CONCURRING STATEMENT OF COMMISSIONER JULIE BRILL
REGARDING THE COMPLAINT AND PROPOSED CONSENT ORDER IN
IN RE GRIFOLS/TALECRIS
JUNE 1, 2011

I concur in the Commission's decision to issue a complaint against Grifols challenging its acquisition of Talecris. I write separately to express my view that whether to resolve this matter through the proposed consent order is a close call, though I ultimately concur in that decision as well.

The vitally important plasma protein industry has seen considerable consolidation in recent years. Today, only four significant active competitors remain as to immune globulin ("Ig"), the largest product by sales at issue in this merger: Grifols, Talecris, CSL and Baxter.[1] In the meantime, prices have increased substantially. Just two years ago, when CSL tried to buy Talecris, the Commission alleged that these "price increases have been caused by the consolidation of competitors and the resulting increases in concentration."[2] The industry has operated as a "tight oligopoly," in the words of a 2007 Department of Health and Human Services report, carefully controlling supply, avoiding robust price competition, and engaging in signaling of future competitive moves.[3]

One outgrowth of the supply limitations and coordinated behavior described in the Commission's CSL complaint has been the difficulty safety-net providers have had in obtaining Ig under the 340B Drug Pricing Program. This Congressionally-mandated program is designed to provide pharmaceuticals at reduced prices to health care providers serving indigent and other at-risk patients. All too often, however, plasma-derivative manufacturers have not made their products available at statutorily-mandated prices.[4] This subverts Congress's goal of ensuring access to life-saving pharmaceuticals and increases costs to the health care system overall.

Against this backdrop, almost any merger in this industry would merit the significant scrutiny this one has received at the FTC. Although Grifols is today one of the smaller firms in the U.S. market, with a roughly 9% share of Ig sales, it recently launched a new 10% concentration intravenous Ig product that could threaten the industry-leading products offered by Talecris, Baxter and CSL. In addition, as alleged in the Commission's current complaint, the Ig market is highly concentrated and the change in market concentration effected by this merger easily raises a presumption of enhanced

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[1] A fifth competitor, Octapharma, withdrew its Ig product from the market in September 2010 due to safety concerns. As the Commission alleges in its complaint, "its future competitive significance is uncertain."

[2] Compl. ¶ 33, *FTC v. CSL Ltd.*, No. 09-1000 (D.D.C., filed May 28, 2009), *available at* http://www.ftc.gov/os/caselist/0810255/091110csl-cerberusunsealedcmplt.pdf.

[3] *Id.* ¶¶ 37-44.

[4] *See, e.g.*, Public Hospital Pharmacy Coalition, "Access to IVIG by Safety Net Hospitals Participating in the 340B Drug Discount Program" (Sept. 2006), *available at* http://www.phpcrx.org/public/documents/pdfs/IVIG_report.pdf.

market power under the antitrust agencies' 2010 Merger Guidelines.[5] Finally, as also alleged in the complaint, the risk of post-merger coordinated behavior is very real, given the history of coordination in this industry and the fact that the immediate post-merger U.S. Ig market will consist of three firms of roughly equal size. Given these and other significant facts, I strongly support issuance of the Commission's complaint.

Whether the consent order does enough to remedy competition concerns is a much closer call. On the one hand, the consent allows for the near-term introduction of product into the market from a new competitor, Kedrion. The consent should also facilitate Kedrion's entry into the U.S. market with its own Ig product in several years. On the other hand, Grifols will keep 67 of Talecris's 69 plasma collection centers, as well as its own 80 centers, while divesting two to Kedrion. In addition, the Melville, NY, manufacturing plant that Grifols is divesting to Kedrion is a smaller facility that is not currently outfitted to purify fractionated plasma into finished product. While Grifols will fractionate and purify a "Designated Amount of [finished] Product" for Kedrion for several years under the consent order, Kedrion may need to build or purchase a new facility in order to effectively compete over the longer term.[6]

In the end, given the particular facts and circumstances of this matter, I support the consent because it provides some degree of immediate, sure relief to consumers. I expect, though, that the Commission, other federal and state agencies, and affected purchasers will closely monitor these markets, both as to future proposed consolidations and potential coordinated behavior, including behavior that may adversely impact indigent and other at-risk patients through the critical 340B program.

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[5] The Ig market share and HHI figures in the Commission's complaint date from 2009 and are thus conservative, as they count Octapharma as a market participant, which it currently is not.

[6] *Compare In re Polypore Int'l, Inc.*, 2010-2 Trade Cas. ¶ 77,267, 2010 FTC LEXIS 97, at *108-110 (F.T.C. 2010) (requiring divestiture of second manufacturing plant to ensure that divestiture assets constituted viable ongoing business).