STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON THE ABANDONMENT OF THE ENDOCARE, INC. / GALIL MEDICAL, LTD. MERGER

I fear that my colleagues' Counterstatement misses the forest for the trees. On Friday, Endocare, Inc. abandoned its unconsummated merger with Galil Medical Ltd., "as a result of" the Commission's ongoing investigation.[1] The merger between two small companies involved in developing innovative therapies for prostate and renal cancer was too small to be covered by the Hart-Scott-Rodino Act, but the parties agreed not to close the transaction so long as the Commission was investigating it. As a result of the Commission's failure to conclude its investigation in a timely fashion, the Commission could not and did not find that there is "reason to believe" that this transaction is illegal or that challenging it would be in the public interest. My colleagues do not and cannot dispute this fundamental fact. They also do not claim that there is any evidence sufficient to justify blocking this merger de jure. In blocking this merger de facto (as the Commission by failing to timely conclude its investigation and reach a

First, this merger involves the combination of two small companies that make and sell products used for a therapeutic treatment for prostate and renal cancer. Those products consist of consoles and consumables that physicians (principally urologists) administer to provide what is called cryotherapy. That is a form of therapy that combats cancer by freezing it (as opposed to, for example, combating cancer by exposing it to radiation or other consumables that burn it or eliminate it through surgery).

The FDA has approved the marketing and use of cryotherapy products for combating prostate and renal cancer (prostate cancer being the most prevalent form of non-skin cancer in America), and the federal government has assigned codes that those seeking reimbursement for these therapeutic uses can use. The FDA has also approved the use of cryotherapy for use in combating certain other metastasized forms of soft tissue cancers such as liver, lung and bone cancer, but it has not approved marketing cryotherapy products for those uses. Moreover, the federal government has not approved reimbursement codes for the use of cryotherapy products for those purposes. Finally, neither the FDA nor the federal agency responsible for assigning reimbursement codes has approved the use of cryotherapy products for the treatment of any primary forms of cancer other than prostate and renal cancer.

Based upon the parties' representations to me, the merger was designed, at least in part, to enable the parties to finance and engage in research and development and to obtain the approvals necessary to market cryotherapy for cancers other than prostate and renal cancer. There is no basis for believing that Healthtronics, Inc., which Endocare has announced will now acquire it (in lieu of a merger with Galil), has ever engaged in research and development respecting any form of cancer.

Second, it does not currently appear that the merger will threaten to injure consumers by substantially increasing the prices that they pay for cryotherapy. To be sure, the parties appear to be the only two companies that make and market cryotherapy products. However, the purchasers of the consoles are principally hospitals and distributors who furnish the consoles to hospitals via

metastasized cancers for which cryotherapy can be used (but not marketed). Indeed, I have not seen any estimates of the pre- and post-merger market shares or HHIs in any relevant market. Likewise, I have not seen any estimates of the amount that the parties' shares (or HHIs) will increase as a result of the merger.

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The parties have not fully complied with the Commission's document subpoena, alleging that the burden and expense of searching for, segregating, and producing the documents called for make it impossible for them to do so. Thus, the Commission must weigh the risk that compliance with its subpoenas will be undercut against the public interest in not blocking this transaction. Given the unique circumstances of this case, however, it does not seem that that risk outweighs the public interest.

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In sum, I respectfully suggest that, by blocking this merger de facto, the Commission acts contrary to the public interest and to its statutory authority to block mergers only when it has reason to believe that they are illegal. This is especially serious in this case in view of the facts that (1) the Commission has had an investigation of this non-HSR reportable merger open for many months; (2) this case involves the treatment of the leading form of non-skin cancer afflicting Americans (so the Commission had better be especially sure it is doing the right thing); (3) I have seen nothing to indicate that the merger here poses a likely threat of supra-competitive pricing; and (4) I have also seen no evidence that indicates that there is a likely danger that this merger will stifle more or quicker innovation.

I am sad to say this about any Commission matter. However, I will not shrink from self-criticism of the agency either. I just sincerely hope that the Counterstatement is wrong in its assertion that this matter was handled in a fashion that is "fully consistent with the Commission's mission." (Counterstatement at 2.) I have higher aspirations for the agency.