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<sup>2</sup>The license to Barr provided by the order enables Barr to begin marketing the generic versions of Actiq at the earliest of final FDA approval of OVF or various specified dates. If Cephalon delays the introduction of OVF, the license allows Barr to market the generic products at specific dates that approximate the time that the parties' premerger documents predict OVF would have been launched.

<sup>3</sup>In the face of generic entry, branded companies frequently raise the price for branded products that did not previously face such competition. *See supra* note 1. In this case, however, given the particular characteristics regarding the branded formulations, it is unclear whether the branded price actually will increase.

<sup>4</sup>*See, e.g., Schering-Plough Corp.*, Dkt. No. 9297, available at <http://www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf> (agreement between branded and generic manufacturers to delay entry of generic); *Biovail Corp.*, Dkt. No. C-4060 (consent order); available at <http://www.ftc.gov/os/2002/04/biovailcomplaint.htm> (wrongful Orange Book listing for Tiazac); *Biovail Corp. and Elan Corp.*, Dkt. No. C-4057 (consent order), available at <http://www.ftc.gov/os/2002/06/biovailelancomp.pdf> (agreement among generic drug companies to divide market for generic Adalat CC); *Abbott Labs.*, Dkt. No. C-3945 (consent order), complaint available at <http://www.ftc.gov/os/2000/05/c3945complaint.htm>; *Tfarm., Dfi501et*

any price increases to the less price-sensitive patients who may continue to choose branded products.<sup>5</sup> Contrary to Commission Thompson’s claim, the underlying rationale for the relief mandated in this case is supported by unanimous Commission precedent.

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<sup>5</sup>In his dissent, Commissioner Thompson relies on a statement in the old case of *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963), that anticompetitive mergers cannot be justified by some “ultimate reckoning of social or economic debits and credits.” We support this general principle. The issue here, however, is whether the transaction, as modified by the Order, can be considered anticompetitive in the first place when price increases, if any, are weighed against much larger price decreases to the same group of customers. In any merger case, predictions of procompetitive and anticompetitive effects are inherently uncertain, and – whether we choose to challenge or to pass – there often is a risk that one set of consumers will benefit and another set will lose. We are choosing between *probabilities* rather than sets of consumers.