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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STALEY, *et al.* Plaintiffs, v. GILEAD SCIENCES, INC., *et al.* Defendants.	Case No. 3:19-cv-02573-EMC ***AMICUS CURIAE* BRIEF OF THE FEDERAL TRADE COMMISSION** Hearing: Jan. 16, 2020 Time: 9:00 a.m. Courtroom: 5 – 17th Floor Judge: Honorable Edward M. Chen

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

In this case, the plaintiffs allege various forms of anticompetitive conduct by several manufacturers of branded HIV medications. The complaint alleges that this conduct harmed competition in two general ways: preventing competition from cheaper generic versions of each respective branded product; and reducing competition among branded products in a class of HIV therapies, leading to overall higher prices. Defendants have filed separate motions to dismiss.

for a given class of goods. In fact, market definition is merely an analytical tool to aid in assessing whether a challenged agreement or action has the potential for genuine anticompetitive effects. Antitrust law has long recognized the economic reality that competition exists in degrees, and that broader or narrower product markets may be appropriate depending on the action and associated effects being scrutinized. Thus, when multiple types of anticompetitive harm are alleged (as here), multiple markets may be relevant.

Interest of the FTC

The FTC's mission is protecting consumers and safeguarding vigorous competition in the marketplace. *See*

Market definition, however, is not an end itself; "it merely aids in the search for competitive injury." *Oltz*, 861 F.2d at 1448. Antitrust law speaks of defining the "relevant" market because market definition "provides the context against which to measure the competitive effects of an agreement." *Geneva Pharm.*, 386 F.3d at 496 (citing *Copperweld v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)). A firm without market power will not be able to harm competition successfully, and market power thus "distinguishes the antitrust violation from the ordinary business tort." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979).

Thus, as the Supreme Court has explained, the purpose of defining a relevant market "is to determine whether an arrangement has the potential for genuine adverse effects on competition." *Indiana Fed'n of Dentists*, 476 U.S. at 460-61; *see also Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 2004) ("It is initially important to keep in mind that '[m]arket definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether power exists.'" (quoting Lawrence A. Sullivan, ANTITRUST

Because antitrust markets are merely analytical devices to assess the alleged anticompetitive effects, they do not necessarily conform to intuition.[7] Indeed, some relevant markets that courts have recognized may appear counter-intuitive. *See, e.g.*, *Pac. Coast Agr. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1203 (9th Cir. 1975) (relevant market was "the distribution of oranges grown in Arizona and California for export to Hong Kong"); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1039-42 (D.C. Cir. 2008) (relevant market was "premium natural and organic supermarkets"); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48 (D.D.C. 2015) (a relevant market was "broadline foodservice distribution to national customers"); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1080 (D.D.C. 1997) (relevant market was "the sale of consumable office supplies through office supply superstores"). Clearly, the products in these cases competed to some degree in broader spheres as well, but that fact did not preclude defining more narrow relevant antitrust markets when assessing the specific alleged anticompetitive effects at issue.

Indeed, the Supreme Court long ago explained that "within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).[8] As the Ninth Circuit observed in *Olin Corp. v. FTC*, "every market that encompasses less than all products is, in a sense, a submarket." 986 F.2d 1295, 1299 (9th Cir. 1993). "Whatever term is used—market, submarket, relevant product market—the analysis is the same." *Staples*, 970 F. Supp. at 1080 n.11. In each case, the goal is to "recognize competition where, in fact, competition exists." *Brown Shoe*, 370 U.S. at 326. Thus, there may be, for example "(1) a market for shoes generally in that a hypothetical cartel of all shoe manufacturers could raise prices substantially, and

[7] *See, e.g.*, Glasner & Sullivan, *supra* note 6, at 6-7 (describing "the natural market fallacy" as one of three common misconceptions about relevant market definition, in addition to "the independent market fallacy" and "the single market fallacy").

[8] *Brown Shoe*'s teachings apply in both merger and non-merger antitrust cases. *United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966) ("In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act . . . there may be submarkets that are separate economic entities." (citing *Brown Shoe*, 370 U.S. at 325)); *Thurman Indus.*, 875 F.2d at 1375 n.1. (same (citing *Greyhound Comput. Corp. v. Int'l Bus. Machs. Corp.*, 559 F.2d 488, 494 n.1 (9th Cir. 1977))).

simultaneously (2) a market for HQMS [high-quality men's shoes], in that a hypothetical cartel of its producers could raise its prices substantially." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 533 (online edition). Depending on the alleged anticompetitive effects, "each may be relevant to the consideration of some antitrust violation." *Id.*

II. Defining different product markets to assess different theories of harm is neither "contradictory" nor legally deficient

Gilead attacks the relevant product markets alleged in the complaint on the ground that they are "contradictory" and that "the pharmaceutical products at issue either are substitutable for one another, or they are not, and they cannot plausibly be both." Gilead's Mot. Dismiss, ECF No. 143 at 33. But, as discussed above, it is simply not the case that only one relevant antitrust market is cognizable for any given product or set of products. To the contrary, across many different industries, courts have repeatedly recognized that multiple different relevant markets or submarkets may exist for a single class of products or services depending on the alleged anticompetitive harm.

Indeed, in *Olin Corp. v. FTC*, the Ninth Circuit expressly rejected an argument that recognizing multiple markets is inherently contradictory. 986 F.2d 1295, 1297 (9th Cir. 1993). *Olin* examined a pool sanitizer manufacturer's purchase of a competitor's assets. *Id.* at 1296. The parties produced two dry pool sanitizers (ISOS and CAL/HYPO). *Id.* They stipulated that there was a relevant product market limited only to ISOS sanitizers, but disagreed whether there was also a broader "dry sanitizers" market comprised of both ISOS and CAL/HYPO. *Id.* at 1297. Much like Gilead, Olin contended that "the existence of a relevant ISOS-only market precludes a broader dry sanitizers market" because "it is inconsistent to recognize a larger, dry sanitizers market once a relevant ISOS-only market has been identified." *Id.* at 1301. The Ninth Circuit disagreed. It held that "[r]ecognizing ISOS as a submarket of the dry sanitizers market is not inherently contradictory with recognizing a dry sanitizers market" because "[w]ithin one market there may exist additional submarkets relevant for antitrust purposes." *Id.* at 1299, 1301 (first

citing *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 274-77 (1964); and then citing *RSR Corp. v. FTC*, 602 F.2d 1317, 1320 (9th Cir. 1979)).

The Supreme Court's decision in *United States v. Continental Can Co.*, 378 U.S. 441 (1964), reflects the same principle. In that case, the Court found that glass and metal containers was the relevant product market in which to assess the merger of a metal can producer with a glass bottle manufacturer. *Id.* at 457. Applying the teachings of *Brown Shoe*, however, the Court noted that "a broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic or cans and glass together." *Id.* at 457-58 (citing *Brown Shoe*, 370 U.S. at 325). Indeed, as Judges Posner and Easterbrook later explained, "if the merger had been between two manufacturers of cans (or of bottles), the Court would surely have held that cans (or bottles) were an appropriate 'submarket' in which to appraise the effects of the merger."[9]

This prediction was borne out in the FTC's subsequent decision in *In re Owens-Illinois, Inc.*, 115 F.T.C. 179 (Feb. 26, 1992). That case involved a merger of two leading glass manufactures (one of which had been involved in *Continental Can*).[10] The merging parties contended that the relevant product market consisted of "all rigid containers" (glass, plastic, metal, and paper). *Id.* at 294. The Commission disagreed, noting that "the [*Continental Can*] Court twice suggested that in evin va

those clusters. In *United States v. Philadelphia National Bank*, the Court held that the antitrust market was "commercial banking," which it defined as a "cluster of products (various kinds of credit) and services (such as checking accounts and trust administration)" provided by large financial institutions. 374 U.S. 321, 356 (1963). The Court reached this conclusion even though it acknowledged that commercial banks competed to some degree with other institutions for some of the services within the cluster. *Id.* ("For example, commercial banks compete with small-loan companies in the personal loan market.").

Seven years later, in *United States v. Phillipsburg National Bank & Trust Co.*, the Supreme Court again made clear that the existence of an overall cluster market for commercial banking services did not preclude the existence of other, narrower markets for the individualized financial services within that cluster. 399 U.S. 350, 360 (1970). The Court explained that "submarkets [for the individualized financial services] . . . would be clearly relevant, for example, in analyzing the effect on competition of a merger between a commercial bank and another type of financial institution," but were "not a basis for the disregard of a broader line of commerce that has economic significance." *Id.* (citing *Brown Shoe*, 370 U.S. at 326). In other words, the smaller financial markets identified by the district court may have been relevant markets for analyzing different conduct involving different alleged competitive effects, but were not relevant to the alleged harm at issue.

Courts have also recognized the possibility of co-existing broad and narrow relevant markets for pharmaceuticals. For example, the relevant market might consist of an entire therapeutic class of drugs when the anticompetitive effects are likely to manifest among that entire class, such as in a merger between two branded manufacturers. *See, e.g., In re Novartis AG & GlaxoSmithKline*, Dkt. No. C-4510 (Fed. Trade Comm'n Apr. 8, 2015) (Novartis's proposed acquisition of GlaxoSmithKline's cancer portfolio required divestiture of Novartis's development-stage BRAF(f)3.c, the developmnce of an ovC-4510 (Fed.4487 Comm'n

motion sickness drugs); *In re Sanofi-Synthelabo & Aventis*, Dkt. No. C-4112 (Fed. Trade Comm'n Sept. 24, 2014) (proposed merger required divestiture of Arixtra because consolidation with Lovenox would have reduced competition in the relevant market of Factor Xa inhibitors).

In other circumstances, the relevant market might be limited to only a subset of a therapeutic class. In *Safeway Inc. v. Abbott Laboratories*, plaintiffs alleged monopolization of the market for "boosted protease inhibitors (PIs) used to treat HIV." 761 F. Supp. 2d 874, 884-85 (N.D. Cal. 2011). Defendants argued that this market definition was overly narrow, because another class of HIV therapies—non-nucleoside reverse transcriptase inhibitors (NNRTIs)—are functionally comparable to boosted PIs. *Id.* at 888. The court held that "this similarity does not preclude Plaintiffs' definition of the boosted market for antitrust purposes," noting that the availability of "several HIV therapies, including NNRTIs and boosted PIs . . . is not inconsistent with Plaintiffs' definition of a boosted PI submar

product market as branded and generic oxymorphone ER, noting "in most cases arising in the [pharmaceutical reverse payment] context, a brand and its generics will constitute the relevant market").

Indeed, even a product market limited to generic versions of a particular branded drug may be a relevant market in which to analyze alleged anticompetitive effects. In *Geneva Pharm. Tech. Corp. v. Barr Labs.*, a manufacturer of a generic warfarin sodium product alleged that Barr, the manufacturer of another warfarin sodium generic had locked up a critical source of supply and thereby excluded it from the market. 386 F.3d at 485. The Second Circuit found that "once Barr entered the market, the market became segmented so that Coumadin [the brand-name warfarin sodium product] and Barr each had smaller, distinct customer groups," and that Barr could charge higher prices for its generic pr

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