Dissenting Statement of Commissioner Mozelle W. Thompson
Cephalon, Inc./Cima Labs Inc., File No. 041-0025

The Commission has accepted, subject to public comment and final approval, a proposed settlement from Cephalon, Inc., and Cima Labs Inc. This settlement is intended to remedy the likely anticompetitive effects of Cephalon's $515 million acquisition of Cima in the $200 million market for drugs that treat terminally ill patients for sporadic breakthrough cancer pain ("BTCP"). I must dissent from the Commission's acceptance of the unprecedented proposed remedy because neither the merging parties nor the investigation have demonstrated that the remedy would substantially restore the lost competition between Cephalon and Cima.

I strongly concur with the allegations in the Commission's complaint, which correctly alleges that Cephalon is a monopolist in the BTCP drug market. It also alleges that Cephalon unlawfully proposes to acquire Cima, the best-positioned potential competitor who would otherwise have likely entered the market within the next several years – well ahead of other potential entrants.

"Every order in a merger case has the same goal: to preserve fully the existing competition in the relevant market or markets."[1] The proposed settlement in this case – which seeks to restore the lost branded competition from Cima by facilitating the entry of a generic product – fails because it cannot meet this goal. Accordingly, the Commission should have rejected the proposed settlement. Further, because the Cephalon/Cima merger in substance appears to be for the primary purpose of allowing Cephalon to gain control of Cima's new BTCP product,[2] I believe that the Commission should have sought to block this merger in court.

The Commission may challenge a proposed transaction that it believes will lessen competition, or it may take a settlement that restores the competition lost. Historically, the Commission has been extraordinarily successful in identifying and blocking proposed mergers that are likely anticompetitive. In a case such as this one, which involves a monopolist's acquiring the best-positioned potential entrant, I am confident that the Commission would be able to successfully block the proposed merger and preserve competition. Indeed, I found the evidence supporting the Commission's complaint against Cephalon and Cima particularly compelling and sufficient to demonstrate that the proposed combination would eliminate the expected future competition between the two companies. This elimination of future competition would allow Cephalon to keep BTCP drug prices at monopoly levels, which would harm cancer patients – a particularly vulnerable group of consumers. Litigation and a district court's entry of

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[1]Staff of the Bureau of Competition, "Frequently Asked Questions About Merger Consent Order Provisions," (Answer to Question 1.), *available at* http://www.ftc.gov/bc/mergerfaq.htm.

[2]Cephalon outbid several alternative suitors, whose deals with Cima would not likely have raised antitrust concerns.

a "full-stop" injunction would have been warranted because of the unusual strength of this antitrust case.

I recognize that in many Commission merger investigations, merging parties offer a settlement to avoid a Commission challenge to their proposed transaction. In such cases, "the burden of coming forward with adequate restructure proposals should be on the sponsors of the merger."[3] Furthermore, divestiture is typically employed where selling the assets used to manufacture and sell one company's competing product to a qualified new competitor can effectively replace the lost competition.[4] Perhaps because divesting one of the merging companies' branded products is the most effective and efficient means of restoring lost competition, the Commission has never taken a settlement for a pharmaceutical merger that requires a respondent to take measures to facilitate generic entry where companies are marketing (or here, where one is marketing and the other likely soon will also be selling) branded products. I understand the argument that by requiring Cephalon to license generic entry, such entry is more certain and more quickly achieved, thus assuring that some customers would gain significant savings. However, while generic products and branded products are interchangeable to some extent, they are not necessarily considered reasonable substitutes by a significant segment of consumers in the typical pharmaceutical market. As a result, the Commission historically has been unwilling to trade away a branded product for a generic one in a Commission merger settlement.

I acknowledge the argument in this case that some end-stage cancer patients who buy BTCP drug products may be more price sensitive than customers in typical pharmaceutical markets because they do not have sufficient insurance coverage. But the investigation failed to develop any empirical or other compelling evidence substantiating that this particular market has such exceptional characteristics that a generic product could serve as a substitute for a branded product. Without such compelling evidence, the Commission should not accept a proposed settlement because "(t)he risk of inadequate relief . . . should not be borne by consumers."[5] The parties likewise failed to present evidence that shows that facilitating generic entry in the BTCP drug market will substantially replace the competition lost between Cephalon and Cima. By contrast, I found it particularly troubling that based on a range of economically reasonable assumptions about this pharmaceutical market, the Commission could have concluded just as easily that less price-sensitive patients could well suffer price increases that may possibly amount to tens of millions of dollars, notwithstanding the licensing of generic entry following

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[3]Robert Pitofsky, "The Nature and Limits of Restructuring in Merger Review," February 17, 2000, *available at* http://www.ftc.gov/speeches/pitofsky/restruct.htm.

[4]Staff of the Bureau of Competition, "Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies," (In discussion under "The Assets to Be Divested"), *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm.

[5]Richard G. Parker and David A. Balto, "The Evolving Approach to Merger Remedies," at 2, *available at* http://www.ftc.gov/speeches/other/remedies.htm.

the merger.

The majority statement cites other Commission challenges to restraints as support for picking which consumers will win and which will lose in pharmaceutical markets. However, these challenged restraints were intended to, and did, hinder generic entry, and the thrust in our remedies in these cases is to allow free competition to work. A subtle but important policy perspective is that the free market picked the winners and losers; we only allowed the market to work. The Commission did not manipulate the outcome of these markets.

In reading the majority's statement, I observe though that the majority unfortunately compares market outcomes in its statement instead of evaluating the Commission's appropriate role in providing antitrust protection in American markets. Our Clayton Act, Section 7 mandate is simple: protect markets so that the competitive process provides the market outcomes, such as quantity produced, prices charged, and who wins and loses financially. I disagree with a merger remedy policy that instead embraces manipulating the structure of market competition and trades off recognized (or probable) benefits for one segment of consumers for recognized (or probable) harm to another. As the Supreme Court over 40 years ago established, antitrust policy does not countenance mergers that are anticompetitive but are, "on some ultimate reckoning of social or economic debits and credits, . . . deemed beneficial."[6] This policy principle equally – if not even more so – applies to government-imposed restructurings in merger remedies. Accordingly, I believe that the Commission should refrain from accepting settlements that expressly contemplate benefitting one group of customers at the expense of other customers, especially where challenging a merger would likely be successful and the Commission is able to fulfill its mandate to protect all consumers from antitrust harm. For all of these reasons, I believe that the Commission should have rejected the proposed settlement and challenged this transaction.

As a final note, I recognize that the pharmaceutical industry over the recent past has transformed itself to an industry where larger, established companies refrain from developing the bulk of their products internally and instead often acquire smaller R&D companies as a means of stocking their portfolio of products. This transaction provides the Commission with the opportunity to demonstrate its commitment to aggressively protect pharmaceutical consumers under these changed market dynamics. Instead, I fear that the Commission today may be signaling the industry that dominant firms in pharmaceutical markets now have the antitrust "green light" to acquire competitors or potential entrants in exchange for a remedy that

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[6]Setting out the bounds of Section 7 enforcement, the Court further cautions decision makers: "A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7." *United States v. Philadelphia National Bank*, 83 S.Ct. 1715, 1745 (1963). The majority statement strains in a failed attempt to distinguish away this Supreme Court case. Regardless of whether customers are within different geographic markets or within different segments of a relevant product market, a reasonable reading of the case is that the Supreme Court does not condone the type of consumer welfare tradeoffs that the majority statement endorses.

restructures markets in ways that trump the free market decision as to who will benefit from the market and who will be harmed, as well as the extent of these effects on different groups of consumers. Accordingly, I believe that the Commission should have rejected the proposed settlement and challenged the transaction in order to protect fully consumers in the BTCP drug market and to signal the Commission's antitrust resolve in both challenging anticompetitive mergers and only accepting remedies that minimize consumer exposure to anticompetitive risk.