In the Matter of Endocare, Inc. and Galil Medical, Ltd.

Joint Statement of
Chairman Leibowitz, Commissioner Harbour, and Commissioner Kovacic

Commissioner Rosch issued a statement today regarding the announcement by Endocare, Inc. that it is abandoning its proposed merger with Galil Ltd. We respectfully disagree with Commissioner Rosch's analysis and conclusions in this matter. Simply put, based on the available evidence, and because the parties failed fully to comply with the Commission's requests for information, the Commission could not justify closing its investigation at this time. Absent the full disclosure of relevant information by the parties, the Commission would not be fulfilling its obligation to protect competition if it were to allow the consummation of a proposed merger that threatens to eliminate head-to-head competition in potentially life-saving products. Nor can the Commission appropriately exercise its prosecutorial discretion based on unsubstantiated merger efficiencies and other unsupported representations proffered by the parties themselves.

Before we address the substance of Commissioner Rosch's objections, we emphasize that Commission staff's handling of this investigation has been diligent, competent, even-handed, and professional.

Commissioner Rosch argues that Commission staff made unreasonable demands on the parties and thereby prolonged the investigation, causing the parties to abandon the transaction. We disagree, and we have a very different view of how this investigation has proceeded. As is typical in merger investigations, staff worked closely with the parties in an effort to obtain relevant information without undue burden.[1] Staff has at all times been willing and available to negotiate the scope of its document requests (which were duly signed by a Commissioner). Furthermore, although this matter involves a non-public investigation, we note that all petitions to quash or limit the Commission's compulsory process routinely are placed on the public record, and the record is devoid of any petition by these parties to quash or limit any subpoena or civil investigative demand as overbroad or unduly burdensome.

Commissioner Rosch says he has seen "no evidence" that this merger would have led to higher prices or less innovation. Although some evidence on these issues does, in fact, exist, we do agree that the evidentiary record is thinner than usual after a six-month investigation. The record is incomplete because the parties never complied with the Commission's requests (and our colleague does not and cannot dispute this fundamental fact). Instead, the parties chose to provide very limited information. Importantly, even the parties' self-selected documents were

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[1] Our colleague suggests that staff should have sent the parties a "more tailored subpoena." We think that, absent a disclosure by the parties of the identity and location of relevant information (electronic and other), as well as the successful completion of negotiations (see Commission Rule 4.7(c)), the staff is not required unilaterally to modify a subpoena duly issued by the Commission.

insufficient to substantiate the parties' purported efficiencies claims, or to otherwise allay staff's substantial concerns about the proposed transaction.

Of course, staff continued to pursue its investigation through every other available channel, independently gathering and assessing additional information from a variety of sources (including numerous interviews with third parties). Based on the evidence currently available, it appears that the proposed merger likely would have anticompetitive effects and would not be in the public interest. Such conclusions would be inconsistent with any decision to close an investigation.

Given the incomplete record, the Commission currently is not in a position to make a formal assessment one way or the other – either that staff should be sent into court to challenge the transaction, or that the transaction would not harm competition and therefore should be allowed to proceed. Under these circumstances, any decision by the parties to abandon the transaction should not be interpreted as reflecting any failure or missteps by staff. Staff has conducted a fair and proper investigation. Allowing any merger to proceed based on hypothetical, undocumented efficiencies would reflect inadequate government enforcement.

We also note that a number of our colleague's assertions are not accepted by the Commission as a statement of the agency's enforcement policy. The Commission's position is that the application of the Merger Guidelines' framework does not depend on the size or resources of merging parties. Under the Guidelines, once evidence has been adduced that a proposed transaction would result in a monopoly or likely would substantially lessen competition, the burden shifts to the parties to establish, via one or more of the available defenses, that the transaction will not be anticompetitive. Nothing in the case law, the Guidelines, or Commission precedent indicates that this framework does not apply merely because the parties have asserted that they do not compete on price or on any other metric. Additionally, we know of no special rule or Section 7 principle that exempts two small companies with small scientific/engineering staffs and limited resources from meaningful antitrust review, even when the companies claim that their proposed transaction will enable them to conduct additional research and development relating to a socially significant product.

We three Commissioners stand firmly behind staff's conduct throughout the investigation. Staff's dedication and hard work in this case have been fully consistent with the Commission's mission to advance competition and protect consumers.