DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. O

moving from clear guidance on disgorgement to virtually no guidance on this important policy

2004,[11] acquisitions the Commission opted not to challenge at the time

remains the sole or dominant radiopharmacy,"[16] notwithstanding the fact that whatever exclusivity Cardinal may have achieved admittedly expired in early 2008.[17] The complaint provides no basis for the assertion that Cardinal's conduct during the 2003-2008 period has caused the lack of entry in those six markets during the past seven years.[18]

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Further, even if causation could be proven here, the evidence of anticompetitive effects in

both values and deserves transparency and predictability."[21] Parties subject to the FTC's jurisdiction should have notice of when they may be subject to disgorgement of their profits.[22]

The Commission therefore ought to reinstate the Policy Statement – either in its original form or in some modified form that the current Commissioners can agree on – or provide some additional guidance on when it plans to seek the extraordinary remedy of disgorgement in antitrust cases. Simply saying that the agency will be guided by the case law is insufficient – particularly considering how meager the relevant case law is. Further, the majority's characterization of its view as "wholly consistent with that of the Supreme Court"[23] rings hollow. The two cases the majority cites for this proposition are wholly inapposite. One stands for the proposition that the FTC Act was designed to stop monopolies in their incipiency – a proposition that is completely irrelevant to the completed monopolization alleged in this matter.[24] The second case involves the more routine remedy of divestiture – not disgorgement.[25]

More fundamentally, the pursuit of disgorgement in this and other recent cases represents a significant departure from the agency's traditional reliance on its cease-and-desist authority in antitrust cases. Even if the FTC has statutory authority to seek disgorgement in competition cases, it is a separate and more important policy question whether the Commission ought to use such authority with increasing frequency in a broader set of circumstances, including for conduct that was not a clear violation when undertaken. Overuse of this remedy fundamentally changes the nature of the agency and the role it was designed to play.[26]

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[21] Letter from R. Bruce Josten, Exec. Vice Pres., U.S. Chamber of Commerce, to FTC Chairman Jon Leibowitz regarding FTC Disgorgement, at 1 (Aug. 22, 2012), *available at* https://www.uschamber.com/letter/letter-regarding-ftc-disgorgement.

[22] *See, e.g.*, *id.* at 2 ("Prosecutorial discretion, while important, is not a suitable substitute for policy guidance. The withdrawal of the 2003 disgorgement policy, combined with the FTC's recent about face on previous pledges to issue guidance with respect to Section 5, suggests a disturbing pattern that undermines the transparent and predictable nature of U.S. antitrust policy and enforcement.").

[23] Cardinal Health, Inc., File No. 101-0006, Statement of the Federal Trade Commission, at 3.

[24] *See id.* (citing Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941)).

[25] *See id.* (citing Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948)).

[26] I would also note that any arguments that the "unfair methods of competition" prong of Section 5 should go beyond the antitrust laws because of the agency's ability to impose only limited prospective relief (*i.e.* cease and desist orders) are undermined by frequent pursuit of disgorgement in competition cases.

Commissioner Leary cogently raised this concern in 2000 in the *Mylan* case:

> An action of this kind is almost too expedient and, dare I say, too seductive. It transforms the Commission into a prosecutor with an immensely powerful antitrust weapon. I suggest thatD