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The Honorable Joseph J. Simons
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons:

I write regarding AbbVie's proposed acquisition of Allergan. You have recently heard from Senators on how the acquisition will harm innovation and allow increased negotiating leverage.[1] And you've heard from consumer groups about how the acquisition will increase "rebate walls" and anticompetitive patent practices.[2]

I write to raise an additional concern that has not yet received attention: that the acquisition will reduce Allergan's incentive to act like generic companies are supposed to in challenging invalid patents. Forthcoming research that I have conducted with Mark Lemley and Shawn Miller shows that the acquisition is likely to transform Allergan from a company that represents a "mixed" brand and generic firm to one that is more of a brand company.[3] We have found that such a transformation reduces the likelihood that the combined company will challenge invalid patents, a vital goal given high drug prices today.

Our empirical research found that of all the leading generic firms, Allegan was sued the most between 2009 and 2017.[4] This serves the purpose of the Hatch Waxman Act, facilitating market entry and generic competition. We also found that Allergan settled less than most of the big generic firms we studied.[5]

Likely due to its "mixed" status with brand and generic lines of business, Allergan has already begun to act like a brand firm. It has filed repetitive citizen petitions to delay generic competition on its dry-eye-disease-treating Restasis. The FDA denied the second of these petitions by stating that Allergan "should not be surprised" by its response and denied the third

[1] Letter from 9 Senators, Sept. 17, 2019, https://www.klobuchar.senate.gov/public/index.cfm/2019/9/klobuchar-leads-letter-warning-that-pharmaceutical-mergers-may-threaten-drug-competition-increase-prices-and-reduce-patient-access-to-essential-medications.

[2] Letter on behalf of Families USA et al., Sept. 12, 2019, http://freepdfhosting.com/02dade1973.pdf.

[3] Michael A. Carrier, Mark A. Lemley, & Shawn P. Miller, *Playing Both Sides: Branded Sales, Generic Drugs, and Antitrust Policy*, 71 HASTINGS L.J. __ (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350629.

[4] *Id.* at 32.

[5] *Id.* at 40.

by lamenting that the petition "repeats many of the assertions" of earlier ones it had already addressed.[6]

Nor was that all. Allergan sought to avoid "inter partes review" of its patents at the Patent Office by transferring patents to a Native American tribe to exploit tribal immunity. Not only did this maneuver fail[7] but it also garnered widespread criticism.[8] One can only imagine how much worse this conduct will get once its generic status recedes and it is combined with AbbVie, which has been criticized for its 136 patents covering Humira.[9]

Considering the nature and size of merging firms and their incentives to foster competition is consistent with the Merger Guidelines. In fact, it can be viewed as an application of the analysis of "mavericks" that "play a disruptive role in the market to the benefit of customers."[10]

In short, when considering AbbVie's acquisition of Allergan, I respectfully suggest that you consider Allergan's reduced likelihood of acting like a generic firm, challenging invalid patents and in the process unleashing quicker competition that lowers prices for consumers.

Thank you for your consideration.

Respectfully,

Michael A. Carrier
Distinguished Professor
Rutgers Law School

cc: Commissioner Noah Joshua Phillips
Commissioner Rohit Chopra
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson
Bruce Hoffman, Director, FTC Bureau of Competition

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[6] Citizen Petition Denial Response Letter, Feb. 10, 2016, https://www.regulations.gov/document?D=FDA-2015-P-1404-0007; Citizen Petition Denial Response Letter, Jan. 2, 2018, https://www.regulations.gov/document?D=FDA-2017-P-4745-0026.

[7] Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals, Inc., 896 F.3d 1322, 1325 (Fed. Cir. 2018).

[8] Meg Tirrell, *Allergan Responds to Mounting Criticism of Mohawk Patent Deal*, CNBC, Oct. 3, 2017, https://www.cnbc.com/2017/10/03/allergan-responds-to-mounting-criticism-of-mohawk-patent-deal.html.

[9] *Humira Patent Fortress at Center Stage during Pharma Execs' DC Showdown*, CRAIN'S, Feb. 26, 2019, https://www.chicagobusiness.com/health-care/humira-patent-fortress-center-stage-during-pharma-execs-dc-showdown.

[10] DOJ/FTC HORIZONTAL MERGER GUIDELINES ¶ 2.1.5, Aug. 19, 2010, https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.