Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright
Federal Trade Commission v. Cephalon, Inc.
May 28, 2015

We voted to accept the proposed consent in this matter. We write separately to explain why disgorgement is appropriate in this case, but also to convey our continuing concerns about the lack of guidance the Commission has provided on the pursuit of this extraordinary remedy in competition cases.

Based on the evidence we have seen in this case, it appears that the use of disgorgement here would meet the factors set forth in the since-withdrawn Commission policy statement on pursuing disgorgement in competition cases (the Policy Statement or Statement).[1] Given that the vast majority of the alleged harm at issue took place while the Statement was in effect, it ought to guide the Commission's use of disgorgement in this case. The Statement identified three determinative factors: (1) whether "the underlying violation is clear;" (2) whether there is "a reasonable basis for calculating the amount of a remedial payment;" and (3) "the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings."[2]

The "clear violation" factor is, in our view, the most important of the three considerations. A violation is "clear" if, measured at the time the conduct is undertaken, and "based on existing precedent, a reasonable party should expect that the conduct at issue would likely be found to be illegal."[3] Here, although the so-called scope of the patent test was the prevailing standard for assessing pay-for-delay agreements when Cephalon entered into the agreements with the four generic firms, that test included an exception for settlements involving fraudulently procured patents.[4] Court decisions have held that Cephalon engaged in inequitable conduct before the U.S. Patent & Trademark Office in obtaining the relevant patent.[5] Given this

[1] *See* Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820 (Aug. 4, 2003).

[2] *Id.* at 45821.

[3] *Id.*

[4] *See, e.g.*, *In re* Tamoxifen Citrate Antitrust Litig., 429 F.3d 370, 398 (2d Cir. 2005) ("Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be

for business conduct with a low probability of detection and punishment or that lacks any plausible efficiency justification – such as naked price-fixing conspiracies, fraud, or deception. While the probability of detecting a blatantly anticompetitive pay-for-delay agreement is likely relatively high because reverse payment settlements must be filed with the FTC and the Department of Justice, the fact that Cephalon engaged in fraudulent behavior materially reduces