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## Medical Device Maker Merger Battle Moves To Court

By **Jacqueline Bell**

Law360, New York (June 12, 2009) -- In a bid to save its merger agreement with Endocare Inc., medical device maker Galil Medical Ltd. has filed a lawsuit to block Endocare from combining with another company, Healthtronics Inc., in a battle that has also sparked a war of words between commissioners at the Federal Trade Commission.

On June 8, Endocare announced that it had terminated its merger agreement with Galil, and instead entered into a merger agreement with urology company HealthTronics, saying its original deal with Galil could not be completed because of the FTC's refusal to close its ongoing investigation into whether the merger violated antitrust laws.

In a statement Thursday, Galil noted that discussions with the FTC were continuing and that the deal could still go through.

"Galil remains very committed to successfully closing the investigation with the FTC, and concluding our merger with Endocare," said Martin J. Emerson, president and CEO of Galil.

In a lawsuit filed in Delaware Chancery Court Tuesday, Galil has asked that Endocare be enjoined from taking further actions to consummate its proposed merger with HealthTronics, and that the original merger agreement between Galil and Endocare be enforced.

Both Galil and Endocare are medical device makers focused on technology aimed at minimally invasive tumor and tissue removal. Both produce products used for treatment of prostate and renal cancer.

On June 9, FTC Commissioner J. Thomas Rosch issued a statement in reaction to Endocare's decision to give up on its deal with Galil, saying the agency had failed to conclude its investigation in a timely fashion, and was in effect blocking the merger.

"There is no legitimate reason why the commission should block this merger de facto by letting the clock run out on the parties' agreement to abandon the transaction if the investigation remained open," Rosch said.

"In short, this case represents a 'poster child' for how protracted investigation of a transaction or practice can result in the commission failing to determine in a timely fashion whether there is 'reason to believe' that a transaction or practice will violate the antitrust laws and the public interest. The commission simply must do better," Rosch added.

Rosch also noted that he had seen no evidence that the merger between Endocare and Galil posed a threat to competition, or that it would stifle innovation.

FTC Chairman Jon Leibowitz, Commissioner Pamela Jones Harbour and Commissioner William E. Kovacic issued a joint statement challenging Rosch's analysis of the situation.

"Based on the the available evidence, and because the parties failed fully to comply with the commission's requests for information, the commission could not justify closing its investigation at this time. Absent the full disclosure of relevant information by the parties, the commission would not be fulfilling its obligation to protect competition if it were to allow the consummation of a proposed merger that threatens to eliminate head-to-head competition in potentially life-saving products," the statement said.

A spokesman for Endocare declined to comment on the lawsuit.

Galil is represented by Arnold & Porter LLP. Attorney information for Endocare was not immediately available Friday.

The case is Galil Medical Ltd. vs. Endocare Inc. and Orange Acquisitions Ltd., civil action number 4655-CC, filed in Delaware Chancery Court.

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