Statement of the Federal Trade Commission[1]
In the Matter of Cardinal Health, Inc.
FTC File No. 101-0006
April 17, 2015

The Federal Trade Commission has voted to accept a settlement with Cardinal Health, Inc. ("Cardinal") to resolve allegations that Cardinal illegally monopolized the market for the sale and distribution of low-energy radiopharmaceuticals ("radiopharmaceuticals") in 25 metropolitan areas across the United States. Under the terms of the proposed Final Order and Stipulated Permanent Injunction ("proposed Order"), Cardinal is required to disgorge its ill-gotten gains by paying $26.8 million into a fund for distribution to customers injured by its conduct.[2] Cardinal also agrees to certain injunctive relief that will prevent future violations and is designed to restore competition in six markets where Cardinal remains the sole or dominant radiopharmacy. For the reasons described below, we believe this settlement appropriately remedies the alleged wrongful conduct by Cardinal and serves the public interest.

Through separate acquisitions in 2003 and 2004, Cardinal became the largest operator of radiopharmacies in the United States and the sole radiopharmacy operator in 25 relevant markets addressed by this settlement. Radiopharmacies distribute and sell radiopharmaceuticals, which are drugs containing radioactive isotopes, used by hospitals and clinics to diagnose and treat diseases. Notably, they typically derive at least of 60% of their revenues from the sale of heart perfusion agents ("HPAs"), a

threatened to, and did in fact, convert customers from Cardiolite to Myoview in multiple markets where Cardinal operated the only radiopharmacy. Second, Cardinal cancelled, or threatened to cancel, its large purchases of other radiopharmaceuticals from BMS. Cardinal then conditioned its future purchases of these products on BMS refraining from licensing other radiopharmacy operators as Cardiolite distributors in Cardinal's monopoly markets. Third, Cardinal threatened to compete against BMS as a future generic Cardiolite manufacturer if BMS granted Cardiolite distribution rights to potential radiopharmacy entrants, while offering to forgo such competition if BMS ceased granting rights. As a result of Cardinal's various tactics, BMS abandoned its plan of widely expanding the Cardiolite distribution network.

Cardinal also threatened GE-Amersham with similar forms of retaliation if GE-Amersham licensed other radiopharmacy operators as Myoview distributors in the relevant markets. First, Cardinal warned GE-Amersham that its current and future radiopharmaceutical product relationships were contingent on keeping Cardinal as its exclusive Myoview distributor. Second, Cardinal assured GE-Amersham that Cardinal would be "product neutral," meaning it would not promote BMS's Cardiolite over Myoview in the relevant markets, as long as GE-Amersham did not license potential radiopharmacy entrants in these markets.

In sum, we have reason to believe that Cardinal's actions caused both BMS and GE-Amersham to deny HPA distribution rights to numerous potential radiopharmacy entrants. This conduct allowed Cardinal to maintain and exercise monopoly power in each of the relevant markets. By excluding potential rivals, Cardinal denied its customers the benefits of competition and profited from the monopoly prices it charged for all radiopharmaceuticals, including HPAs, in the relevant markets. Importantly, there was no efficiency benefit or legitimate business justification for Cardinal simultaneously maintaining exclusive distribution rights to the only two HPAs then available in the relevant markets.

The settlement we have approved is properly tailored to prevent future violations by Cardinal, restore the competition that was lost, and ensure that Cardinal does not retain the fruits of its misconduct. Specifically, the proposed Order prohibits Cardinal from engaging in future schemes similar to that alleged in the Complaint. It also includes provisions designed to restore competition in six of the relevant markets where Cardinal continues to operate as the sole or dominant radiopharmacy. For example, Cardinal is required to allow customers to terminate their exclusive contracts to facilitate effective entry by a competing radiopharmacy operator. Finally, the proposed Order requires Cardinal to disgorge its ill-gotten gains by paying $26.8 million into a fund that will be used to compensate affected customers.

In their respective dissenting statements, Commissioners Ohlhausen and Wright assert that disgorgement is not appropriate in this case and question more broadly the propriety of the Commission's use of disgorgement as a remedy in competition cases. We respectfully disagree on both counts.[3]

In 2012, the Commission withdrew its 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases to dispel the notion that the FTC would seek disgorgement and restitution remedies only in "exceptional" cases. Importantly, we emphasized that "[a]lthough our decisions and orders generally focus on structural or behavioral remedies intended to curb future competitive harm, the agency's mission to protect consumers and competition also includes, where appropriate, taking action to remedy the actual, realized effects of antitrust violations."[4] Our view is wholly consistent with that of the Supreme Court, which has observed that the Commission's cease-and-desist authority to prevent future competitive harm emanates from the FTC Act's prophylactic objective—that "attempts to bring about complete monopolization of an industry might be stopped in their incipiency."[5] But, as the Court has also observed, where the government has been unable to intervene "at the incipient stages of the unlawful project," cease-and-desist orders that merely "forbid a repetition of the illegal conduct" would allow the defendants to "retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors."[6] Such an outcome would thwart the goals of the antitrust laws.

This case therefore presents precisely the type of situation in which we appropriately "start from the premise that an injunction against future violations is not adequate to protect the public interest."[7] As described above, we have ample reason to believe that Cardinal violated the Sherman Act. Our Complaint does not charge, as Commissioner Ohlhausen suggests, that Cardinal's 2003 and 2004 acquisitions were themselves unlawful. We view them instead as initial steps in a monopolization scheme that hinged on post-merger exclusionary conduct designed to prevent and delay entry by other radiopharmacy operators.[8] In other words, Cardinal's scheme relied on an anticompetitive combination of acquiring existing competitors in the relevant markets and then raising artificial barriers to new entry that would have created

---

Cir. 2014) (Section 13(b) confers power to award "monetary consumer redress, which is a form of equitable relief"); *FTC v. Bronson Partners*, LLC, 654 F.3d 359, 365 (2d Cir. 2011) ("Section 13(b) permits a court to order ancillary equitable relief, including monetary relief"); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468–70 (11th Cir. 1996) ("Among the equitable powers of a court [that may be invoked by Section 13(b)] is the power to grant restitution and disgorgement."); *see also FTC v. Cephalon, Inc.*, No. 2:08-cv-02141-MSG, slip op. at 8 (E.D. Pa. Apr. 15, 2015) (concluding that the FTC may seek disgorgement in cases brought under Section 13(b)).

[4] Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070, 47,070–71 (July 31, 2012), *available at* https://www.ftc.gov/policy/federal-register-notices/federal-register-notice-withdrawal-commission-policy-statement.

[5] *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 466 (1941).

[6] *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948). In *Schine Chain Theatres*, the Court likened divestiture to restitution, both equitable remedies designed to "deprive[] a defendant of the gains from his wrongful conduct" and "in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." *Id.* The same is true of disgorgement. *Accord SEC v. Teo*, 746 F.3d 90, 105 n.26 (3d Cir. 2014) (holding that "Justice Douglas' comments [in *Schine Chain Theatres*] on divestiture in the antitrust context could be applied to the SEC's use of disgorgement").

[7] *Schine Chain Theatres*, 334 U.S. at 128.

[8] *See* Complaint ¶ 18.

competition in these markets. Cardinal’s exclusionary conduct allowed it to unlawfully maintain its monopoly status.[9]

Moreover, it is well accepted that where a single firm acts as the exclusive distributor for all, or nearly all, potential suppliers of an essential input, such an arrangement can prevent or foreclose effective competition.[10] In his dissent, Commissioner Wright correctly observes that exclusive dealing can have plausible efficiency justifications. Here, however, Cardinal’s

’s

norr, ir5 Td 1

manufacturer and the distributor, as one would expect to see in a classic case where exclusive distribution generates procompetitive efficiencies.[14]

The evidence also contradicts Commissioner Ohlhausen's suggestion that Cardinal's monopolies were the result of "insufficient demand." Significantly, there is direct evidence that Cardinal's conduct caused BMS and GE-Amersham to deny potential entrants HPA distribution rights and prevented entry that would have occurred in the relevant markets between 2003 and 2008. Indeed, prior to Cardinal's acquisitions, all but one of the relevant markets sustained two competing radiopharmacies and each of the relevant markets attracted the interest of would-be entr-, pr1.15 T4725 -1.15 Td -6m(1.15 T4 p)-2(onop(a)-6d.-1( )]</MCID 1 >>BDC -17.73 -1.15 T3j EMC

In his dissent, Commissioner Wright analyzes the propriety of disgorgement using an economic approach applicable to antitrust penalties. Unlike treble damages, however, disgorgement is remedial, not punitive, in nature.[17] Disgorgement deters subsequent conduct simply by sending a message that wrongdoers, if caught, will not be able to profit from their wrongdoing.[18]

Moreover, while BMS and GE-Amersham would have been aware of Cardinal's exclusionary conduct as the recipients of Cardinal's threats, acts of coercion, and inducements, the same cannot be said of Cardinal's hospital and clinic customers and the other victims of Cardinal's anticompetitive scheme. If Cardinal were the only radiopharmacy operator in a given relevant market, it follows that Cardinal would have been the only source of Cardiolite and Myoview in that market. Customers would have had no reason to suspect that this outcome was the product of any exclusionary tactics. Cardinal's exclusionary conduct cannot be characterized as "open and notorious," as Commissioner Wright suggests. In our view, Commissioner Wright's analysis is therefore inapposite.

As always, the Commission will continue to exercise responsibly its prosecutorial discretion in determining which cases are appropriate for disgorgement. We regard disgorgement as one of many remedial tools at our disposal in competition cases, and will employ it judiciously to protect consumers and promote competition.

---

[17] *Compare ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 300 (3d Cir. 2012) (describing the role of treble damages in penalizing antitrust violators), *with SEC v. Cavanagh*, 445 F.3d 105, 116 n.25 (2d Cir. 2006) (noting that disgorgement, being remedial, may not exceed the amount acquired through wrongdoing).

[18] *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) ("Because disgorgement's underlying purpose is to make lawbreaking unprofitable for the law-breaker, it satisfies its design when the lawbreaker returns the fruits of his misdeeds, regardless of any other ends it may or may not accomplish.").