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March 29, 2002

Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room 172
Washington, DC 20580

Re: Comments on the Use of Disgorgement as a Remedy

Dear Mr. Clark:

Attached please find a copy of comments that we have prepared in response to the Commission's request for comments on the use of disgorgement as a remedy for violations of the Hart-Scott-Rodino (HSR) Act, Federal Trade Commission Act and Clayton Act.

As always, it is a pleasure working with you and your office.

Best regards,



James M. Spears

Enclosure

COMMENT FOR FEDERAL TRADE COMMISSION

I. Introduction.

The Federal Trade Commission recently has solicited public comment regarding the proper use of disgorgement as an equitable remedy for law violations in competition cases. *See* Federal Trade Commission, *Remedial Use of Disgorgement*, 66 FED. REG. 67254 (Dec. 28, 2001). This comment responds to that request.

As set forth in greater detail below, it is respectfully submitted that much of the confusion regarding the proper application of the equitable remedy of disgorgement is attributable to a certain lack of precision in how the term is used. In both *FTC v. Mylan Laboratories* and *FTC v. Hearst Trust et al.* the term “disgorgement” may have been used by the Commission to describe a remedy that would have been more accurately termed “restitution” under traditional equitable doctrines. Where the Commission compels an alleged wrongdoer to pay funds, either directly or indirectly, to those who may have been harmed by the allegedly wrongful act, the equitable remedy employed is more accurately described as restitution and not disgorgement.

Traditionally, the equitable remedy of disgorgement is employed after other equitable and statutory remedies have been employed to insure that the wrongdoer is not allowed to keep profits that may have accrued as a result of the wrongdoing. To the extent that other equitable and statutory remedies are sufficient to deprive the wrongdoer of the profits of its unlawful enterprise, the remedy of disgorgement has no role to play, and in fact could impermissibly result in double recovery. Accordingly, disgorgement is limited to those situations in which there are no adequate alternative remedies, in either law or equity, which can effectively deprive the

violator of its unlawful profits. And because disgorgement presumes that restitution and statutory damages are not available, at least in sufficient magnitude to deprive the wrongdoer of its ill-gotten gains, monies disgorged properly should be paid into the U.S. Treasury.

II. Background Legal Framework and Principles.

Any comment regarding the Commission's use of disgorgement as an equitable remedy for competition violations must take account of the full panoply of federal rights and remedies available to the Commission, the Justice Department, the state enforcement authorities and private parties under federal antitrust law. Moreover, the fact that the precedent supporting the Commission's use of equitable remedies under § 13(b) turns on a fairly aggressive reading of the jurisprudence also counsels that the Commission exercise some care in exercising this remedial option.

A. Rights and Remedies Under Federal Antitrust Law Generally.

A right to demand monetary relief is expressly provided under virtually all of the major federal antitrust statutes. Treble damages are available under the Clayton Act to private parties under § 4, to state enforcement authorities as *parens patriae* under § 4c, and to the Justice Department for injuries to the United States under § 4a. *See* 15 U.S.C. §§ 15, 15a, 15c. The Commission may impose civil penalties for violations of cease and desist orders under § 5(l) of the FTC Act and § 11(l) of the Clayton Act. *See id.* §§ 21(l), 45(l). Fines may be imposed in a Justice Department criminal prosecution under the Sherman Act. *See id.* §§ 1-2.

The competition laws also provide for injunctive relief. Courts may award such relief under the Clayton Act to private parties or state enforcement authorities as *parens patriae* under

§ 16, and to the Justice Department under § 15. *See id.* §§ 25-26. The Commission has administrative cease and desist authority under § 5(b) of the FTC Act and § 11(b) of the Clayton Act, as well as the power to seek injunctive relief under § 13(b) of the FTC Act. *See id.* §§ 21(b), 45(b), § 53(b).

Finally, the Commission possesses special legal and equitable enforcement powers in consumer protection cases under the FTC Act. The Commission may impose an administrative cease and desist order with civil penalties for violations under § 5; civil penalties are also available for violations of Commission rules and rulings. *See id.* §§ 45(b), 45(l), 45(m)(1). In addition, the Commission may seek broad, equitable consumer redress from a court under § 19. *See id.* § 57b. Injunctive relief under § 13(b) applies to all statutes enforced by the Commission. *See id.* § 53(b).

B. Historical Development of Equitable Remedies under § 13(b).

The historical context of the Commission's use of equitable remedies under § 13(b) in its consumer protection and competition enforcement actions also is significant. Understanding this history is necessary to appreciate fully the consequences of the Commission's pursuit of a disgorgement remedy in competition cases.

The text of § 13(b) provides that the Commission may ask the court to issue an "injunction" to "enjoin" violations of statutes the Commission enforces. Contemporary prevailing methods of statutory interpretation instruct courts to follow the text of statutes and not extend them based on policy considerations or legislative intent. *See, e.g., United States v. Gonzalez*, 520 U.S. 1, 6 (1997); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Nat'l*

Coal Ass'n v. Chater, 81 F.3d 1077, 1082 (11th Cir. 1996). Nevertheless, courts consistently have found that, despite the fact that § 13(b) only refers to an “injunction,” it also can be used by the Commission in consumer protection cases to seek other kinds of equitable remedies, including those that involve monetary relief.

In part, this interpretation of § 13(b) developed from an expansive reading of the language and holdings of two Supreme Court opinions. The Emergency Price Control Act at issue in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), authorized the Administrator of the price control agency to obtain an “injunction ... or other order” from the court to enforce the Act. *See id.* at 397. In *Porter*, the Supreme Court held that the remedy of restitution was available under the “other order” reference in that provision. *See id.* at 399. In further support of this conclusion, the Court stated that Congress ordinarily intends to authorize the full scope of equitable relief unless the statute clearly says otherwise. *See id.* at 398-403. Subsequently, in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), the Court drew upon its holding in *Porter* to conclude that a Fair Labor Standards Act provision authorizing the Secretary of Labor to seek a court order to “restrain violations” also permitted the Secretary to seek an equitable order for restitution of wages lost due to a retaliatory discharge. *See id.* at 289-96. In part, the Court justified this construction of the statute to prevent the employer from compounding its violations by using retaliation to deter complaints. *See id.* at 292-93.

When the courts of appeal first began to apply *Porter* and *DeMario* to § 13(b) in Commission consumer protection enforcement actions, they took a narrow view. The first cases held that § 13(b) authorized not only injunctions against further statutory violations per se, but also ancillary *injunctive* relief in the form of an asset freeze—to be sure there would be money

left to satisfy the subsequent § 19 relief the Commission was entitled to seek. *See FTC v. Southwest Sunsites Inc.*, 665 F.2d 711, 714, 719 (5th Cir. 1982); *see also FTC v. World Travel Vacation Brokers Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *FTC v. H.N. Singer Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982). This interpretation seems fully consistent with the text of § 13(b) because that injunctive power is available to assist the Commission in enforcing all of its statutes, which includes § 19. Significantly, however, the available remedy under § 19 is only restitution to victims, *not* disgorgement of any additional amounts to other parties. *See FTC v. Figgie Int'l Inc.*, 994 F.2d 595, 607 (9th Cir. 1993).

Subsequently, however, the courts of appeal used the language of *Porter* and *DeMario* to expand the ancillary relief available in consumer protection cases under § 13(b) to *monetary* equitable relief in the form of rescission, restitution, or disgorgement to the Treasury, despite the fact that § 13(b) is specifically limited to *injunctions*. *See FTC v. Febre*, 128 F.3d 530, 534, 537 (7th Cir. 1997); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 469-70 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991); *FTC v. Amy Travel Service Inc.*, 875 F.2d 564, 571 (7th Cir. 1989); *see also Singer*, 668 F.2d at 1112-13. Yet quite unlike the statute in *Porter*, § 13(b) does not provide for “other” orders in addition to injunctions; and the anti-retaliation interpretation of “restrain violations” in *DeMario* would seem to have no rational application to monetary payments for consumer protection violations under § 13(b). Thus, while the broad dicta employed by the Supreme Court in those two cases might support an expansive reading of the Commission’s power to seek equitable relief under § 13(b), there is no discernable “hook” in

the statutory language that would properly support a reading of the § 13(b) power to issue an “injunction” to “enjoin” violations as authorizing the Commission to seek *monetary* equitable remedies in addition to ancillary *injunctive* relief. This lack of a statutory hook in § 13(b) is particularly problematic given that Congress statutorily provided a limited right for the Commission to employ monetary equitable remedies under § 19, which specifically contemplates consumer redress.

Of course, the Commission more recently has sought to extend its right to demand disgorgement to competition cases. Because § 13(b) applies equally to both consumer protection and competition statutes, the courts have acceded to this development. *See FTC v. Mylan Laboratories*, 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999). But while the courts have permitted this natural extension of authority from the consumer protection context, it remains that the Commission’s general authority to employ § 13(b) beyond the right to seek injunctive relief remains poised on relatively narrow legal footing. As a result, the Commission may wish to exercise caution and prudence in terms of how it exercises these powers.

III. The Distinction between Disgorgement and other Equitable Remedies.

A problem common to any discussion of disgorgement is that the term “disgorgement” is not always used consistently or precisely. Sometimes “disgorgement” is used in an overly broad sense to refer to any general equitable remedy that requires the law violator to pay money. Properly used, however, “disgorgement” refers to a specific equitable remedy with a particular definition and purpose. Disgorgement is designed simply to strip the law violator of those profits that it has earned as a consequence of its wrongdoing, thereby serving the dual purposes of preventing unjust enrichment and deterring future violations of the law. Other equitable

remedies, such as restitution, also involve monetary payments but are designed to accomplish somewhat different objectives.

Perhaps the most useful way of understanding disgorgement is that it looks at the illegal transaction from the perspective of the law violator. Because the central purpose of disgorgement is to strip the law violator of its ill-gotten gains, the amount of money to be disgorged in equity is an amount equal to the violator's unlawful profits. *See, e.g., SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993); *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1085 (D.N.J. 1996). Thus, in determining the amount to be disgorged, equity is not concerned with the amount of damages incurred by the victims or with punitively imposing a fine. Instead, disgorgement seeks only to identify and recover from the law violator those amounts earned that were causally related to the specific law violation involved. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231-32 (D.C. Cir. 1989).

The remedy is imposed to ensure that the law violator does not retain some benefit from his wrongful conduct. In this manner, disgorgement serves two salutary purposes. One is to preclude the unjust enrichment of the violator by depriving it of the funds and benefits it has illegally obtained: "to prevent the wrongdoer from enriching himself by his wrongs." *Huffman*, 996 F.2d at 802; *see also, e.g., CFTC v. American Metals Exchange Corp.*, 991 F.2d 71, 76 (3d Cir. 1993); *First City*, 890 F.2d at 1230; *SEC v. Drexel Burnham Lambert, Inc.*, 956 F. Supp. 503, 507 (S.D.N.Y.), *aff'd*, *SEC v. Fischbach Corp.*, 133 F.3d 170 (2d Cir. 1997). The other is to deter further violations of the law by ensuring that there is no benefit to illegal activity through the retention of some of the unlawful profits. *See, e.g., Fischbach Corp.*, 133 F.3d at 175; *First City*, 890 F.2d at 1230; *American Metals*, 991 F.2d at 76; *Drexel*, 956 F. Supp. at 507.

These purposes of the remedy of disgorgement make it distinct from other equitable remedies, particularly the remedy of “restitution.” Unlike disgorgement, which looks at the transaction from the perspective of the law violator, restitution looks at the transaction from the perspective of the victim. The purpose of restitution is to make the victim whole and restore the *status quo ante* for the victim. Consequently, restitution should equal the amount of the victim’s loss without regard to whether the malefactor actually received benefits commensurate with those losses. *See, e.g., Gem Merchandising*, 87 F.3d at 470; *Huffman*, 996 F.2d at 802; *Drexel*, 956 F. Supp. at 507; *Hughes Capital*, 917 F. Supp. at 1085, 1089.¹ As a result, the amount of money that a wrongdoer might be obliged to pay under a restitution theory might either exceed or be less than that wrongfully received as a consequence of the illegal acts.

“Disgorgement” and “restitution” also are distinct from the statutory remedies that may be available to the Commission, the Justice Department, states or private parties under the federal antitrust laws. These remedies, listed at Part II.A, might include, for example, an injunction against specific practices or an injunctive order of divestiture by the Commission or Justice Department, or the remedy at law of treble damages, such as under § 4 of the Clayton Act.

¹ Because the malefactor’s profits may be more or less than the identifiable losses of his victims, the amount that equity would look to under a disgorgement theory “might be for an amount more or less than that required to make victims whole” in restitution. *Huffman*, 996 F.2d at 802; *see also, e.g., Fischbach Corp.*, 133 F.3d at 176; *Drexel*, 956 F. Supp. at 507.

IV. Applying the Traditional Equitable Principles to Recent Commission Disgorgement Cases.

Under this analysis, the Commission's two recent principal disgorgement cases likely would have been described differently.² In the matter of *FTC v. Hearst Trust et al.*, File No. 991-0323, plaintiffs in a class action lawsuit obtained a settlement of \$26 million from Hearst as damages for an illegal merger. The Commission also obtained a settlement of \$19 million of unlawful profits that it styled as "disgorgement"—yet that settlement provided that the \$19 million would not be an additional payment but instead would be considered to be part of the \$26 million to be disbursed in the private action. Hence, it would have been much more accurate for the Commission to describe such relief as "restitution" because it was paid directly to victims as compensation for Hearst's wrongdoing.³

Likewise, in the matter of *FTC v. Mylan Laboratories et al.*, File No. X990015, it appears that the Commission took the position that Mylan earned unlawful profits of \$120 million from its allegedly illegal activity. In settlement of the claims against it, however, Mylan paid \$39 million in damages and attorney's fees to insurers and managed care organizations, \$8 million in attorneys fees to State Attorneys General, and an additional \$100 million—styled as disgorgement—into an escrow fund that was dedicated to compensate consumer and state agency victims. Again, because the entirety of the settlement was paid to victims as compensation for

² See generally Press Release concerning Hearst settlement (Dec. 14, 2001); Press Release concerning Mylan settlement (Nov. 29, 2000).

³ To the extent the Commission's involvement in the Hearst matter concerns the issue of attorney's fees—that is, whether class counsel is entitled to fees based on the \$26 million settlement or only the \$7 million above the Commission's restitution order—we take no position on that question. See Jenna Greene, *FTC Adds Bite to Bark*, LEGAL TIMES, January 23, 2002.

Mylan's wrongdoings, the \$100 million would have been more accurately referred to as "restitution."⁴

Thus, as a starting point, it may be useful for the Commission to be more precise in describing the particular equitable remedy or remedies that it pursues for competition violations. Disgorgement should not be confused with restitution and should only be used to describe the situation where the wrongdoer is being stripped of its ill-gotten gains and where the proceeds are not being used, in whole or in part, to compensate victims for their losses. To do otherwise will only confuse the law and the Commission's own intentions and policies.⁵

V. The Remedy of Disgorgement Should Have a Limited Use.

Applying this understanding, the Commission should limit the use of disgorgement to cases in which other available remedies for competition violations will be inadequate or ineffective in divesting the violator of its unlawful profits. Given the definition and purposes of disgorgement, there is no role left for disgorgement to play in a case where the amounts charged as damages or restitution already have met or exceeded the amount of unlawful profits gained by the law violator. Any different application of disgorgement either would contravene the

⁴ Because the total monetary liability imposed exceeded the companies' unlawful profits in both cases, the true equitable remedy of "disgorgement" was not implicated in either case.

⁵ For example, the Statement of Chairman Pitofsky and Commissioners Anthony and Thompson in the *Mylan* matter rightfully notes that "[t]he purpose of a disgorgement order is to ensure that the defendant does not reap the rewards of its unlawful conduct, whereas an order for damages or restitution is aimed at making the injured plaintiff whole." The next paragraph, however, describes how "[t]he consent settlement in this matter requires the parties to pay \$100 million into an escrow fund for the purpose of compensating consumers." It is respectfully submitted that if the purpose of the settlement is to "compensate consumers," then the remedy is restitution and not disgorgement.

prohibition on double recoveries or would simply be an end run around statutory limitations on recovery.

As a matter of first principles, because disgorgement is an equitable remedy, it should not be invoked unless legal remedies, like claims for statutory damages, are inadequate to strip the wrong-doer of its ill-gotten gains. *See, e.g., United States ex rel. Zissler v. Regents of University of Minnesota*, 992 F. Supp. 1097, 1112-13 (D. Minn. 1998); *see also, e.g., Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75-76 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

For instance, if a violator's unlawful profits are \$50 million, then a disgorgement remedy would be moot if the victim's trebled damages are \$75 million. In addition, if the victim's loss is \$50 million for an order of restitution but the violator's unlawful profits are \$40 million, there should be no disgorgement to be had.⁶ In either situation, disgorgement is inapplicable because other remedies have already effectively achieved the equitable purpose of disgorgement.

When other remedies will be or have been effective in divesting the violator of an amount equal to or greater than its unlawful profits, a disgorgement remedy also is inappropriate because

⁶ Traditional principles of equity also place limitations on the remedy of restitution. For example, restitution may be used only to make the victims whole, restoring the *status quo ante*—no greater amount is permissible in equity. *See, e.g., Tull v. United States*, 481 U.S. 412, 424 (1987); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946); *United States v. Universal Management Services, Inc.*, 191 F.3d 750, 763 (6th Cir. 1999); *Harris Trust & Savings Bank v. Salomon Bros., Inc.*, 832 F. Supp. 1169, 1173 (N.D. Ill. 1993). (That amount, however, may exceed the defendant's unlawful profits. *See Universal Management*, 191 F.3d at 763-64.) Additionally, restitution only compensates victims whose economic injury conferred a benefit on the defendant—it is not enough that the defendant profited from its wrongdoing; the gain must have been at the victim's expense. *See Pacamon Bearings, Inc. v. Minebea Co.*, 892 F. Supp. 347, 357 (D.N.H. 1995); *see also, e.g., Universal Management*, 191 F.3d at 763; *Harris Trust*, 832 F. Supp. at 1173.

then an application of the remedy would run afoul of the prohibition on double recovery. The law does not permit double or multiple recoveries for the same violation or injury. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972); *MidAmerica Fed.l Savings & Loan v. Shearson/American*, 962 F.2d 1470, 1473 (10th Cir. 1992); *University of Colorado Found. v. American Cynamid*, 153 F. Supp. 2d 1231, 1246 (D. Colo. 2001).

Yet double recovery is exactly what would occur if a disgorgement or restitution is imposed *in addition to* other remedies of an amount equal to unlawful profits. For example, consider a case with unlawful profits of \$100 million and trebled damages of \$75 million. If the violator pays the \$75 million in damages, only \$25 million of unjust enrichment remains. Accordingly, a disgorgement remedy of \$25 million in addition to the treble damages claim of \$75 million would be appropriate. *See, e.g., SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (deducting damages paid to settle class action litigation from amount to be disgorged). If, by contrast, unlawful profits were only \$50 million and damages \$75 million, then *any* disgorgement would be inappropriate because the violator already has been divested of all unlawful profits. *See, e.g., SEC v. Better Life Club*, 995 F. Supp. 167, 179 & n.20 (D.D.C. 1998), *aff'd*, 203 F.3d 54 (D.C. Cir. 1999) (tbl.) (ordering restitution of approximately \$25 million to victims and declining to order additional disgorgement because unlawful profits were approximately \$6 million). For this reason, courts consistently have refused to order disgorgement or restitution when a damages claim or other monetary relief is available. *See, e.g., American Metals*, 991 F.2d at 78 (available civil action to recover losses); *Drexel*, 956 F.

Supp. at 508 (monetary settlement of claims).⁷ The Commission should follow these principles in using the remedy of disgorgement to avoid imposing double recoveries upon violators.

These principles explain the limitations the Commission should follow when deciding whether to seek disgorgement. The Commission could, in its discretion, seek a disgorgement remedy in cases where alternative remedies have been, or are likely to be, ineffective and inadequate to divest the violator of the full extent of its unlawful profits. Divesting the remaining unlawful profits would further the goals of preventing unjust enrichment and deterring illegal conduct, while at the same time precluding the possibility of a double recovery. If the Commission acts only when other remedies have not exhausted (and cannot exhaust) the unlawful profits, disgorgement will perform its proper function as an equitable remedy.

A situation in which disgorgement would be the appropriate action for the Commission would involve a group of victims who cannot readily be compensated, if even identified. For example, when a violation harms a large number of persons with a small injury, it may be next to impossible to identify the victims and determine how to distribute compensation. In such a case, enforcing the damages remedy those victims possess may not be feasible, even as a class action. The only remaining equitable remedy would be disgorgement and, because the victims cannot be

⁷ Both the *American Metals* and *Drexel* cases involve discussions of payments to victim claimants of portions of a disgorgement amount ordered as an equitable remedy. As compensatory awards, they properly would be termed “restitution” rather than “disgorgement” under the definitions used in this comment. *See also Hughes Capital*, 917 F. Supp. at 1089 (where victims’ losses exceeded unlawful profits, declining to order restitution in addition to disgorgement because victims had filed class action to recover those losses); *cf. American Metals*, 991 F.2d at 78-79 (holding that amount of victims’ losses may be used as measure of unjust enrichment for disgorgement only upon finding that amount of violator’s unlawful profits “cannot be reasonably approximated”).

reasonably identified, disgorgement to the Treasury is the only available means of preventing unjust enrichment and vindicating the laws. *See, e.g., FTC v. Febre*, 128 F.3d 530, 533, 537 (7th Cir. 1997); *Gem Merchandising*, 87 F.3d at 470; *Drexel*, 956 F. Supp. at 507-08, *aff'd*, *Fischbach Corp.*, 133 F.3d at 174-76. Thus, disgorgement is viable when consumers or other victims who have a cause of action cannot be personally compensated—or when even after that compensation there remain unlawful profits in the wrongdoer's hands. And in either case, only the Treasury would be entitled to the disgorged funds.⁸

Finally, the principles surrounding the disgorgement remedy explain why that remedy is not available to private parties and should not be made available to make an end run around other limitations on recovery. Disgorgement is a last resort remedy to ensure that a violator does not benefit from its illegal conduct. It exists only when there is no adequate alternative means for divesting unlawful profits; because it applies only after compensation, if any, has been made, disgorgement is paid into the Treasury.

Hence, disgorgement cannot serve as a *supplement* to other means of damages or equitable compensation paid to victims of wrongdoing. For example, private parties and states may assert treble damages claims under § 4 and § 4c, respectively, of the Clayton Act. And

⁸ The Miscellaneous Receipts Act requires federal agencies to deposit into the Treasury monies that otherwise come into their possession during the normal course of business. The Anti-Deficiency Act precludes a federal agency from spending any money that might otherwise come into its possession without the express authorization of Congress. While the Commission would have the authority to hold, in escrow, funds ultimately to be paid in restitution to victims, any other use of disgorged funds would violate these limitations on the Commission's spending authority. *See* 31 U.S.C. § 1341 (Anti-Deficiency Act); *AT&T v. United States*, 177 F.3d 1368, 1373 (Fed. Cir. 1999); 31 U.S.C. § 3302 (Miscellaneous Receipts Act); *United States v. Smithfield Foods, Inc.*, 982 F. Supp. 373, 374-76 (E.D. Va. 1997).

long-standing precedent holds that such claims are available only for direct purchasers, not indirect purchasers. See *Illinois Brick*, 431 U.S. at 730-41; *FTC v. Mylan Laboratories*, 62 F. Supp. 2d 25, 41 (D.D.C. 1999). Consequently, the availability of injunctive relief to private parties or states under § 16 of the Clayton Act is likewise limited: neither restitution nor disgorgement can be used as equitable relief under § 16 to make an end run around the decision of Congress to deprive indirect purchasers of a remedy. “The States should not be allowed to circumvent *Illinois Brick* through a novel interpretation of § 16.” *Mylan*, 62 F. Supp. 2d at 42.

Under the competition laws, as in any other context, the statutes enacted by Congress, as interpreted in judicial precedent, determine when and under what conditions victims have a remedy in law or equity through “an independent civil action against defendants. The hardship of [victim] losses, however, should not be used as an excuse to impose a remedy under circumstances in which the scope of relief falls outside that remedy’s recognized parameters.” *American Metals*, 991 F.2d at 78; see also, e.g., *Mehgrig v. KFC Western, Inc.*, 516 U.S. 479, 488 (1996).

VI. Conclusion.

For the foregoing reasons, the Commission should limit the application of the equitable remedy of disgorgement to cases in which the other available remedies for competition violations have been, or are likely to be, inadequate and ineffective to divest the violator of the unlawful profits obtained from its misconduct. When remedies like damages or restitution have exhausted those unlawful profits, there is no work left for the remedy of disgorgement. The broad and indiscriminate use of disgorgement risks imposing double recovery on violators and undermines the remedies Congress has elected to impose in response to violations of antitrust

laws. Moreover, to the extent that the Commission's use of disgorgement conflicts with other equitable or statutorily provided remedies, the Commission risks the possibility that a court might impose a narrower reading of its powers under § 13(b) which could detract from its law enforcement responsibilities.

When other statutory and equitable remedies fail to deprive a law violator of the profits that it earned as a result of its illegal conduct, however, disgorgement is proper to both strip the wrongdoer of its ill-gotten gains and deter others from engaging in comparable conduct. And because disgorgement presumes that restitution and other statutory available remedies have failed to relieve the wrongdoer of its ill-gotten gains, disgorged funds always should be deposited into the Treasury.