**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| FEDERAL TRADE COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>ABBVIE INC. et al.,<br><br>Defendants. | CIVIL ACTION<br><br>Case No. 14-cv-5151 |

# DEFENDANTS' BRIEF IN SUPPORT OF THEIR PROPOSED FORM OF JUDGMENT AND OBJECTIONS TO FTC'S PROPOSED FORM OF JUDGMENT

## I. INTRODUCTION

The Court should adopt Defendants' proposed form of judgment because it creates a rules-based procedure allowing those who may have a legal right to be compensated for the conduct found unlawful by the Court to claim reimbursement from any funds recovered by FTC.[1] This procedure is practicable and administrable—and it is closely modeled on the precedent created by FTC in *FTC v. Cephalon, Inc.*, No. 08-cv-2141 (E.D. Pa.).

The procedure specified in Defendants' proposed form of judgment also safeguards against duplicative recovery. Private plaintiffs who claim to be purchasers of AndroGel 1% have already filed a putative class action seeking treble damages arising from the same conduct that gave rise to the Court's finding of monopolization and the Court's award of $448 million plus interest. While recognizing that the Court has made the findings that it has made, Defendants respectfully submit that, under the circumstances, it would be appropriate for the Court to provide for a procedure that safeguards against duplicative recovery.

FTC's proposed form of judgment should be rejected because it does not include a Court-supervised plan for disbursement of funds, but rather gives the FTC unfettered discretion as to how to distribute the judgment of $448 million plus interest. Especially with a judgment of this size, and in light of legal rules regarding who has standing to recover for antitrust injuries, judicial oversight of the criteria for distribution is appropriate.

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[1] Defendants have submitted their proposed form of judgment pursuant to the Court's instruction. Defendants reserve their right to challenge, on appeal and otherwise, the Court's final judgment and the interlocutory rulings that merge into that judgment, including but not limited to the Court's summary judgment ruling on objective baselessness, the Court's ruling that Defendants are liable on Count I, and the Court's award of equitable monetary and any other relief against them.

## II. ARGUMENT

### A. The Disgorgement Amount Should Be Disbursed According to a Court-Approved Plan for Compensating Those Having a Legal Right to Compensation

As the Court heard at trial, the pharmaceutical distribution and payment chain is complex. The antitrust laws have evolved with nuanced rules for who may recover for violations. This is meant to ensure that proof is not speculative and to protect against double recovery. Under federal antitrust law, direct purchasers of a product are the parties with the legal right to recover antitrust damages for overcharges on purchases of the product. *See Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84-85 (3d Cir. 2011) (citing *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977)). Here, two plaintiffs purporting to represent a class of direct purchasers of AndroGel have already brought a treble-damages lawsuit based directly on the Court's Findings of Fact and Conclusions of Law. *See Value Drug Co. v. AbbVie Inc.*, No. 18-cv-2804 (E.D. Pa. filed July 2, 2018).[2]

Defendants' proposed form of judgment specifies a concrete procedure for resolving and, if ultimately applicable, paying claims of those allegedly injured by the conduct at issue. That procedure is fully consistent with—indeed, based on—the structure of the antitrust laws. Defendants' proposed form of judgment starts by properly defining the scope of claims that are "related" to this case and, thus, could be eligible for payment from the disgorgement fund, based on conduct relating to the Teva and Perrigo NDAs for those companies' respective 1% testosterone gel products. Dkt. 443-1, Defs.' Proposed Judgment § II.E. Recognizing that there is an established plaintiffs' bar that brings antitrust claims based on alleged improper delays in

[2] Defendants do not concede that the *Value Drug* plaintiffs or any other actual or potential plaintiffs have any right to relief, and reserve the right to defend against the claims in *Value Drug* and any other claims on all available grounds.

generic pharmaceutical competition, Defendants' form of proposed judgment also provides for payments from any funds FTC receives here of any settlements or judgments in cases involving "related" claims. *Id.* § III.C-I. Defendants' form of proposed judgment also specifies how requests for disbursements would be made. *Id.* § III.J-K. And that form of proposed judgment specifies how disputes over disbursement requests are to be resolved. *Id.* § III.L.

Defendants did not create this proposed form of judgment themselves. They based it upon FTC's own form—the one that FTC submitted, and Judge Goldberg entered, in the *Cephalon* litigation.[3] Like Defendants' proposed form of judgment here, the *Cephalon* order created procedures for escrowing FTC's recovery and requesting disbursements from the escrowed funds to pay settlements of claims relating to the challenged conduct. Dkt. 405, *Cephalon*, No. 08-cv-2141 (E.D. Pa. June 17, 2015) (attached hereto as Ex. 1). FTC's procedure as adopted by Judge Goldberg has apparently proved workable, and it is equally appropriate in this analogous case.

### B. A Court-Approved Plan for Compensating Those Having a Legal Right to Compensation Would Also Avoid Duplicative Recovery

The Supreme Court's direct purchaser rule is motivated in part by a concern under the antitrust laws that there not be double recovery. *Ill. Brick*, 431 U.S. at 730 (noting "[t]he risk of duplicative recoveries" if "indirect purchaser[s] could sue"). Likewise, it is a "basic tenet of equity jurisprudence" that "if an adequate remedy at law exists," then equitable relief—of which disgorgement is a form—"will not be granted." *Goadby v. Phila. Elec. Co.*, 639 F.2d 117, 122 (3d Cir. 1981). It is thus only because there has not yet been a procedure for payment of claims

[3] *Cephalon* involved allegations that a pharmaceutical manufacturer had engaged in "fraud and misrepresentations to the PTO" and "'sham litigation'" relating to a patent covering the drug Provigil. *King Drug Co. of Florence v. Cephalon, Inc.*, 702 F. Supp. 2d 514, 533 (E.D. Pa. 2010).

made by anyone alleging legal standing under the antitrust laws that disgorgement could even be considered as a potentially appropriate remedy.

That leads to the conclusion that the Court should follow the *Cephalon* procedure and set up a concrete procedure for compensation of those alleging legal claims while ensuring that Defendants do not end up paying twice for the same conduct. The Due Process Clause of the Constitution likewise protects a defendant from being "compelled to relinquish . . . [property] without assurance that he will not be held liable again in another . . . suit brought by a claimant who is not bound by the first judgment." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961); *see also Cities Serv. Co. v. McGrath*, 342 U.S. 330, 334-35 (1952) (Due Process Clause required that the defendant be allowed to recoup property seized by the U.S. government if future claims from foreign governments "would effect a double recovery against" the defendant).

### C. FTC's Form of Proposed Judgment Does Not Include Any Distribution Plan

FTC's form says merely that any funds it recovers would be escrowed in a fund for relief "including consumer and other purchaser redress," and that FTC evidently would have sole discretion in determining which parties are eligible for redress as well as the amounts to be paid; Defendants would have "no right to contest the manner of distribution chosen by the Commission." Dkt. 442-1, FTC Proposed Judgment § III.C.3. Especially for this amount of money, when different potential claimants made different AndroGel purchases and paid different amounts for each purchase, there should be some judicially approved and transparent plan of allocation. It is the Court that is ordering the creation of the disgorgement fund, after all, and the Court therefore should ensure that there is a sufficient structure in place for administration of the fund. By contrast, providing FTC with sole, unreviewable discretion to design and administer a redress program would not provide the "assurance" against duplicative recovery that the Due

Process Clause requires or the assurance of court oversight that is a hallmark of the courts' role in ensuring that any fund it creates is properly administered. *See W. Union Tel.*, 368 U.S. at 75.[4]

## III. CONCLUSION

For those reasons, the Court should enter Defendants' proposed form of judgment.

Dated: July 16, 2018

Respectfully submitted,

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[4] Thus, the Court should at the very least require FTC to establish a process (1) to substantiate claimants' purchases and standing to recover damages and (2) to provide notice to Defendants prior to any distribution.

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**CERTIFICATE OF SERVICE**

I certify that, on July 16, 2018, the foregoing document was filed with the United States District Court for the Eastern District of Pennsylvania using the ECF system. The document is available for viewing and downloading.

/s/ Markus Brazill