



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

**CONCURRING STATEMENT OF
COMMISSIONER REBECCA KELLY SLAUGHTER**

Federal Trade Commission; and State of New York v. Vyera Pharmaceuticals, LLC; Phoenixus AG; Martin Shkreli; and Kevin Mulleady

Commission File No. 161-0001

January 27, 2020

Today, the Commission voted unanimously to file a complaint against Vyera Pharmaceuticals, LLC, Phoenixus AG, Martin Shkreli, and Kevin Mulleady. Let me begin by commending our staff for a thorough and important investigation. The complaint filed today is only a small snapshot of the effort the Bureaus of Competition and Economics, as well as staff across the entire agency, poured into investigating this matter.

I strongly support bringing an enforcement action in this case; the alleged conduct is egregious and clearly violates Section 1 and Section 2 of the Sherman Act. By naming the individuals who directed the conduct and by seeking monetary relief, the Commission sends a strong message to the market that the FTC is monitoring these issues closely and will not hesitate to challenge anticompetitive conduct around drug pricing.

I write separately to explain why I would have supported including a count in the complaint alleging a violation of the FTC Act's prohibition on unfair acts or practices. This case is about a company and its leadership raising the price of an off-patent drug that had no therapeutic alternatives, where the price hike—by more than 4000%—was not attributable to increases in production or manufacturing costs, nor was it due to a change in supply or demand.¹ And here, as the complaint alleges, the company and its leadership engaged in a pattern of conduct to protect that price hike by prohibiting competitive entry. In my view, there is no question that dramatically increasing the price of life-saving medication, while taking actions to prevent competition, satisfies the elements of our long-standing law that prohibits unfair acts or practices.

First, the conduct as alleged in our complaint causes substantial injury to consumers, in the form of higher drug prices and delay in obtaining life-saving medication. Second, the injury is not reasonably avoidable because Daraprim is the gold standard treatment for toxoplasmosis; patients cannot choose to go without this life-saving treatment and our complaint alleges that they do not have any good therapeutic alternative to which to turn. Finally, I believe that the

¹ Statement of Commissioners Rohit Chopra & Rebecca Kelly Slaughter, FTC Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531606/p180101_section_5_report_dissenting_statement_by_chopra_and_slaughter_6-27-19.pdf.

injury is not outweighed by countervailing benefits to consumers or competition; while price increases normally induce competitive entry, the defendants ensure that such entry is incredibly difficult and substantially delayed—even for a drug that had been off-patent for nearly half a century—largely because as we have alleged, the defendants are actively preventing competition.²

To be clear, my position is not simply about condemning price increases alone and it is not about creating new law. Instead, this is about applying the FTC’s statutory authority and obligation to address emerging and evolving practices that harm consumers, as Congress intended when it passed the FTC Act.³ While the FTC has a long history of using the antitrust laws to protect consumers from anticompetitive conduct that can cause high drug prices, the stakes are too high to rely on this approach alone. Where we see new patterns of problematic behavior in the marketplace, such as the practice of raising prices on orphan drugs, we need to adapt our enforcement strategies to address them. Indeed, the practice at issue in this investigation was the topic of a bi-partisan U.S. Senate Committee on Aging investigation; the Committee’s resulting report on sudden price spikes encouraged the FTC to be aggressive in policing this kind of behavior.⁴

I will continue to advocate that the Commission aggressively explore new ways to utilize our existing enforcement tools to restore competition and eliminate unfair or deceptive acts or practices in the pharmaceutical industry.⁵

² 15 U.S.C. § 45(n) (2018).

³ *Fed. Trade Comm’n v. Colgate-Palmolive*, 380 U.S. 374, 385 (1965) (“It is important to note the generality of the [unfairness] standards of illegality; the proscriptions in § 5 are flexible, to be defined with particularity by the myriad of cases from the field of business.”).

⁴ S. Special Comm. on Aging, 114th Cong., *Sudden Price Spikes in Off-Patent Prescription Drugs: The Monopoly Business Model that Harms Patients, Taxpayers, and the U.S. Health Care System*, 118–19, (2016), <https://www.aging.senate.gov/imo/media/doc/Drug%20Pricing%20Report.pdf>.

⁵ Statement of Commissioners Rohit Chopra & Rebecca Kelly Slaughter, *supra* note 1.