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Re: Commission's Request for Comments on the Use of Disgorgement in Antitrust Matters

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Re: Commission's Request for Comments on the Use of Disgorgement in Antitrust Matters, March 29, 2002 (comments filed with the FTC on behalf of the AAI)

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March 29, 2002
Donald Clark, Secretary
Federal Trade Commission
c/o Document Processing Section
Office of the Secretary
Room 159-H
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Commission's Request for Comments On The Use Of Disgorgement in Antitrust Matters

Dear Secretary Clark:

The American Antitrust Institute is submitting this in response to the FTC's Request For Comments on the Remedial Use of Disgorgement in antitrust cases, dated December 19, 2001. We greatly appreciate that you are asking for Comments on this important and timely issue.

The American Antitrust Institute (AAI)(1) strongly supports the FTC's use of the disgorgement remedy in antitrust cases. We do so because it will help deter future violations of the antitrust laws.(2) We applaud the manner in which the FTC has utilized this remedy to date, and urge the Commission to use the disgorgement remedy even more vigorously in the future, in a manner that will significantly increase the overall payouts resulting from antitrust violations. The FTC's innovative use of disgorgement in consumer protection cases, starting in the early 1980s, has proven to be one of the outstanding successes in the history of the agency. The use of disgorgement to further the Commission's competition mission holds similar promise.

However, it is possible that the disgorgement remedy could be misimplemented by the Courts, which could rule that disgorgement payouts prevent private treble damages suits. If this occurred, the FTC's use of the disgorgement remedy could do more harm than good. For this reason the FTC should urge the Courts to treat disgorgement as a supplemental remedy, one that increases the overall payouts from antitrust violations. To ensure that the remedy serves its intended purposes the FTC should carefully monitor the manner in which the Courts implement the disgorgement remedy, and reassess its use periodically to be sure that it continues to be in the public interest.

Current Antitrust Damage Award Levels Are Far Too Low

The current levels of antitrust damage awards are substantially lower than they should be to deter(3) antitrust offenses optimally. The Clayton Act provides for "treble" damages, and if antitrust damage levels truly were at this level they might well be adequate to deter anticompetitive conduct optimally.(4) However, a close examination reveals that antitrust's so-called "treble" damages remedy is probably at most single damages.(5) The optimal deterrence model developed by Prof. William Landes provides a widely-accepted framework for analyzing this issue.(6)

Building upon his framework, antitrust's so-called "treble" damages awards should be adjusted for: (1) their lack of prejudgment interest; (2) effects of the statute of limitations; (3) effects of plaintiffs' attorney fees and costs; (4) other costs to plaintiffs pursuing cases; (5) costs to the judicial system in handling antitrust cases; (6) umbrella effects of market power; (7) allocative inefficiency effects of market power; and (8) tax effects. (7) These adjustments show that antitrust's "treble" damages are, in reality, probably between .48 and 1.09 times actual damages. (8) In other words, antitrust's so-called "treble damages" remedy probably is at most single damages.

Of course, in reality even nominal treble damages rarely are paid by defendants. In reality the rule of thumb is that even many of the strongest cases settle for single damages, and settlements for more than single damages are certainly not the norm. But these "single" damages are only nominally single damages because they have not been adjusted for any of the factors listed previously. In reality most antitrust settlements are for only a tiny fraction of the amount needed to ensure an optimal level of deterrence.

Because damages levels should, for deterrence purposes, truly be at the threefold level, yet more frequently are at the nominal singlefold level, there is no doubt that the current levels of antitrust damages should dramatically be increased. This is an important reason why disgorgement has the potential to operate in the public interest. If a disgorgement recovery is added to the recovery from private cases, overall damages levels would be more nearly optimal. The amount disgorged could not, of course, significantly exceed single damages, (9) and if these damages were added to the typical level of damages obtained in private litigation (also singlefold damages) the result would be approximately double damages. If this "double" damages figure were adjusted for the factors discussed earlier, however, it would still only constitute a small percentage of that needed for purposes of optimal deterrence. (10) But disgorgement would be a step in the right direction.

Some might object that if disgorged funds were awarded in addition to a private treble damages action, the result would be quadruple damages, and this would be excessive or duplicative. However, when these nominal "quadruple" damages were adjusted properly for the factors discussed earlier, the supposed "quadruple" damages would be, on the average, significantly less than double damages. They would still be lower than required for purposes of optimal deterrence. And even this figure of "double" damages supposes that the private litigation yielded treble damages - an atypical event.

The alleged "duplication" or "overdeterrence" argument also is frequently made in opposition to Illinois Brick repealer legislation. Defendants often warn that Illinois Brick repealer legislation would give rise to the specter of sixfold or ninefold damages. To this alleged nightmare scenario could be added the argument that disgorgement would raise overall damages to the tenfold level! However, the reality is very different. We are unaware of even a single antitrust case in history where the defendant paid more than treble damages. This is true even if criminal fines are added to the total of direct and indirect damages. (11) Even considering criminal penalties, the current overall level of antitrust payouts and penalties is only a fraction of that needed for purposes of optimal deterrence. (12) Overly high antitrust damages exist only in purely theoretical

nightmare scenarios concocted by defendants for the purpose of attempting not to pay even the inadequate damages that the current law provides for.

In theory, optimal deterrence could be provided through remedies other than disgorgement, such as higher criminal penalties and improving private actions through, for example including prejudgment interest in these recoveries. However, when each portion of our enforcement system is discussed, defendants can point to another portion of the antitrust system and argue that the other part of antitrust is better suited to doing the job at hand. However, redundant approaches are a hallmark of the U.S. antitrust system. The basic approach of the United States' system is a combination of federal, state, and private enforcement, both civil and criminal. We have built in this overlap or redundancy so that if one portion of the system should falter, with luck another part will take up part or all of the slack.

Perhaps we don't fully trust any one institution or approach, so we have opted for decentralized decisionmaking in the antitrust field. Disgorgement is another useful addition to this mix - if it truly is an additional remedy.

Disgorgement's Primary Benefit Is Additional Payouts By Lawbreakers

The main benefit of the disgorgement remedy is to increase the overall level of deterrence by increasing the total amount of funds paid by law violators. If the disgorged funds are added to the revenues obtained in private recoveries, deterrence will be more nearly optimized.

Unfortunately, it is not yet certain that this is the manner in which the disgorgement remedy will be treated by the Courts when they consider follow-up private treble damages suits. The issue is now before the United States Court of Appeals For The District Of Columbia Circuit. This case arose in a private follow-up suit to the liability and disgorgement settlement obtained by the FTC in its Mylan Laboratories litigation, D. Ct.

Nos 98-3114 and 98-3115. In this private case, Defendant argues that the disgorgement of approximately single damages obtained by the FTC should preclude the private plaintiffs from obtaining treble damages. Defendant argues that, once disgorgement has occurred, private plaintiffs should not receive any damages at all!. See Brief For Petitioners, filed in In re Lorazepan & Clorazepate Antitrust Litigation, No. 01-7163, dated Nov. 28, 2001.

We believe that Defendant's argument is totally without merit, and expect that it will be completely rejected by the Court. However, if the Court accepts Defendant's argument, then the FTC disgorgement remedy, which is at most approximately nominal single damages,(13) might not be in the public interest. If disgorgement precludes private treble damage suits, the FTC's use of this remedy might well result in less deterrence. If this misguided interpretation prevails, the FTC should sharply curtail its disgorgement initiative.

Similarly, the FTC asserts that the plaintiffs' attorneys in In re First Databank Antitrust Litigation, Master File No. 1:01CV00879 (TJP), tried to secure a legal fee based upon work that the FTC performed in a disgorgement case. The private attorneys apparently attempted to gain a portion of the disgorged funds as payment for their legal services, even though they did nothing to secure the disgorged funds. See the FTC's Jan 2, 2002 Memorandum of Points and Authorities.

If true, this would be a severe abuse because plaintiffs' attorneys should not be compensated for work performed by FTC attorneys.

The AAI strongly urges the FTC to monitor and file amicus briefs in relevant private follow-on suits. The FTC should urge the Courts to rule that disgorgement should be an additional payout by lawbreakers, not a device by which clever defendants end up paying at most single, rather than treble, damages. Nor should private attorneys profit from the disgorged funds. We urge the FTC to use the disgorgement remedy a number of times and then to perform an impact evaluation study of the effects of this remedy.(14) Disgorgement's impact upon the settlements in private cases should be analyzed with great care.(15) If disgorgement actions do not increase total antitrust damages significantly, or result in a more equitable distribution of funds, the FTC should re-think its use of this remedy.

The FTC Should Use Disgorgement In Antitrust Cases More Frequently

If disgorgement is interpreted by the Courts to be a supplemental remedy, the Commission should use it whenever possible.(16) As explained above, disgorgement awards that add to lawbreakers' total payouts are very likely to be in the public interest since they will lead to a more nearly optimal level of deterrence.(17)

There are additional reasons why disgorgement is likely to be in the public interest. There are occasions when no private follow-up suit is likely to occur. This could happen if class certification is likely to be too difficult for any of a number of reasons - e.g., because the victims' damages are too heterogeneous or individualistic. It could also happen if no victim is willing to sue out of a fear of retaliation from a dominant firm or cartel. Moreover, the FTC lawyers will of course know the facts well from working on the underlying liability case, so there could well be synergies from the same lawyers bringing a disgorgement action. FTC lawyers might enjoy the fruits of better discovery, and could possess more credibility than some plaintiff lawyers. Also, there will be times that the FTC will have better, more experienced lawyers than the plaintiffs' lawyers in private follow-on cases. If these cases are especially complex, no victim remedy might arise, as practical matter, other than by disgorgement.

The FTC Act is broader than either the Sherman Act or the Clayton Act. Actions that violate the spirit of one of these two laws, or constitute an incipient violation of one of these laws, can violate the FTC Act.(18) In these cases a private damages action probably would not be possible. Disgorgement actions could be especially important in these cases.

Moreover, at times certain plaintiffs' lawyers have been known to settle for an unduly small amount just so they can be assured that they will receive legal fees. For any of a number of reasons attorneys for private plaintiffs might obtain a recovery only for some categories of victims of illegal acts. Sometimes these attorneys request excessive legal fees (which diminish the victims' share of the settlement).(19)

In theory the presiding judge can prevent these abuses, but these judges are overworked and often lack the necessary factual information. We stress that we

believe that most private attorneys are honest and that they function as true "private attorneys general." However, disgorgement would ensure that in those cases where abuses do occur there would at least be some deterrence.(20)

We expect that the FTC will pick its targets carefully. We expect that the private suits will continue to be the primary damages mechanism in most cases. But we also believe that disgorgement has the potential to be a valuable additional antitrust remedy.

Thank you again for soliciting public Comments on this crucial matter. We would be delighted to discuss these and related issues at your convenience.

Sincerely yours,

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Endnotes:

1. The American Antitrust Institute is a public interest education, research, and advocacy organization. We are an independent, non-partisan, centrist group which believes that antitrust should play a larger role in the national and international economy. For more information please see our website, www.antitrustinstitute.org.

2. Disgorgement also will help compensate victims of antitrust violations and deprive violators of their illegally acquired gains. Although the AAI also is greatly interested in these issues, these Comments largely will address matters of optimal deterrence because of our perception that deterrence issues are of greatest interest to the Commission.

3. Current damages levels are also too low from the perspective of compensating victims of antitrust offenses. See note 10, *infra*.

4. For purposes of optimal deterrence, damages for law violations should be greater than singlefold to account for detection problems, proof problems and risk aversion. See Gary S Becker, "Crime and Punishment: An Economic Approach," 76 J. Pol. Economy 169, 199 (1968). See also the sources cited *infra* at notes 5, 6, 11, and 12. While the presence of these considerations certainly means that optimal antitrust damages should be more than singlefold, they do not necessarily mean that three is the correct multiplier. For the purposes of this Comment we will assume that three, the traditional figure which long has been an integral part of the antitrust system, is the correct multiplier. For a discussion of this issue see Robert H. Lande, "Are Antitrust 'Treble' Damages Really Single Damages," 54 Ohio State L. J. 115, 115 n. 4 (1993).

5. See Robert H. Lande, "Are Antitrust 'Treble' Damages Really Single Damages," 54 Ohio State L. J. 115 (1993) (Copies of this article are available from the author upon request.)

6. William M. Landes, "Optimal Sanctions For Antitrust Violations," 50 U. Chi. L. Rev. 652 (1983).

7. For the reasons why these adjustments are necessary see Lande, supra note 5.

8. Id. at 159. These numbers should be used cautiously. The articulation that "treble" damages are probably between .48 and 1.09 times actual damages could inadvertently give the impression of more accuracy than is warranted. This range is just an estimate. Nevertheless, it is fair to conclude that actual antitrust damages are much more likely to be at, or at less than, the singlefold level than at the double or triple level.

9. Of course, the measure of damages for disgorgement purposes is not the same as the amount by which victims are harmed.

10. The current level of antitrust damages also is low from a compensation perspective. The appropriate adjustments show that even an award of so-called "treble" damages would probably only compensate victims between .43 and 1.10 times the victims' actual damages. See Lande, supra note 5, at 163. Accordingly, an award of double damages (approximately disgorgement plus the single damages that typically are attained) probably would still undercompensate victims.

11. Joseph C. Gallo et al., "Department of Justice Antitrust Enforcement 1955 -1997: An Empirical Study," 17 J. Ind. Org. 75 (2000).

12. Id. Dr. Gallo et al. showed that fines from 1955 to 1993 were only four-tenths of one percent of the optimal level. His calculations included a generous adjustment for jail time served. See Joseph C. Gallo et al., "Criminal Penalties Under The Sherman Act: A Study In Law & Economics," 16 Res. L. & Econ. 25, 59 (1994). Although fines and jail time have increased significantly in recent years, they would have to increase more than 200 fold from Gallo's baseline to be at the optimal level.

13. It is likely that the FTC did not even obtain single damages in this case, which was in some respects a test case for the FTC. Moreover, the very nature of a settlement typically is to settle for less than all of the damages that the government might have obtained if they had gone to trial. For these reasons it is likely that the FTC had to settle for disgorgement that was less than single damages.

14. The Commission could also profitably study related issues, such as the effects of disgorgement actions on settlements in private cases that are follow-ups to BCP actions. There might also be parallel situations in the securities area that the Commission could learn from.

15. Defendants might be able to settle for lower amounts by arguing that they already disgorged their illegal gains. The Commission should determine whether this actually occurs. An interesting related question is whether a heavy criminal penalty causes the amount obtained in settlements of private cases to decrease.

We suspect that this effect does not arise, but would welcome an FTC analysis of this question.

16. Indirect purchasers frequently are damaged as much as direct purchasers, and can suffer by an amount that is even more than the direct mark-up caused by an antitrust violation. Indirect purchasers deserve compensation as much as direct purchasers, even though this task often is difficult to do reliably.

17. The disgorgement remedy should be calculated in a manner that errs on the side of calculating a larger amount to be disgorged. For example, any interest or other income earned by defendant on the illegally obtained funds should also be disgorged, and if this amount cannot readily be calculated the base amount should be increased by the time-value of money to similarly situated defendants.

It also is possible that one of the benefits to defendant from its antitrust violation might be a tax or other financial advantage. To the extent that these benefits are caused by antitrust violations, they should be disgorged. Otherwise defendant would be unjustly enriched and deterrence would be even more sub-optimal. These are illegitimate profits from an antitrust violation.

Calculating the amount to be disgorged necessarily will give rise to complications. For example, defendant might waste some of its illegally acquired wealth in any of a number of ways, such as by paying the responsible corporate officers bonuses for engaging in illegal activity. If these sums could reliably be calculated they too should be disgorged.

18. See Neil W. Averitt, "The Meaning Of 'Unfair Methods Of Competition' in Section 5 of the FTC Act," 21 B. C. L. Rev. (1980).

19. "Competition" from the FTC could even lead to higher quality work by the plaintiff's bar and larger recoveries for victims in private cases.

20. In addition, the victims (or an appropriate cy pres fund or, as a last resort, the U.S. Treasury) would at least obtain some recovery, and the law violator would be kept from some unjust enrichment.