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Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission

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I. Introduction

Good morning, and thank you for inviting me to speak with you. Today, I discuss a matter that should concern those who care about the FTC's competition mission. The problem is the pursuit of disgorgement. In 2003, the FTC announced that it would ordinarily not seek such relief absent a clear violation of the antitrust laws, among other conditions.[2] Over my dissent, however, the FTC discarded that policy statement in 2012.[3] The result has been a dramatic uptick in the agency's pursuit of monetary equitable relief.

Some commentators might applaud this development. After all, depriving antitrust violators of their ill-gotten gains has an intuitive appeal. But the FTC's new enthusiasm for

[1] My remarks reflect my own views, rather than those of the Commission.
[2] Policy Statement On Monetary Equitable Remedies -- Including in Particular Disgorgement and Restitution -- In Federal Trade Commission Competition Cases Addressing Violations of the FTC Act, the Clayton Act, or the Hart-Scott-Rodino Act (July 31, 2003), https://www ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular [2003 Policy Statement].
[3] Statement of the Commission Regarding Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), https://www.ftc.gov/public-statements/2012/07/statement-commission-regarding-withdrawal-commissions-policy-statement [2012 Withdrawal]; Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), https://www.ftc.gov/public-statements/2012/07/statement-commissioner-maureen-k-ohlhausen-dissenting-commissions-decision [2012 Withdrawal Dissent].

monetary equitable relief, which we can only obtain in federal court under Section 13(b), has troubling ramifications.

As I observed in my concurring statement in *Cephalon* last year, "the incentive to pursue monetary remedies more frequently, particularly in other cases without a clear violation, may cause the Commission to neglect its special mission to develop the antitrust laws through Part III litigation and other unique tools. That concern is only heightened now that we are counting disgorgement in the billions of dollars."[4]

Part III is a fundamental institutional strength of the FTC and has allowed the agency to serve a critical function in emerging areas of competition law. The FTC has an enviable track record of bringing cases administratively that ultimately transform the law. Prominent examples include *North Carolina Dental*, *McWane*, *ProMedica*, *Evanston*, and—indirectly—*Schering Plough*.[5] The FTC has also used its Part III process to good effect, and with appellate courts' approval, in consummated-acquisition cases like *Chicago Bridge* and *Polypore*.[6]

Today, the Commission is fighting hard to retain the full scope of its Part III process, which pending legislation, known as the SMARTER Act, may limit.[7] Despite the FTC's professed devotion to Part III, however, the agency has neglected it in recent antitrust cases. I worry that the pursuit of disgorgement is partially to blame.

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[4] FTC v. Cephalon, Inc., Separate Statement of Commissioners Maureen K. Ohlhausen & Joshua D. Wright, at 3 (May 28, 2015), https://www ftc.gov/public-statements/2015/05/separate-statement-commissioners-maureen-k-ohlhausen-joshua-d-wright.

[5] N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015); McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015), *cert. denied*, 2016 WL 1078944 (U.S. 2016); ProMedica Health Sys. v. FTC, 749 F.3d 559 (6th Cir. 2014), *cert denied*, 135 S. Ct. 2049 (2015); *In re* Evanston Nw. Healthcare Corp., 2008 FTC LEXIS 62 (2008); Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006) (*later effectively reversed*, FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013)).

[6] Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008); Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2853 (2012).

[7] Standard Merger & Acquisition Reviews Through Equal Rules Act of 2015, H.R. 2745, 114th Cong. (2015).

Over the next few minutes, I will discuss the FTC's embrace of disgorgement, the value of the agency's administrative process, and how the FTC has recently forsaken Part III in antitrust matters.

II. The FTC Pursues Disgorgement

A. *1980-2002: The FTC Wields Disgorgement as a Precision Tool*

Our story begins with the FTC's historical pursuit of disgorgement. The agency previously wielded that imposing remedy with restraint. Between 1980 and 2002, for example, the FTC sought disgorgement in just two cases: *Hearst Trust* and *Mylan Laboratories*.[8] The Commission settled those cases in 2001 and 2000, respectively, with the accused firms' agreeing to disgorge their wrongfully obtained profits.[9]

Importantly, both of those matters involved clear wrongdoing.[10] In *Hearst*, a merger-to-monopoly case, the FTC alleged that the firm had omitted important documents from its merger filing, which prevented the Commission from fully analyzing the acquisition's competitive effects.[11] *Mylan* involved an alleged conspiracy to monopolize a market for two anti-anxiety drugs.[12] The accused firms denied their competitors a key active-pharmaceutical ingredient through exclusive supply agreements that they could not justify.[13] The price of the relevant drugs rose by 2,000-3,000%.[14]

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[8] Compl., FTC v. The Hearst Trust, No.1:01CV00734 (D.D.C. Apr. 4, 2001); Compl., FTC v. Mylan Labs, Inc., No.1:98CV03114 (D.D.C. Dec. 21, 1998).
[9] FTC v. Mylan Labs., Inc., FTC File No. X990015, Statement of Chairman Robert Pitofsky & Commissioners Sheila F. Anthony and Mozelle W. Thompson (Nov. 29, 2000), https://www.ftc.gov/sites/default/files/documents/cases/2000/11/mylanpitofskystatment.htm; *see also* The Hearst Trust *et al.*, Statement of Commissioners Sheila F. Anthony & Mozelle W. Thompson, File No. 991-0323 (Dec. 14, 2001), https://www ftc.gov/sites/default/files/documents/cases/2001/12/anthstate.htm.
[10] 2003 Policy Statement, *supra* note 2.
[11] *See* Compl. ¶¶ 16-19, FTC v. The Hearst Trust, No. 01-cv-00734 (D.D.C. filed Apr. 5, 2001).
[12] *See* Amd. Compl., FTC v. Mylan Labs, Inc., No. 98-cv-03114 (D.D.C. filed Feb. 8, 1999).
[13] *Id.*
[14] *Id.* at ¶ 29.

All told, the pre-2003 period saw the FTC pursue monetary equitable remedies with cautious discretion. Neither disgorgement nor restitution featured routinely in the agency's competition-enforcement efforts.

B. *The Commission Unanimously Adopts the 2003 Policy Statement*

Shortly after *Hearst* and *Mylan*, the FTC expressed its views on when disgorgement or restitution is appropriate.[15] Its 2003 policy statement on monetary equitable remedies marked the culmination of a thoughtful, deliberative process. The Commission received comments from the practicing bar and scholars, assiduously studied the relevant case law and literature, and engaged in public discussions. After that multi-year process, by a unanimous vote of the full Commission, the FTC released a statement that envisioned an important—but properly cabined—role for disgorgement.

In the 2003 Commission's view, disgorgement is not a "routine remed[y,]" but rather appropriate only "in exceptional cases."[16] The FTC embraced three principles to guide its enforcement discretion.[17] Ordinarily, it would seek monetary relief "only where the underlying violation is clear" and there is "a reasonable basis for calculating the amount of the remedial payment."[18] Further, the FTC would "consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings."[19]

The clear-violation factor, in particular, has an important rationale.[20] The 2003 statement explained that "the value of deterrence is reduced when the violator has no reasonable way of knowing in advance that its conduct is placing it in jeopardy of having to pay back all the

[15] *See* 2003 Policy Statement, *supra* note 2.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *See* Ohlhausen & Wright, Separate Statement in *Cephalon*, *supra* note 4, at 1.

potential gains."[21] Hence, the disincentive value of disgorgement is greatest "when the violator can determine in advance that its conduct would probably be considered illegal."[22] In this respect, it is important to emphasize that disgorgement is not a punitive tool.

The principles espoused by the 2003 Commission found favor within the larger antitrust community. The Antitrust Modernization Commission, for instance, approved of the FTC statement in 2007.[23]

C. *The FTC Seeks Disgorgement in Two Cases Between 2003 and 2012*

The Commission remained true to its principles for almost a decade after the 2003 statement. It sought disgorgement in just two cases during that time. In *Perrigo*—the first case—two drug companies conspired to limit competition in the sale of ibuprofen for children.[24] In settling the case in 2006, then-Chairman of the FTC, Tim Muris, announced that "[t]his case involves a clear antitrust violation[.]"[25]

In the second matter, *Lundbeck*, the FTC challenged a drug company's acquisition of the only substitute drug for treating a heart condition suffered by premature infants.[26] Shortly after the acquisition, the firm raised price 1300%.[27] In suing Lundbeck in 2008, the FTC sought disgorgement, though it ultimately lost the case on market-definition grounds.[28] During this period, the FTC clearly adhered to its principles in deciding whether to pursue monetary equitable relief.

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[21] 2003 Policy Statement, *supra* note 2.
[22] *Id.*
[23] ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 285, 288 (2007).
[24] Compl., FTC v. Perrigo Co., No. 1:04CV01397 (D.D.C. Aug. 12, 2004).
[25] FTC, *Generic Drug Marketers Settle FTC Charges* (Aug. 12, 2004), https://www.ftc.gov/news-events/press-releases/2004/08/generic-drug-marketers-settle-ftc-charges.
[26] Compl., FTC v. Ovation Pharma. (*later* Lundbeck, Inc.), Civil No. 8-06379 (D. Minn. Dec. 16, 2008).
[27] FTC. v. Lundbeck, Inc., Civil No. 0:08-cv-06379, Findings of Fact, Conclusions of Law, and Order Issued by the District Court, at 1-2 (D. Minn. Aug. 31, 2010).
[28] FTC v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011).

D. *The Commission Reverses Course in 2012*

The Commission abruptly changed direction in 2012.[29] Over my dissent, the FTC jettisoned the 2003 statement, taking a different approach to disgorgement and restitution.[30] Rather than view such relief as the exclusive preserve of "exceptional cases," the FTC concluded "competition cases may *often* be appropriate candidates for monetary equitable relief."[31] It bemoaned its limited pursuit of such relief in the past, believing that the 2003 statement had "chilled" its enforcement zeal.[32] Notably, though, the FTC did not identify any case in which it should have sought, but did not pursue, disgorgement or restitution.

In making this change, the Commission claimed that "existing law . . . provides sufficient guidance on the use of monetary equitable remedies" but the withdrawal statement did not discuss the law that apparently provides such direction.[33] Perhaps the FTC sought to free itself to seek disgorgement and restitution to the maximum extent allowed by law. But if so, it ought to have said that explicitly and explained why such relief would not feature in every case where a firm profits—innocently or otherwise—from an antitrust violation. Absent such an explanation, the business community is simply left to guess how the Commission will exercise its discretion from one case to the next.

Even today, the FTC does not seek disgorgement in every antitrust case but the factors that undergird the Commission's decision making are unclear. The Commission disclaimed the three factors from the 2003 statement but offered nothing else in their place.

[29] 2012 Withdrawal, *supra* note 3.
[30] *Id.*
[31] *Id.* at 1 (emphasis added).
[32] *Id.* at 2.
[33] *Id.* at 1.

One might expect such an about-face to reflect rigorous debate, with the benefit of the practicing community's insights. But the FTC did not solicit any public input. No wonder stakeholders reacted with alarm. For example, the U.S. Chamber of Commerce wrote to the FTC's then-Chairman to express its "its deep disappointment" with the agency's withdrawal of the 2003 policy statement.[34]

E. *The FTC Pursues Disgorgement More Frequently*

In suddenly withdrawing its 2003 policy statement, the FTC signaled a new-found enthusiasm for pursuing monetary equitable relief. Subsequent events have borne out expectations. Since 2012, the Commission has sought disgorgement four times.[35] That is as many times as the FTC pursued such relief in the prior twenty years.[36]

That doesn't necessarily mean, of course, that disgorgement was inappropriate in all of those cases. In 2015 in *Cephalon*, I supported a consent providing for disgorgement of $1.2 billion, the largest disgorgement obtained in the agency's history.[37] I had reason to believe that Cephalon clearly violated antitrust law by fraudulently procuring patents from the PTO.[38] Indeed, the Federal Circuit had affirmed a finding of inequitable conduct.[39] Hence, the circumstances justified monetary equitable relief, consistent with the 2003 statement.

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[34] U.S. Chamber of Commerce, Letter to Honorable Jon Leibowitz, Chairman, FTC, Letter regarding FTC Disgorgement, Aug. 22, 2012, https://www.uschamber.com/letter/letter-regarding-ftc-disgorgement.
[35] *See* FTC v. Endo Pharma., No. 2:16-cv-1440 (E.D. Pa. Mar. 30, 2016); FTC v. Cardinal Health, No. 15-cv-3031 (S.D.N.Y Apr. 20, 2015); FTC v. AbbVie, Inc., No. 2:14-cv-05151 (E.D. Pa. Sept. 8, 2014); FTC v. Cephalon, Inc., No. 2:08-cv-2141 (E.D. Pa. Nov. 18, 2013).
[36] *Cf.* FTC v. Cardinal Health, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 2 (Apr. 17, 2015), https://www.ftc.gov/public-statements/2015/04/dissenting-statement-commissioner-maureen-k-ohlhausen-cardinal-health-inc [*Cardinal* Dissent].
[37] FTC v. Cephalon, Inc., Statement of the Fed. Trade Comm'n (May 28, 2015), https://www.ftc.gov/public-statements/2015/05/statement-federal-trade-commission-ftc-v-cephalon-inc.
[38] *Id.* at 4.
[39] Apotex Inc. v. Cephalon, Inc., 500 Fed. App'x 959 (Fed. Cir.), *cert. denied*, 134 S. Ct. 825 (2013).

Other instances of disgorgement were not as well founded. In *Cardinal Health* in 2015, the FTC sued the company for monopolizing 25 radiopharmaceutical markets and entered into a consent, in which Cardinal Health agreed to pay almost $27 million in disgorgement.[40] I dissented.[41] Even accepting the FTC's withdrawal of the 2003 statement, I believe that the FTC in *Cardinal Health* should have honored the 3-factor test because the alleged misconduct occurred while the 2003 statement was in effect.

The principles embedded in the 2003 statement counseled heavily against disgorgement in *Cardinal Health*. First, there was no clear violation.[42] Indeed, in my view, the evidence did not support an antitrust violation at all.[43] The FTC's complaint largely focused on Cardinal Health's acquisition of two companies in 2004. Despite timely and compliant HSR filings, the FTC declined to challenge those acquisitions at the time, thus distinguishing the case from *Hearst*. Further, the evidence of post-merger exclusionary conduct by Cardinal Health was mixed, at best. Far from engaging "in particularly egregious conduct" that would justify the pursuit of disgorgement,[44] Cardinal Health at worst committed an unclear Section 2 violation.[45]

Second, there was no reasonable basis for calculating the amount of a remedial payment.[46] Indeed, the disgorgement amount may have been zero, meaning that Cardinal enjoyed no ill-gotten gains.[47] Combined with little or no evidence of anticompetitive effects and consumer harm, the case for disgorgement was thin.

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[40] Compl., FTC v. Cardinal Health, Inc., No. 15-cv-3031 (S.D.N.Y Apr. 20, 2015).
[41] *Cardinal* Dissent, *supra* note 36.
[42] *Id.* at 2.
[43] *Id.* at 3.
[44] FTC v. Mylan Labs., Inc., Statement of Chairman Robert Pitofsky & Commissioners Sheila F. Anthony & Mozelle W. Thompson (Nov. 29, 2000), https://www.ftc.gov/sites/default/files/documents/cases/2000/11/mylanpitofskystatment.htm.
[45] *Cardinal* Dissent, *supra* note 36, at 3.
[46] *Id*. at 4.
[47] *Id.*

To my mind, *Cardinal Health* exemplifies the lax disgorgement standard that reigns after the FTC withdrew its policy statement. In closing out my dissent, I predicted a danger that has since loomed large. I warned that "[o]veruse of this remedy fundamentally changes the nature of the agency and the role it was designed to play."[48]

As I worried, subsequent cases show that disgorgement may have distorted the FTC's decision making. In *AbbVie* in 2014 and in *Endo* just last month, disgorgement loomed large.[49]

III. The Pursuit of Disgorgement Has Undermined the FTC's Antitrust Mission

A. AbbVie*: Getting Bogged Down in Federal Court*

I begin with *AbbVie*. In 2014, the FTC sued several pharmaceutical firms for excluding competition in the sale of AndroGel.[50] The accused firms allegedly paid a generic competitor, Teva, to drop its patent challenge and filed sham infringement lawsuits to delay FDA approval of a generic version of AndroGel.[51] In its complaint, the FTC sought disgorgement or restitution.[52]

Notably, *AbbVie* was the first reverse-payment case that the Commission voted out post-*Actavis*. It raised some complex questions, including the implications when a branded drug manufacturer settles infringement litigation by allowing its generic competitor to market an authorized generic of another drug.

The Commission could have brought a standalone pay-for-delay case in *AbbVie* in Part III to allow us to tackle those difficult issues. Indeed, had we taken the matter into administrative litigation in 2014, the FTC would likely have issued an opinion by now. Perhaps the relevant appellate court would have already ruled on a petition for review.

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[48] *Id.* at 5.
[49] Compl., FTC v. Endo Pharma., Inc., No. 2:16-cv-1440 (E.D. Pa filed Mar. 30, 2016); Compl., FTC v. AbbVie Inc., No. 2:14-cv-05151 (E.D. Pa. filed Sept. 26, 2014).
[50] *AbbVie*, 107 F. Supp. 3d at 438.
[51] *Id.*
[52] *Supra* note 50.

Instead, the agency preferred to go to court. I did not believe that it was in the public interest to sue in federal court, challenging the full array of conduct identified in the Section 13(b) complaint. Hence, I dissented.

Unfortunately, the *AbbVie* litigation in federal court has not proved fruitful, at least thus far. Last year, the district court dismissed the FTC's pay-for-delay claim, while allowing discovery on the sham-litigation count to proceed.[53] The result is that the restraint of trade claim under *Actavis* will lie in abeyance until the court resolves the other issues in the case. No doubt, staff will appeal the district court's pay-for-delay decision to the Third Circuit and may very well succeed. But even if the appellate court reverses the judgment of dismissal, it would have to remand for discovery and the litigation will continue onward, potentially for years.

In the meantime, district courts have struggled mightily with pay-for-delay cases. In the first post-*Actavis* case to go to trial, *In re Nexium*, the district judge began his opinion with the concession that "I did not try this case very well."[54] He admitted to proceeding all the way to trial under a "major misconception" about the claims in the case.[55] Judge Young's difficulties reflect the challenges faced by his counterparts across the country. As Chief Justice Roberts observed in dissent in *Actavis*, "good luck" to the district courts that must fashion an appropriate rule of reason inquiry in these matters.[56] My firm belief is that there are correct answers to these difficult questions and that the FTC is optimally placed to address them.

The FTC could have taken the lead in *AbbVie* through Part III, guiding the lower courts on how to think through these issues and providing an appellate court with an expert agency's ruling based on a clean record. Instead, the agency has gotten stuck in the weeds. The

[53] FTC v. AbbVie Inc., 107 F. Supp. 3d 428, 436-48 (E.D. Pa. 2015).
[54] *In re* Nexium (Esomeprazole) Antitrust Litig., 309 F.R.D. 107, 110 (D. Mass. 2015).
[55] *Id.* at 111.
[56] FTC v. Actavis, Inc., 133 S. Ct. 2223, 2245 (2013) (Roberts, C.J., dissenting).

Commission has thus been relegated to damage control. Over the past two years, the FTC has filed a series of amicus briefs across the country to rectify misconceptions that the agency might have nipped in the bud by proceeding administratively.

For instance, in June 2015 in *American Sales v. Warner-Chilcott*, the FTC filed an amicus brief before the First Circuit.[57] Our brief explained that the district court had wrongly dismissed a pay-for-delay claim where the reverse payment was a promise not to market an authorized generic, rather than a cash transfer.[58]

Two months ago, in *In re Nexium*, the FTC told the First Circuit that the lower court had erroneously conflated the existence of an antitrust violation with antitrust injury.[59] And, last month, the Commission filed a brief before the Third Circuit in *In re Wellbutrin*.[60] Again, the district court had been mistaken. It had held that there is no antitrust problem when a branded drug firm pays its generic rival not to enter at risk, if the deal allowed the underlying patent litigation to continue.[61] Again, the agency had to intervene to explain how the rule of reason operates under *Actavis*.[62]

[57] Brief of FTC as Amicus Curiae in Support of Plaintiffs-Appellants, Am. Sales Co. v. Warner-Chilcott Co., Nos. 14-2071 & 15-1250 (1st Cir. 2015), https://www.ftc.gov/policy/advocacy/amicus-briefs/2015/06/american-sales-co-et-al-plaintiffs-appellants-v-warner.
[58] *Id.* at 2, *passim*.
[59] Brief of Amicus Curiae FTC in Support of No Party, *In re* Nexium (Esomeprazole) Antitrust Litig., Nos. 15-2005, 15-2006, & 15-2007 (1st Cir. 2016), https://www.ftc.gov/policy/advocacy/amicus-briefs/2016/02/re-nexium-esomeprazole-antitrust-litigation.
[60] Brief of FTC as Amicus Curiae in Support of No Party, *In re* Wellbutrin Antitrust Litig., Nos. 15-3559, 15-3591, 15-3681, & 15-3682 (3d Cir. 2016), https://www ftc.gov/policy/advocacy/amicus-briefs/2016/03/re-wellbutrin-antitrust-litigation.
[61] *Id.* at 11.
[62] *Id.* at 12-16.

B. Endo*: A Missed Opportunity to Develop the Law*

The FTC's most recent venture into the world of pay-for-delay agreements came just three weeks ago, in *Endo*.[63] The case, which challenged two separate deals involving the same branded company, raises a fascinating array of issues.

There were compelling reasons to bring *Endo* into administrative litigation under Part III. Above all, *Endo* implicates how the rule of reason should operate in the pay-for-delay context. As courts and scholars have asked in this area, is a "large, unjustified payment" a threshold inquiry whose satisfaction triggers rule of reason analysis or does it lie at the heart of the rule of reason itself? What else must a plaintiff show beyond such a payment to prevail? Should the courts scrutinize the competitive effects of a pay-for-delay agreement at the time the parties signed it or at the time of suit? What kinds of compensation qualify as a payment? Both settlement agreements in *Endo* included a promise not to market an authorized generic for a time.[64] One agreement involved the provision of free branded product. How do those provisions factor into the analysis?

I believe that the FTC is optimally placed to resolve those questions—as reviewed by the appellate courts, of course. The Part III process would have allowed the Commission to weigh in expeditiously, perhaps stemming the plethora of amicus briefs that we must file as courts work through post-*Actavis* pay-for-delay matters. Instead, the Commission filed in federal court and sought disgorgement.

As I explained in my dissenting statement in *Endo*, "I do not believe . . . that it serves the public interest to seek disgorgement in this case. The better course would be to pursue this matter administratively. The Part III process grants the Commission a unique tool to advance the law.

[63] Compl., FTC v. Endo Pharma., 2:16-cv-1440 (E.D. Pa filed Mar. 30, 2016).
[64] *Id.* ¶¶ 2-3.

Employing it here would allow the Commission to render a thoughtful decision applying the *Actavis* standard, providing much-needed guidance to courts and firms around the country."[65]

This is a missed opportunity to continue the FTC's strong track record in advancing competition policy through Part III, which I recounted at the outset of my remarks.

IV. The SMARTER Act

In *AbbVie* and *Endo*, the FTC saw advantages to federal court that outweighed the benefits of administrative litigation. Disgorgement may explain that calculus. Of course, monetary equitable remedies are appropriate tools to deter clear violations of the antitrust laws. But frequent pursuit of money undercuts the FTC's competition mission. As should now be obvious, I think that the FTC has overestimated the value of disgorgement and undervalued its administrative function in complex antitrust cases.

The irony is that the FTC's pivot toward federal court in important antitrust matters comes at a time when the agency is fighting to preserve its administrative-litigation authority. Last month, the House of Representatives passed the SMARTER Act.[66] If enacted, the legislation would—among other things—prevent the FTC from challenging unconsummated mergers in Part III.

My colleagues on the Commission have staunchly opposed the SMARTER Act. Last October, in congressional testimony, Chairwoman Ramirez remarked upon the FTC's success in challenging healthcare mergers administratively under Part III.[67] In that respect, the Commission

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[65] *In re* Endo Pharma. Inc., Dissenting Statement of Commissioner Maureen K. Ohlhausen (Mar. 31, 2016), https://www.ftc.gov/public-statements/2016/03/dissenting-statement-commissioner-maureen-k-ohlhausen-matter-endo.

[66] H.R. 2745, *supra* note 7.

[67] United States. Cong. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary, Hearing on S. 2102, The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015", Oct. 7, 2015. 114th Cong. (Prepared Statement of the Federal Trade Commission), https://www.ftc.gov/public-statements/2015/10/prepared-statement-federal-trade-commission-s-2102-standard-merger.

has enjoyed a near-unblemished track record in healthcare since its 2007 administrative finding in *Evanston*.[68] In *St. Luke's* and *ProMedica*—for instance—the Ninth and Sixth Circuits recently held in the Commission's favor.[69] Based on that record of success, the Chairwoman offered an impassioned defense of the Part III administrative process, which she described as "a defining characteristic of the agency" and a "fundamental institutional attribute of the FTC."[70]

I share the Chairwoman's appreciation of Part III's role. Yet, in practice, Part III bestows unique value only in conduct matters and consummated-merger cases. For unconsummated mergers, the action takes place in federal court. Parties typically abandon their mergers if the court grants a preliminary injunction. Although the FTC could continue in Part III after losing a motion for preliminary injunction, it has not done so in twenty years. I struggle to imagine a scenario where I would support proceeding administratively after losing in court. Indeed, last year, I championed an amendment to the rules governing Part III proceedings.[71] As a result of the change, the FTC, after losing its motion for a preliminary injunction, now automatically withdraws (or stays) an administrative case if respondents move to withdraw (or dismiss) the matter.[72]

In short, I support the SMARTER Act insofar as it subjects the DOJ and FTC to the same legal standards, and forum, in challenging unconsummated mergers.[73] I thus find myself in an unusual position. I want the FTC to make more use of its Part III process than my colleagues

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[68] Deborah L. Feinstein, Director, Bureau of Competition, *Antitrust Enforcement in Health Care: Proscription, not Prescription* (June 19, 2014), https://www.ftc.gov/public-statements/2014/06/antitrust-enforcement-health-care-proscription-not-prescription.
[69] St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys., 778 F.3d 775 (9th Cir. 2015); ProMedica Health Sys. v. FTC, 749 F.3d 559 (6th Cir. 2014), *cert denied*, 135 S. Ct. 2049 (2015).
[70] Chairwoman Ramirez Testimony of Oct. 7, 2015 on Behalf of FTC, *supra* note 67.
[71] Maureen K. Ohlhausen, *A SMARTER Section 5*, Remarks before the U.S. Chamber of Commerce, at 3-11 (Sept. 25, 2015), https://www ftc.gov/public-statements/2015/09/smarter-section-5.
[72] Debbie Feinstein, Director, Bureau of Competition, FTC, *Changes to Commission Rule 3.26 re: Part 3 proceedings following federal court denial of a preliminary injunction* (Mar. 16, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/changes-commission-rule-326-re-part-3-proceedings.
[73] Ohlhausen, *SMARTER Section 5*, *supra* note 71, at 15.

apparently support. Meanwhile, they fight to defend Part III for cases where it matters least. In recent conduct cases like *Endo* and *AbbVie*—where Part III offered compelling advantages—the FTC opted for federal court. To the extent the Commission may have looked past Part III for monetary relief reasons, I would think that to be a most unfortunate mistake.

V. Conclusion

In summation, I worry that the FTC's pursuit of disgorgement—though well intentioned—distracts from the agency's unique mandate to develop antitrust law. To appreciate the FTC's change in direction, recall Commissioner Thomas Leary's remarks in *Mylan*, which closely preceded the 2003 statement.[74] Commissioner Leary worried about the district court's suggestion in *Mylan* that the FTC could seek ancillary monetary relief in antitrust cases for any violation of a law enforced by the Commission.[75]

Commissioner Leary observed that, while "present members of the Commission may only intend to seek this extreme relief in the most extraordinary cases," the court's ruling "may be employed by successors less scrupulous."[76] He worried that the "seemingly expedient solution may have a ripple effect far beyond the matter at hand."[77]

Cases like *Endo*, *AbbVie*, and *Cardinal Health* show that Commissioner Leary was prescient. I call on the FTC to reinstate the principles adopted by the 2003 statement on monetary equitable relief. If today's Commission cannot embrace those norms, at the very least it should explain the principles that guide its discretion in pursuing such powerful remedies. Today's *status quo* is unacceptable, not least when it leads the FTC to forgo its special mission to develop complex antitrust doctrines through Part III, as it has done so successfully in the past.

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[74] Mylan Labs., Inc., FTC File No. X990015, Statement of Commissioner Thomas B. Leary, Dissenting in Part & Concurring in Part, at 5 (Nov. 29, 2000), https://www.ftc.gov/sites/default/files/documents/cases/2000/11/mylanlearystatment.htm.
[75] *Id.*
[76] *Id.*
[77] *Id.*

To conclude, I will merely repeat what I said in *Cephalon*, "Disgorgement is a tool that affects the behavior of those against whom it may be wielded. It also, however, affects the behavior of the entity that wields this 'immensely powerful antitrust weapon.'"[78]

Thank you and I look forward to hearing your questions.

[78] Ohlhausen & Wright, Separate Statement in *Cephalon*, *supra* note 4, at 3.