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provided Endo with an opportunity to challenge these bald, unsupported assertions or otherwise defend its rights under the 2017 Settlement. In addition, Complaint Counsel did not indeed, could not establish a record to support their baseless contentions regarding that agreement. *Id.*

a contract to which Endo is a party without properly raising a challenge to that agreement and giving Endo an opportunity to present relevant evidence, expert testimony, and right to due process. requested relief. In addition, however, as a result of the complete lack of any process, let alone due process, related to the 2017 Settlement, Complaint Counsel have failed to develop a record to support the relief that they seek.

Complaint Counsel can Labeling relief ancillary does not permit Complaint Counsel to deprive non-party Endo of its rights under the 2017 Settlement without due process. Moreover, nullification of the 2017 Settlement, retrospective relief that would deprive a non-party of its contractual rights under an agreement, is not proper ancillary relief. And even ancillary relief must be supported by an appropriate record, which is absent here.

it relates to the 2017 Settlement and opposes any related and similarly unsupported proposed Findings of Fact and Conclusions of Law.

BACKGROUND

I. The Current Action Relates Solely to the 2010 Agreements.

This administrative action involves two agreements between Endo and Impax: (1) a 2010 Settlement and License Agreement which resolved patent litigation between Endo and Impax and provided Impax with a broad license to sell generic Opana ER starting in January 2013, and (2) a 2010 Development and Co-Promotion Agreement for a potential new drug for the treatment of (collectively . See generally Jan. 23, 2017 Compl.,

FTC No. 9373. No other agreements have been challenged in this action.

The challenge to the 2010 Agreements was the product of a three and one-half year investigation and administrative process related to those agreements. The FTC first issued a civil investigative demand to Endo related to the 2010 Agreements on February 20, 2014. Before deciding whether to formally challenge the 2010 Agreements, the FTC Staff engaged in an extensive investigation over a period of more than two years. During that investigation, Endo produced more than 400,000 documents from dozens of custodians, made eight

settlement to Complaint Counsel. The 2017 Settlement was also filed with the FTC under the Medicare Modernization Act on August 16, 2017.

Neither Complaint Counsel nor any member of the Complaint Counsel is a member of the FTC. The Complaint Counsel is not a party to the 2017 Settlement. The Complaint Counsel is not a party to the 2017 Settlement. The Complaint Counsel is not a party to the 2017 Settlement.

Second, Endo itself

that relief related to the 2017 Settlement is ancillary. Ancillary relief is proscriptive of otherwise permissible acts that are connected to acts found to be illegal.

relief is no such thing. Indeed, where courts have permitted ancillary relief, such relief, consistent with due process, was prospective and impacted only the respondent in the action, not non-parties. Moreover, ancillary relief must still be supported by a factual record demonstrating that it will remedy the anticompetitive effects of the challenged conduct (here, the 2010 Agreements). Complaint Counsel have not even attempted to develop an appropriate record to support their proposed findings or relief related to the 2017 Settlement, relying on nothing more than their own naked characterization of that agreement.

I. Complaint Counsel’s Collateral Challenge of the 2017 Settlement Violates Non-Party Endo’s Due Process Rights.

A government agency cannot act to deprive a party of its rights under a contract without due process of law. *See Mathews v. Eldridge*

Anglemyer v. Hamilton

Cnty. Hosp., 155 F.3d 1193, 1206 (10th Cir. 1995) (explaining that express or implied contracts give rise to protected property interests). The fundamental requirement of due process is the opportunity to be heard

Armstrong v. Manzo,

380 U.S. 545, 552 (1965); *see also Fuentes v. Shevin*

century the central meaning of procedural due process has been clear: Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be

³ Procedural due process is required in administrative proceedings. *Standard Oil v.*

FTC

giving the party against whom the injunction was sought an opportunity to present evidence on his

Here, the proceeding did not even include one of the parties necessary to litigate issues related to the 2017 Settlement, namely Endo.

In short, to satisfy due process, an agency attempting to deprive a party of its property

competition for . . .

respond. They failed to do any of these things, and their proposed Findings and relief related to

In sum, before any condemnation of the 2017 Settlement, these issues and many others would need to be explored on a fully developed evidentiary record, and both parties whose contractual rights would be affected would need to be afforded appropriate due process. Complaint Counsel did neither and their effort to use the post-trial briefing in this proceeding to skirt those basic requirements is wholly improper.

III. Nullification of the 2017 Settlement Agreement is Not Proper Ancillary Relief.

Complaint Counsel characterize the proposed relief related to the 2017 Settlement as within the category of permissible practices connected with the acts found to be illegal must sometimes be *United States v. Loew's, Inc.*, 371 U.S. 38, 53 (1962)). Apparently, Complaint Counsel believe that, by invoking this term, they can nullify the 2017 Settlement an entirely different agreement than the 2010 agreements at issue in this proceeding without providing Endo with basic due process and without creating an evidentiary record supporting the proposed relief.

The relief Complaint Counsel seek with respect to the 2017 Settlement is not ancillary. Ancillary relief is typically limited to *prospective* remedies that impact the respondent(s) in an action, not the retrospective nullification of an existing agreement with a non-party, like the 2017 Settlement. Moreover, can rights. Finally, even ancillary relief must be supported by an adequate record demonstrating a

ER product from the market). They also propose a finding that, [REDACTED]
[REDACTED]
[REDACTED] *Id. at* ¶ 1492. Thus, Complaint Counsel assert both that the 2017 Settlement reduced competition *and* [REDACTED]
[REDACTED]

reasonable relationship with the anticompetitive effects of the challenged conduct (i.e., the 2010 Agreements), which is entirely lacking in this case.

- A. Nullification of the 2017 Settlement is not proper ancillary relief because it is retrospective and impacts the rights of a non-party.

retrospective nullification of the 2017 Settlement is not the type of relief that courts have deemed to be ancillary. Such retrospective remedies for alleged anticompetitive conduct cannot extend beyond the issues of liability contemplated in the underlying administrative proceeding. *See Microsoft II*, 373 F.3d at 1215, 1222, 1224. Here, the issues of liability contemplated in the administrative proceeding did not include the 2017

By contrast, the case law that allows for ancillary restrictions clearly contemplates *prospective* restrictions on *future* conduct by the *respondent*. *See FTC v. Colgate-Palmolive Co.*,

respondents from engaging in similarly illegal practices in future *Telebrands v. FTC*,
457 F.3d 354, 357 & n.5 (4th Cir. 2006) -in remedies are designed to prevent future
unlawful conduct *see also Nat'l Soc. of Prof. Eng'rs*, 435 U.S. at 697 (explaining that courts

the rights of non-parties); *Ford Motor Co.*

CONCLUSION

For the reasons stated herein, proposed Findings related to the 2017 Settlement, requested nullification of the 2017 Settlement, and any remedy that would affect should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I caused a true and correct

Notice of Electronic Service

I hereby certify that on January 16, 2018, I filed an electronic copy of the foregoing Endo Pharmaceuticals's Opposition to Complaint Counsel's Findings and Proposed Relief [Redacted], with:

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I hereby certify that on January 16, 2018, I served via E-Service an electronic copy of the foregoing Endo Pharmaceuticals's Opposition to Complaint Counsel's Findings and Proposed Relief [Redacted], upon:

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