

**Concurring Statement of Commissioner Jon Leibowitz
Genzyme Corporation's Acquisition of ILEX Oncology, Inc.
File No. 041-0083**

I support the conclusion reached by my fellow Commissioners to approve the consent order regarding Genzyme's acquisition of ILEX. Through this transaction, Genzyme intends to acquire ILEX's key oncology product Campath. However, because a small percentage of Campath sales are used off-label for acute therapy in solid organ transplants ("SOT"), a significant competitive problem arises concerning the overlap between ILEX's SOT use and Genzyme's Thymoglobulin acute therapy SOT product. The relief provides a solution designed to protect consumers against the likely harm otherwise caused by this transaction, while allowing the parties to move forward, even though it creates entanglements that could raise serious concerns under a different set of facts. Thus, I write separately to clarify my support for the relief here, and to express some general observations on merger policy, which I am sure will continue to develop during my tenure here at the Commission.

Merger enforcement is a vital component of the Commission's mission. We are charged under the Clayton Act with ensuring that competition and consumers do not suffer from transactions whose effects may be to "substantially lessen competition." Of course, the Clayton Act provides no inalienable right to merge. It is important, then, for the Commission to rigorously scrutinize each transaction we review in fulfilling our mission. Where a transaction may substantially lessen competition, a high burden should be placed on the parties to show that harm is demonstrably outweighed by efficiencies or that potential relief restores competition. My fellow Commissioners and our attorneys, economists and staff take our responsibility very seriously.

At the same time, where transactions present potential economic benefit – through efficiencies or enhanced research and innovation – we should weigh those benefits relative to the likely harm, and not seek to impose unnecessary obstacles to the parties achieving those benefits. In particular, each merger should be reviewed carefully on its merits and its own facts, and we should remain flexible in considering remedies that restore competition.

My support of the remedy regarding Genzyme's acquisition of ILEX is consistent with these principles. *Absent the relief*, this transaction would have resulted in significant harm to consumers through increased prices and a possible reduction in research and innovation. And since the original transaction's purported efficiencies (assuming they were cognizable under the Merger Guidelines) were not sufficient to reverse the likely anticompetitive harm, it was incumbent that the parties demonstrate that the relief effectively restores competition.

Here, the remedy likely accomplishes that purpose. It is a creative solution – severing Genzyme from its rights and revenues relating to use of ILEX's Campath product in the SOT market (while allowing Genzyme to maintain its rights and revenues to the product in the oncology market) in a manner that substantially diminishes the likelihood of anticompetitive harm.

As a general matter, creative and flexible remedies should be encouraged where we are

confident they will succeed in restoring competition. However, no matter how creative the