DISSENTING STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

CARDINAL HEALTH, INC.

FILE NO. 101-0006

APRIL 17, 2015

I do not join the Commission's decision to enter into a consent decree with Cardinal Health, Inc. (Cardinal) because the decree includes a monetary payment. For the reasons explained below, this case does not present a good vehicle for the Commission to exercise its authority to pursue a monetary remedy. Moreover, I am troubled by the Commission's continued efforts to pursue monetary remedies without providing any guidance regarding the bases it uses to choose when and whether it will pursue them.

I. Monetary Remedies are Inappropriate in this Case

Understanding why I believe this case does not present a good vehicle for the Commission to pursue monetary relief requires an understanding of the economics of penalties.[1] Economic theory teaches that penalties should be set at a level sufficient to induce offenders to internalize the full social cost of their crimes.[2]

In a world with perfect detection and punishment, profit-maximizing market participants will need to face a potential damage award calibrated such that the expected gains from engaging in the prohibited conduct – the profits that accrue as a result of the anticompetitive behavior – are less than or equal to the expected penalty at the time the firm decides to engage in the challenged conduct. As a threshold matter, from the perspective of a market participant there is no meaningful economic distinction between a monetary penalty that is "remedial" on the one hand, or "punitive, in nature" on the other, as the Commission suggests there is.[3] In shaping their behavior to align with legal rules, market participants care only about the expected penalty and not about whether the expected penalty is labeled as "damages," "disgorgement," "restitution," or some other legal term of art that connotes the payment of money. The expected penalty is, of course, a function of the probability of punishment and the magnitude of the penalty. The probability of punishment includes the potential for both private and public enforcement actions. If, every time a firm engages in anticompetitive conduct, it is sued in court by a private plaintiff, the Department of Justice, the Federal Trade Commission, or one or more state attorneys general and ordered to pay monies approximating the social harm caused by its conduct, then all firms would be properly and efficiently deterred from engaging in such conduct.

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[1] *See* Joshua D. Wright, The Federal Trade Commission and Monetary Remedies, Remarks at the European University Institute Department of Law Annual Workshop (July 19, 2013), https://www.ftc.gov/public-statements/2013/07/federal-trade-commission-and-monetary-remedies.

[2] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON 169 (1968); *see also* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3, 3 (2010).

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

Using this simple model, a damage multiplier – like treble damages in an antitrust case – can be justified on deterrence grounds if there is reason to believe plaintiffs – including both private and public litigants – do not successfully detect and challenge every example of anticompetitive conduct. If the probability of a lawsuit falls significantly below 100%, then to achieve optimal deterrence,[4] the magnitude of liability ought to be adjusted accordingly.[5] In the case of price fixing cartels and other horizontal conspiracies, we can reasonably expect that regulators and private litigants do not ferret out and challenge every illegal conspiracy that exists because such conspiracies are clandestine by their very nature.[6] On the other hand, most examples of potentially harmful single-firm conduct are open and notorious. For example, upstream input suppliers to downstream monopolists are keenly aware of any restraints on distribution put in place by the monopolist and, to the extent the input supplier is harmed by the restraint, will generally have the appropriate incentive to challenge the conduct. In this case, moreover, Cardinal's customers would certainly have the incentive and ability to sue Cardinal in the markets in which Cardinal held exclusive rights to both Myoview and Cardiolite. These customers were no doubt aware that their only source for Myoview and Cardiolite in these markets was Cardinal. Cardinal's tactics to obtain exclusivity may have been unknown to Cardinal's customers, as the Commission suggests,[7] but the effect of those tactics certainly was known, especially to doctors who had a strong preference for Myoview or Cardiolite. Accordingly, to the extent there are ever successful private suits challenging vertical restraints by a firm with monopoly power that result in trebled damage awards, those suits are already likely to *over-deter* such conduct, and therefore ought not to be supplemented by government enforcement actions seeking disgorgement.[8]

In the context of single-firm conduct, and with treble damages and follow-on suits available for successful antitrust plaintiffs, regulators and courts should be primarily concerned with *over-deterrence* and not *under-deterrence*. In my view, the bar for the Commission pursuing monetary relief against a firm engaging in single-firm conduct challenged under Section 2 of the Sherman Act is extremely high, much higher than the bar for pursuing such

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[4] *See* Fed. Trade Comm'n, Policy Statement on Monetary Remedies (July 31, 2003) (explaining that the requirement that there be a "clear violation" for the FTC to seek disgorgement is because "[i]n such cases, the use of disgorgement will serve an appropriate deterrence goal"), *available at* https://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular, *withdrawn by* Statement of the Commission, Effecting the Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47070 (July 31, 2012).

[5] Landes, *supra* note 2, at 657; Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 454 (1985).

[6] Ginsburg & Wright, *supra* note 2.

[7] Statement of the Federal Trade Commission, *supra* note 3.

[8] Easterbrook, *supra* note 4, at 460 ("When the risk of false condemnation rises, and so the costs of engaging in beneficial conduct go up, the penalty should fall."); Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469, 509 (2009) (stating that the case for treble damages applied to "open and notorious" conduct is "weak"); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987) (explaining that mandatory trebling "has adverse effects, not only encouraging baseless or trivial suits brought in hopes of coercing settlements, but also discouraging legitimate competitive behavior in the gray areas covered by the rule of reason.").

relief against competitors restraining trade. The Commission has not cleared that bar in this case.

I would support a limitation on the Commission's ability to pursue disgorgement only against naked price fixing agreements among competitors or, in the case of single-firm conduct, only if the monopolist's conduct violates the Sherman Act and has no plausible efficiency justification. This latter category would include a monopolist's fraudulent or deceptive conduct, or tortious activity such as burning down a competitor's plant if such conduct violates the Sherman Act. I would also provisionally support disgorgement in a case if there were evidence demonstrating that a particular category of conduct shown to harm consumers was not adequately deterred through private suits and public enforcement actions seeking injunctive relief. This case does not belong in that category. Declining to pursue disgorgement in most cases involving vertical restraints has the virtue of taking the remedy off the table – and thus reducing the risk of over-deterrence – in the cases that present the most difficulty in distinguishing between anticompetitive conduct that harms consumers and procompetitive conduct that benefits them, such as the present case.

This case involves an alleged vertical restraint – exclusive dealing – and there are numerous plausible efficiency justifications for such restraints.[9] I disagree with the Commission's assertion that "there was no efficiency benefit or legitimate business justification" for Cardinal's conduct.[10] The Commission ignores the fact that Cardinal's efforts to prevent Bristol-Meyers Squib from licensing Cardiolite to other radiopharmacies were not limited to the 24 markets in which Cardinal also held the right to distribute Myoview. The tactics the Commission challenges could have been output-enhancing in these other markets. Without considering whether the alleged harm caused by Cardinal's conduct[11] outweighs any such efficiencies, I believe the inquiry into whether a matter is appropriate for disgorgement should end if the conduct to be challenged has a plausible efficiency justification. Exclusive dealing does. For that reason, I cannot vote to accept the consent decree in this case.

II. The Commission's Lack of Policy Regarding Monetary Remedies

I also share Commissioner Ohlhausen's concern about the Commission's repeated efforts to pursue disgorgement in competition cases without providing any meaningful guidance

[9] *See, e.g.*, Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433 (2008); Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits"*, 12 GEO. MASON L. REV. 119 (2003); Howard Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982).

[10] Statement of the Federal Trade Commission, *supra* note 3.

[11] I disagree with the Commission's assertion that there is "significant evidence of anticompetitive effects" in this case. *Id.* The Commission explains that "[w]e 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." *Id.* Though the Commission describes the direction of the results of this data analysis correctly, these results are very fragile. The data show that the impact of a second competitor on Cardinal's price is small, borderline statistically significant, and not robust to minor changes in specification. Though I applaud staff's efforts to adduce persuasive quantitative evidence of effects in this matter, I do not agree that this evidence can be characterized as "significant."

regarding when and whether it will seek such a remedy.[12] This concern is heightened in light of the fact that the Commission has sought or is seeking disgorgement in three recent cases including this one,[13] and the current Director of the Bureau of Competition has expressed a desire to pursue settlements with monetary payments in competition cases.[14] This stands in contrast to the Commission's pursuit of monetary remedies in only two cases during the nine-year period prior to the adoption of the withdrawn Policy Statement and two cases during the nine-year period when the Statement was operative.[15] I agree with Commissioner Ohlhausen that "[t]he 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 we will be guided by the case law is insufficient."[16] As I have stated before, "I fear that a lack of guidance from the Commission could cause much mischief. Risk averse companies concerned about the financial and reputational effects associated with a disgorgement order from the FTC could respond to the lack of guidance by not engaging in conduct that could plausibly benefit consumers."[17] The Commission's decision to accept a monetary payment from Cardinal to settle this case presents precisely this risk.

I respectfully dissent.

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[12] In the Matter of Cardinal Health, Inc., FTC File No. 101-0006, Dissenting Statement of Commissioner Maureen K. Ohlhausen (April 17, 2015) ("The lack of guidance from the Commission on the use of its disgorgement authority makes any such use inherently unpredictable and thus unfair.").

[13] *See* FTC v. AbbVie, Inc., No. 2:14-cv-05151-HB (E.D. Pa. filed Sept. 8, 2014); Brief for FTC in Opposition to Cephalon's Motion to Dismiss for Lack of Subject Matter Jurisdiction, FTC v. Cephalon, Inc., No. 2:08-cv-2141 (E.D. Pa. filed Nov. 18, 2013).

[14] Harry Phillips, *Feinstein wants billion-dollar pay-for-delay settlement*, GLOBAL COMPETITION REV. (Mar. 30, 2014), http://globalcompetitionreview.com/usa/article/35647/feinstein-wants-billion-dollar-pay-for-delay-settlement/.

[15] Wright, *supra* note 1.

[16] *See* Ohlhausen, *supra* note 12.

[17] Wright, *supra* note 1, at 32.