DISSENTING STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

CARDINAL HEALTH, INC.

FILE NO. 101-0006

APRIL 17, 2015

I do not join the Commission's decision to enter into a consent decree with Cardinal Health, Inc. (Cardinal) because the decree includes a monetary payment. For the reasons explained below, this case does not present a good vehicle for the Commission to exercise its authority to pursue a monetary remedy. Moreover, I am troubled by the Commission's continued efforts to pursue monetary remedies without providing any guidance regarding the bases it uses to choose when and whether it will pursue them ts(e)rerhou itrTT2 1 Tf(th)1(e)6(C)-1soeI. e

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In a world with perfect detection and punishment, profit-maximizing market participants will need to face a potential damage award calibrated such that the expected gains from engaging in the prohibited conduct – the profits that accrue as a result of the anticompetitive behavior – less than or equal to the expected penalty at the time the firm decides to engage in the challenged conduct. As a threshold matter, from the perspective of a market participant there is no meaningful economic distinction between a monetary penalty that is "remedial" on the one hand, or "punitive, in nature" on the other, as the Commission suggests there is.[3] In shaping their behavior to align with legal rules, market participants care only about the expected penalty and not about whether the expected penalty is labeled as "damages," "disgorgement," "restitution," or some other legal term of art that connotes the payment of money. The expected penalty is, of course, a function of the probability of punishment and the magnitude of the penalty. The probability of punishment includes the potential for both private and public enforcement actions. If, every time a firm engages in anticompetitive conduct, it is sued in court by a private plaintiff, the Department of Justice, the Federal Trade Commission, or one or more state attorneys general and ordered to pay monies approximating the social harm caused by its conduct, then all firms would be properly and efficiently deterred from engaging in such conduct.

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[1] See Joshua D. Wright, The Federal Trade Commission and Monetary Remedies, Remarks at the European

but the effect of those tactics certainly was known, es

relief against competitors restraining trade. The Commission has not cleared that bar in this case.

I would support a limitation on the Commission's ability to pursue disgorgement only against naked price fixing agreements among competitors or, in the case of single-firm conduct, only if the monopolist's conduct violates the Sherman Act and has no plausible efficiency justification. This latter category would include a monopolist's fraudulent or deceptive conduct, or tortious activity such as burning down a competitor's plant, if such conduct violates the Sherman Act. I would also provisionally support disgorgement in a case if there were evidence demonstrating that a particular category of conduct shown to harm consumers was not adequately deterred through private suits and public enforcement actions seeking injunctive relief. This case does not belong in that category. Declining to pursue disgorgement in most cases involving vertical restraints has the virtue of taking the remedy off the table – and thus reducing the risk of over-deterrence – in the cases that present the most difficulty in distinguishing between anticompetitive conduct that harms consumers and procompetitive conduct that benefits them, such as the present case.

This case involves an alleged vertical restraint – exclusive dealing – and there are numerous plausible efficiency justifications for such restraints.[9] I disagree with the Commission's assertion that "there was no efficiency benefit or legitimate business justification" for Cardinal's conduct.[10] The Commission ignores the fact that Cardinal's efforts to prevent Bristol-Meyers Squibb from licensing Cardiolite to other radiopharmacies were not limited to the 24 markets in which Cardinal also held the right to distribute Myoview. The tactics the Commission challenges could have been output-enhancing in these other markets. Without considering whether the alleged harm caused by Cardinal's conduct[11] outweighs any such efficiencies, I believe the inquiry into whether a matter is appropriate for disgorgement should end if the conduct to be challenged has a plausible efficiency justification. Exclusive dealing does. For that reason, I cannot vote to accept the consent decree in this case.

II. The Commission's Lack of Policy Regarding Monetary Remedies

I also share Commissioner Ohlhausen's concern about the Commission's repeated efforts to pursue disgorgement in competition cases without providing any meaningful guidance

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[9] See, e.g., Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433 (2008); Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. ng8M0 T4t.96 c -06 -0 0 9.96 l6Tc 0 T

regarding when and whether it will seek such a remedy.[12] This concern is heightened in light of the fact that the Commission has sought or is seeking disgorgement in three recent cases including this one,[13] and the current Director of the Bureau of Competition has expressed a desire to pursue settlements with monetary payments in competition cases.[14] This stands in contrast to the Commission's pursuit of monetary remedies in only two cases during the nine-year period prior to the adoption of the withdrawn Policy Statement and two cases during the nine-year period when the Statement was active.[15] I agree with Commissioner Ohlhausen that "[t]he 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 we will be guided by the case law is insufficient."[16] As I have stated before, "I fear that a lack of guidance from the Commission could cause much mischief. Risk averse companies concerned about the financial and reputational effects associated with a disgorgement order from the FTC could respond to the lack of guidance by not engaging in conduct that could plausibly benefit consumers."[17] The Commission's decision to accept a monetary payment from Cardinal to settle this case presents precisely this risk.

I respectfully dissent.

[12] In the Matter of Cardinal Health, Inc., FTC File No. 101-0006, Dissenting Statement of Commissioner Maureen K. Ohlhausen (April 17, 2015) ("The lack of guidance from the Commission on the use of its disgorgement authority makes any such use inherently unpredictable and thus unfair.").

[13] *See* FTC v. AbbVie, Inc., No. 2:14-cv-05151-HB (E.D. Pa. filed Sept. 8, 2014); Brief for FTC in Opposition to Cephalon's Motion to Dismiss for Lack of Subject Matter Jurisdiction, FTC v. Cephalon, Inc., No. 2:08-cv-2141 (E.D. Pa. filed Nov. 18, 2013).

[14] Harry Phillips, *Feinstein wants billion-dollar pay-for-delay settlement*, GLOBAL COMPETITION REV. (Mar. 30, 2014), http://globalcompetitionreview.com/usa/article/35647/feinstein-wants-billion-dollar-pay-for-delay-settlement/.

[15] Wright, *supra* note 1.

[16] *See* Ohlhausen, *supra* note 12.

[17] Wright, *supra* note 1, at 32.