuits that, in a Section 13(b) complaint, the Commission may seek equitable relief, including monetary equitable relief such as restitution and disgorgement. *See, e.g., FTC v. Ross*, 743 F.3d 886, 890–92 (4th

In 2012, the Commission withdrew its 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases to dispel the notion that the FTC would seek disgorgement and restitution remedies only in "exceptional" cases. Importantly, we emphasized that "[a]lthough our decisions and orders generally focus on structural or behavioral remedies intended to curb future competitive harm, the agency's mission to protect consumers and competition also includes, where appropriate, taking action to remedy the actual, realized effects of antitrust violations."[4] Our view is wholly consistent with that of the Supreme Court, which has observed that the Commission's cease-and-desist authority to prevent future competitive harm emanates from the FTC Act's prophylactic objective—that "attempts to bring about complete monopolization of an industry might be stopped in their incipiency."[5] But, as the Court has also observed, where the government has been unable to intervene "at the incipient stages of the unlawful project," cease-and-desist orders that merely "forbid a repetition of the illegal conduct" would allow the defendants to "retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors."[6] Such an outcome would thwart the goals of the antitrust laws.

This case therefore presents precisely the type of situation in which we appropriately "start from the premise that an injunction against future violations is not adequate to protect the public interest."[7] As described above, we have ample reason to believe that Cardinal violated the Sherman Act. Our Complaint does not charge, as Commissioner Ohlhausen suggests, that Cardinal's 2003 and 2004 acquisitions were themselves unlawful. We view them instead as initial steps in a monopolization scheme that hinged on post-merger exclusionary conduct designed to prevent and delay entry by other radiopharmacy operators.[8] In other words, Cardinal's scheme relied on an anticompetitive combination of acquiring existing competitors in the relevant markets and then raising artificial barriers to new entry that would have created

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Cir. 2014) (Section 13(b) confers power to award "monetary consumer redress, which is a form of equitable relief"); *FTC v. Bronson Partners*, LLC, 654 F.3d 359, 365 (2d Cir. 2011) ("Section 13(b) permits a court to order ancillary equitable relief, including monetary relief"); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468−70 (11th Cir. 1996) ("Among the equitable powers of a court [that may be invoked by Section 13(b)] is the power to grant restitution and disgorgement."); *see also FTC v. Cephalon, Inc.*, No. 2:08-cv-02141-MSG, slip op. at 8 (E.D. Pa. Apr. 15, 2015) (concluding that the FTC may seek disgorgement in cases brought under Section 13(b)).

[4] Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070, 47,070−71 (July 31, 2012), *available at* https://www.ftc.gov/policy/federal-register-notices/federal-register-notice-withdrawal-commission-policy-statement.

[5] *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 466 (1941).

[6] *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948). In *Schine Chain Theatres*, the Court likened divestiture to restitution, both equitable remedies designed to "deprive[] a defendant of the gains from his wrongful conduct" and "in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." *Id.* The same is true of disgorgement. *Accord SEC v. Teo*, 746 F.3d 90, 105 n.26 (3d Cir. 2014) (holding that "Justice Douglas' comments [in *Schine Chain Theatres*] on divestiture in the antitrust context could be applied to the SEC's use of disgorgement").

[7] *Schine Chain Theatres*, 334 U.S. at 128.

[8] *See* Complaint ¶ 18.

competition in these markets. Cardinal's exclusionary conduct allowed it to unlawfully maintain its monopoly status.[9]

Moreover, it is well accepted that where a single firm acts as the exclusive distributor for all, or nearly all, potential suppliers of an essential input, such an arrangement can prevent or foreclose effective competition.[10] In his dissent, Commissioner Wright correctly observes that exclusive dealing can have plausible efficiency justifications. Here, however, Cardinal's simultaneous maintenance of exclusive distribution rights to the only two HPAs then available in the relevant markets lacked any legitimate business or efficiency justification.[11] Indeed, not only was there no legitimate efficiency justification for Cardinal's *de facto* exclusives but by locking up *both brands* of HPAs in the relevant markets, Cardinal's conduct suppressed interbrand competition. In addition to providing a "product neutral" assurance to GE-Amersham, Cardinal denied rival radiopharmacies access to *either brand*, thus eliminating the possibility of interbrand competition between rivals and Cardinal.

Furthermore, Cardinal's conduct with respect to BMS and GE-Amersham included threatened and actual retaliation, as well as an offer to forgo direct competition with BMS if it ceased granting Cardiolite distribution rights to other radiopharmacy operators.[12] The fact that both BMS and GE-Amersham wanted to license new distributors of their respective HPAs, as the Complaint alleges,[13] contradicts any suggestion that Cardinal's *de facto* exclusives could have been output-enhancing in other markets. There was no commonality of interest between the

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[9] *See United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) (explaining that "this monopoly was achieved in large part by unlawful and exclusionary practices," which included Grinnell's acquisitions of ADT, AFA, and Holmes); *Beatrice Foods Co.*, 67 F.T.C. 473, 540−41 (1965) (explaining that acquisitions may be "an integral part of a larger offense such as monopolization").

[10] *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) (acknowledging the "adverse economic consequences" of "allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply"); *see also* Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209, 234 (1986) (obtaining exclusionary rights from all suppliers of an input is the "simplest and most obvious" method of supply foreclosure); FTC Guide to Antitrust Laws, *available at* http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/exclusive-supply-or (a monopolist's use of exclusive supply contracts to prevent entrants from obtaining needed inputs may violate Section 2 of the Sherman Act).

[11] *Cf. United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196−97 (3d Cir. 2005) (affirming district court's finding that Dentsply's justifications for its exclusionary practices were pretextual); *United States v. Microsoft Corp.*, 253 F.3d 34, 67−74 (D.C. Cir. 2001) (affirming district court's findings that Microsoft's exclusive dealing arrangements with internet access providers, independent software vendors, and Apple lacked any procompetitive justification and hence violated Section 2).

[12] *Cf. Lorain Journal Co. v. United States*, 342 U.S. 143, 149−50, 152−53 (1951) (holding that newspaper's refusal to accept local advertisements from third parties that also ran advertising on rival radio station effectively forced those advertisers to refrain from doing business with the station, thus threatening the station's financial viability).

[13] Complaint ¶¶ 24, 26 & 31.

manufacturer and the distributor, as one would expect to see in a classic case where exclusive distribution generates procompetitive efficiencies.[14]

The evidence also contradicts Commissioner Ohlhausen's suggestion that Cardinal's monopolies were the result of "insufficient demand." Significantly, there is direct evidence that Cardinal's conduct caused BMS and GE-Amersham to deny potential entrants HPA distribution rights and prevented entry that would have occurred in the relevant markets between 2003 and 2008. Indeed, prior to Cardinal's acquisitions, all but one of the relevant markets sustained two competing radiopharmacies and each of the relevant markets attracted the interest of would-be entrants during the relevant time period.

Finally, there is also significant evidence of anticompetitive effects. We obtained and analyzed data regarding the prices paid by Cardinal's customers in the relevant markets and found that Cardinal charged higher prices in its monopoly markets. This price analysis is buttressed by an abundant amount of documentary and other evidence showing that customers in the relevant markets did not enjoy the significantly lower prices (up to 20% lower) available to customers in competitive markets. We therefore have ample grounds for believing that Cardinal's conduct resulted in demonstrable consumer harm and enabled Cardinal to amass substantial ill-gotten gains.[15]

Under these circumstances, we believe that a remedy consisting solely of injunctive relief is inadequate. As the Supreme Court has emphasized, adequate relief in a monopolization case should both "deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act."[16] Although Cardinal ceased its unlawful conduct in 2008 because of independent market events, the fact remains that up until that time Cardinal suppressed competition in the relevant markets through its exclusionary tactics and charged its customers significantly higher prices. The imposition of injunctive relief alone would fail to adequately remedy the harm caused by Cardinal's past conduct and would have insufficient deterrent effect. Furthermore, given statute-of-limitation hurdles that Cardinal almost certainly would raise in any private follow-on lawsuits, disgorgement may be the only realistic avenue for any victims of Cardinal's anticompetitive conduct to obtain monetary redress.

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[14] *Cf. Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 938 (7th Cir. 2000) (describing a situation in which manufacturers wanted to distribute their toys "to as many different kinds of outlets as would accept them" and did not think that the "extra services" Toys "R" Us wanted to provide them under a restricted distribution arrangement were necessary).

[15] Contrary to Commissioner Ohlhausen's contention, the evidence provides a reasonable basis for calculating disgorgement. The $26.8 million to be paid by Cardinal reasonably approximates its ill-gotten gains. Moreover, the dissent asserts that a recently dismissed private lawsuit brought by PharmaRx "alleged facts quite similar" to those in the Complaint. In fact, PharmaRx's suit was grounded on an allegation that Cardinal and GE Healthcare had entered into an illegal distribution agreement in March 2008. That agreement is outside the relevant time period alleged in the Commission's Complaint and pertains to just one of the HPAs at issue here (Myoview).

[16] *Grinnell Corp.*, 384 U.S. at 577.

In his dissent, Commissioner Wright analyzes the propriety of disgorgement using an economic approach applicable to antitrust penalties. Unlike treble damages, however, disgorgement is remedial, not punitive, in nature.[17] Disgorgement deters subsequent conduct simply by sending a message that wrongdoers, if caught, will not be able to profit from their wrongdoing.[18]

Moreover, while BMS and GE-Amersham would have been aware of Cardinal's exclusionary conduct as the recipients of Cardinal's threats, acts of coercion, and inducements, the same cannot be said of Cardinal's hospital and clinic customers and the other victims of Cardinal's anticompetitive scheme. If Cardinal were the only radiopharmacy operator in a given relevant market, it follows that Cardinal would have been the only source of Cardiolite and Myoview in that market. Customers would have had no reason to suspect that this outcome was the product of any exclusionary tactics. Cardinal's exclusionary conduct cannot be characterized as "open and notorious," as Commissioner Wright suggests. In our view, Commissioner Wright's analysis is therefore inapposite.

As always, the Commission will continue to exercise responsibly its prosecutorial discretion in determining which cases are appropriate for disgorgement. We regard disgorgement as one of many remedial tools at our disposal in competition cases, and will employ it judiciously to protect consumers and promote competition.

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[17] *Compare ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 300 (3d Cir. 2012) (describing the role of treble damages in penalizing antitrust violators), *with SEC v. Cavanagh*, 445 F.3d 105, 116 n.25 (2d Cir. 2006) (noting that disgorgement, being remedial, may not exceed the amount acquired through wrongdoing).

[18] *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) ("Because disgorgement's underlying purpose is to make lawbreaking unprofitable for the law-breaker, it satisfies its design when the lawbreaker returns the fruits of his misdeeds, regardless of any other ends it may or may not accomplish.").