

## UNITED STATES OF AMERICA Federal Trade Commission

WASHINGTON, D.C. 20580

## **Statement of Commissioner Melissa Holyoak**

In the Matter of Cooperativa De Farmacias Puertorriqueña Commission File No. C4374

## December 9, 2024

Collusion is the "supreme evil of antitrust." As alleged in the Commission's 2012 Complaint, Cooperativa De Farmacias Puertorriqueña ("Coopharma") agreed to "fix prices in their negotiations with third-party payers." To further the conspiracy, the Commission alleged that Coopharma "collectively negotiated contracts, including price terms; contracted jointly with some payers; and organized boycotts to coerce payers to accept their demands." To remedy these allegations of collusion, Coopharma agreed to a consent order that prevented it from engaging in the collusive behavior ("2012 Order").<sup>4</sup> Now 12 years into that 20-year order, Coopharma seeks to set aside or modify the 2012 Order based upon changes in law or because the public interest so requires.<sup>5</sup>

Today's unanimous order modifies the existing order based *solely* upon changes in Puerto Rican law<sup>6</sup> that grant Coopharma state-action immunity for *some* of the conduct prohibited by the 2012 Order.<sup>7</sup> State-action immunity protects the rights held by states in our system of cooperative federalism,<sup>8</sup> but we still need to ensure that state-action immunity does not create a pendulum that swings from an economy harmed by private restraints into an economy handicapped by public

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<sup>&</sup>lt;sup>1</sup> Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

<sup>&</sup>lt;sup>2</sup> Compl., *In re Cooperativa de Farmacias Puertorriqueñas*, No. C-4374, at ¶ 1 (Aug. 8, 2012), available at https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120821coopharmacmpt.pdf.

<sup>&</sup>lt;sup>4</sup> See Decision & Order, *In re Cooperativa de Farmacias Puertorriqueñas*, No. C-4374, at § II (Nov. 6, 2012), available at https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121107coopharmado.pdf.

<sup>&</sup>lt;sup>5</sup> Petition to Reopen and Set Aside or Modify Order, *In re Cooperativa de Farmacias Puertorriqueñas*, No. C-4374, at §§ I.A, I.B. (Aug. 8, 2024) [hereinafter Petition]; *see also* 15 U.S.C. § 45(b) ("[T]he Commission may . . . reopen and alter, modify, or set aside, in whole or in part any report or order . . ., whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . ."); 16 C.F.R. § 2.51(b) (similar).

<sup>&</sup>lt;sup>6</sup> See Act 228 Article 20A.9; Reg. No. 9161 § 8.05e3.

<sup>&</sup>lt;sup>7</sup> Order Reopening and Modifying Order to Permit Joint Negotiations, *In re Cooperativa de Farmacias Puertorriqueñas*, No. C-4374, § IV (Dec. 5, 2024) [hereinafter Order].

<sup>&</sup>lt;sup>8</sup> See Parker v. Brown, 317 U.S. 341, 350–51 (1943) ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."); N. Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 503 (2015) ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate.").

restraints.<sup>9</sup> I voted in favor of today's modification of the 2012 Order because it appears to me that the Puerto Rican statute (and regulations) satisfies the demands of state-action immunity, <sup>10</sup> and because the modifications we grant are sufficiently narrow that Commission oversight will continue to guard against any unauthorized collusion. <sup>11</sup> But just because Coopharma has secured some level of immunity, it does not change the fact that Coopharma's prior collusive behavior—and conduct allowed via state-action immunity—represents the "supreme evil of antitrust." <sup>12</sup>

During the last four years, the Biden Administration's Commission has oscillated between two very different approaches to antitrust:<sup>13</sup> one consistent with long-standing welfare principles that undergird the antitrust laws<sup>14</sup> and one that has attempted to undermine those same long-standing principles.<sup>15</sup> The latter—in addition to providing an extraordinary test run on how not to operate an agency—has been a resounding failure.<sup>16</sup>

Consistent with the latter approach, Chair Khan's statement "questions the wisdom" of using Commission resources to prosecute cartels because of the alleged misconduct of other

<sup>&</sup>lt;sup>9</sup> See Timothy J. Muris, State Intervention/State Action—A U.S. Perspective, Remarks before Fordham Annual Conference on International Antitrust Law & Policy (Oct. 24, 2003), https://www.ftc.gov/sites/default/files/documents/public\_statements/state-intervention/state-action-u.s.perspective/fordham031024.pdf.

<sup>&</sup>lt;sup>10</sup> See, e.g., N. Carolina State Bd. of Dental Examiners, 574 U.S. at 504–507.

<sup>&</sup>lt;sup>11</sup> The exception to the 2012 Order only applies when Coopharma is operating "pursuant to Act 239, as amended by Act 228, if (1) such negotiations are Overseen by COSSEC in accordance with Regulation 9161, and (2) within three business days of filing a notice of intent to negotiate with COSSEC under Section 8.05 of Regulation 9161, Coopharma provides notification . . . to the Commission." Order, *supra* note 7, at § VI (modification to Paragraph II). The modification also allows "the Commission, at its discretion, [to] request a supplemental compliance report . . . or otherwise seek additional information." *Id*.

<sup>&</sup>lt;sup>12</sup> Trinko, 540 U.S. at 408.

<sup>&</sup>lt;sup>13</sup> See Daniel Francis, After Neo-Brandeis, ProMarket (Nov. 25, 2024), https://www.promarket.org/2024/11/25/after-neo-brandeis/.

<sup>&</sup>lt;sup>14</sup> See, e.g., Compl., In re Tapestry, Inc., & Capri Holdings Ltd., No. 9429 (F.T.C. Apr. 22, 2024); Compl., FTC v. Restoro Cyprus Ltd., No. 1:24-cv-00735 (D.D.C. Mar. 14, 2024). But note that even in Tapestry—a unanimous complaint by the Commission based upon traditional theories of harm that ended in a litigation victory—the Chair and her Democratic colleagues have attempted to spin the result as some sort of assault on the use of economics evidence to define markets and a way to justify the 2023 Merger Guidelines. See Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter & Commissioner Alvaro M. Bedoya, In re Tapestry, Inc. and Capri Holdings Limited, No. D09429 (Dec. 5, 2024). The judge's opinion, however, speaks for itself and demonstrates traditional antitrust principles rather than an aggressive embrace of a radical neo-Brandeisian revolution. See FTC v. Tapestry, Inc., No. 1:24-CV-03109 (JLR), 2024 WL 4647809 (S.D.N.Y. Nov. 1, 2024).

<sup>&</sup>lt;sup>15</sup> See, e.g., Compl., *In re Chevron Corp.*, No. 241-0008 (F.T.C. Sep. 30, 2024); Compl., *In re Exxon Mobil Corp.*, No. 241-0004 (F.T.C. May 1, 2024); Compl., *In re Meta Platforms, Inc.*, No. 9411 (F.T.C. Aug. 11, 2022); Press Release, Fed. Trade Comm'n, *FTC Announces Rule Banning Noncompetes* (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes; Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Fed. Trade Comm'n Act, No. P221202 (Nov. 10, 2022), *available at* https://www.ftc.gov/system/files/ftc\_gov/pdf/P221202Section5PolicyStatement.pdf.

<sup>&</sup>lt;sup>16</sup> See Cat Zakrzewski, Sinking FTC Workplace Rankings Threaten Chair Lina Khan's Agenda, Washington Post (Jul. 13, 2022), https://www.washingtonpost.com/technology/2022/07/13/ftc-lina-khan-rankings/; Paul Steidler, The FTC's Bogus Spin on its Employees' Satisfaction, Lexington Institute (May 21, 2024), https://lexingtoninstitute.org/the-ftcs-bogus-spin-on-its-employees-satisfaction/.

players in the healthcare industry.<sup>17</sup> She also expresses concerns—based on speculative allegations against "dominant firms"—with pursuing enforcement against a small price-fixing cartel when its conduct may have been "spurr[ed]" by "coercive acts or outsized leverage of dominant firms." Conveniently, today's "dominant firms" happen to be among the Chair's well-known foes,<sup>19</sup> and would, from her perspective, appear to constitute "gigantic trusts and combinations of capital." The Chair's acolytes have advocated for the same approach, suggesting that price-fixing should be permissible for certain entities as long as their behavior somehow constrains groups unpopular with the political left.<sup>21</sup> The Chair's suggestion that the Commission ignore collusive activity serves as a last-minute salvo that further encourages the antitrust agencies to undermine long-standing principles.

The Chair's worldview fundamentally misunderstands who competition serves. It does not serve the interests of politically connected special interests or other rent-seeking groups that curry favor.<sup>22</sup> Competition serves the American public.<sup>23</sup> And "[t]he only way to have competition is to compete."<sup>24</sup>

<sup>&</sup>lt;sup>17</sup> See Statement of Chair Lina M. Khan, *In re Cooperativa de Farmacias Puertoriqueñas*, No. C-4374 (Dec. 9, 2024). As if my track record did not speak for itself, I strongly endorse antitrust enforcement against all entities that violate the antitrust laws.

<sup>&</sup>lt;sup>18</sup> Id.

<sup>&</sup>lt;sup>19</sup> See Compl., In re Caremark Rx, LLC, No. 9437 (F.T.C. Sep. 20, 2024); Respondents Express Scripts, Inc. et al. Mot. To Disqualify Chair Lina M. Khan, In re Caremark Rx, LLC, No. 9437 (F.T.C. Oct. 8, 2024); Compl., Express Scripts, Inc. v. Fed. Trade Comm'n, No. 4:24-cv-01263 (E.D. Mo. Sep. 17, 2024); Fed. Trade Comm'n, Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies, Report (July 8, 2024); see also Dissenting Statement of Commissioner Melissa Holyoak, In re Pharmacy Benefit Managers Report, No. P221200 (Jul. 9, 2024).

<sup>&</sup>lt;sup>20</sup> Khan, *supra* note 17 (quoting 51 Cong. Rec. 9545 (1914) (statement of Rep. Thomas F. Konop)). Importantly, however, Coopharma represents *over half* of the 900 pharmacies in Puerto Rico. *See* Georgina Silva-Suarez, et al., *The Voices of Community Pharmacists During the COVID-19 Pandemic in Puerto Rico*, 62 J. Am. Pharmacists Ass'n 202, 202–08.e3 (2022) (900 pharmacies in Puerto Rico); Petition, *supra* note 5, at 4 ("Coopharma's membership consists of approximately 500 independent pharmacies/independent pharmacy owners . . . ."). None of Coopharma's negotiation counterparties can claim a similar share of the market, raising question whether the Chair may actually be favoring the more dominant party. Coopharma's share also demonstrates that the Chair's predilection for market structure only extends insofar as it helps her condemn parties that she disfavors. *See, e.g.*, Khan, *supra* note 14.

<sup>&</sup>lt;sup>21</sup> Open Markets Institute, *The Federal Trade Commission Should Terminate the Coopharma Consent Order and Reevaluate Its Approach to Horizontal Coordination Among Small Players* (2024); Testimony of Barry Lynn, *Competition and Consumer Protection in the 21st Century*, FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law at 321 (Nov. 1, 2018) (confirming that its "exactly what [he's] saying" when asked if "collective actions by certain classes of workers or professionals . . . should be given more running room under the antitrust law, even if . . . it looked like a cartel"). It goes without saying that allowing one price fixer to publicly proceed without punishment undermines the deterrence created by over a century of antitrust enforcement. Further, allowing incumbents to price fix may raise the price of admission for new entrants, and in some circumstances, may even undermine entry entirely.

<sup>&</sup>lt;sup>22</sup> The ability to secure political favor via specialized legislation does not signify powerless entities or individuals. In fact, the ability to secure favor demonstrates what happens when the pendulum swings from private restraints to public restraints. *See* Muris, *supra* note 9.

<sup>&</sup>lt;sup>23</sup> The Chair also cites statutes where Congress has exempted specific groups or even types of conduct from the antitrust laws. Khan, *supra* note 17. But this undermines her efforts to justify today's price-fixing cartel. The existence of such statutes demonstrates that when Congress wants to exempt conduct or groups, it certainly knows how to do it, and it has not done so in this context.

<sup>&</sup>lt;sup>24</sup> In re Nat'l Lead Co., 49 F.T.C. 791, 887 (1953).