## STATEMENT OF COMMISSIONER J. THOMAS ROSCH<sup>1</sup> IN FEDERAL TRADE COMMISSION v. LUNDBECK, INC.

Dkt. Nos. 10-3458 and 10-3459; FTC File No. 0810156

January 20, 2012

There are many reasons for seeking Supreme Court review of the the Eighth Circuit's panel and *en banc* decisions in the *Lundbeck* case, which blessed the district court's decision. To begin with, those decisions are about as erroneous as any merger decisions can get. This office is not alone in this view. The American Antitrust Institute (AAI) filed amicus briefs in the Eighth Circuit on the Commission's behalf. One of the authors of those briefs, Professor Chris Sagers of the Cleveland–Marshall College of Law

The first error of law<sup>5</sup> committed by the district court and the Eighth Circuit was that, in holding that the two drugs at issue in this case—Indocin and NeoProfen—did not compete with each other in the same relevant product market, both courts focused only on cross-price elasticity of demand—i.e., whether customers would switch from one product to the other based on price considerations alone, and they failed to embrace the basic legal (and economic) principle that cross-elasticity of demand includes non-price considerations as well. This was at odds with the Supreme Court's teachings in multiple merger decisions.<sup>6</sup> The FTC's Post-Trial Brief argued for a product market definition based on the prospect of non-price competition as well as price competition. The AAI's amicus briefs also asserted that this was a fundamental error of law.

Second, by erroneously focusing only on cross-*price* elasticity of demand, the district court allowed an economic expert's opinion to trump the record facts regarding how these products were being marketed, purchased, and used in the real world. There can be no doubt that the district judge committed this error because she said she was focusing on cross-price elasticity to the exclusion of other relevant, non-price factors, which were incorporated into her findings of fact. Moreover, that is what the Eighth Circuit panel's decision blessing her error said she did. To allow economic expert opinion and theory to override undisputed findings of fact made by the district court itself

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<sup>&</sup>lt;sup>5</sup> The Commission majority agrees with me that "the result in this case was profoundly wrong" but takes the view that the decisions of both the Eighth Circuit panel and the district court are limited to the latter's "assessment of the evidence." Although the Eighth Circuit panel did undertake to protect itself in that fashion, its decision nonetheless acknowledged that Rule 52(a) does not apply to errors of law, citing Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 501 (1984), and Universal Title Ins. Co. v. United States, 942 F.2d 1311, 1314 (8th Cir. 1991). As the Commission pointed out in its petition for rehearing en banc, one of the reasons that these decisions were so "profoundly wrong" was that they conflicted with decisions of the Supreme Court and other courts of appeals (and with the views of Professor Hovenkamp, among others) on various points of law. Thus, the district court's errors (which were blessed by the Eighth Circuit) were not only outside the protection of Rule 52(a) but were squarely within the ambit of Supreme Court Rule 10 and the Court's other jurisprudence on grounds that traditionally merit certiorari review.

<sup>&</sup>lt;sup>6</sup> See, e.g., United States v. Continental Can Co., 378 U.S. 441, 455–56 (1964); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956).

in Supreme Court Rule 10(c), namely, a decision on "an important question of federal law" (how a relevant product market under the