Nos. 10-3548 and 10-3549

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEDERAL TRADE COMMISSION and STATE OF MINNESOTA,
Appellants,

v.

LUNDBECK, INC.,
Appellee.

On Appeal from the United States District Court for the District of Minnesota in Civil Nos. 08-6379 (JNE/JJG) and 08-6381 (JNE/JJG)

BRIEF OF *AMICUS CURIAE* AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute ("AAI") is an independent non-profit educational, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 115 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org. The AAI frequently appears as *amicus curiae,* and presented oral argument in *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.,* 129 S.Ct. 1109 (2009). The Board of Directors is particularly concerned that the opinion below entirely disregards non-price competition, potentially immunizing anticompetitive conduct in pharmaceutical and other markets in which price competition may be attenuated, and that it sets too high a standard for considering price effects in a monopoly-preserving merger.[1]

FED. R. APP. P. 29(a) STATEMENT

The AAI has the consent of all the parties, Plaintiffs-Appellants Federal Trade Commission and State of Minnesota, and Defendant-Appellee

[1] The AAI's Board of Directors alone has approved the filing of this brief; the individual views of members of the Advisory Board may differ from AAI's positions.

Lundbeck, Inc., to submit this *amicus* brief.

FED. R. APP. P. 29(c)(5) STATEMENT

No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than the AAI or its counsel – has contributed money that was intended to fund preparing or submitting this brief. Certain members of AAI's Advisory Board represent plaintiffs in related litigation against Lundbeck, but they played no role in drafting or funding the brief, nor participated in the AAI Board of Directors' deliberations over the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The basis for the District Court's ruling was its view that cross-price elasticity of demand was "very low" between the two drugs acquired by Lundbeck, and therefore that they could not be in the same relevant market.[2] AAI urges reversal on three grounds. First, assuming *arguendo* that cross-price elasticity was low – even if it were zero – the court's approach fundamentally misapprehended the law. A lack of price competition between two functionally interchangeable products does not preclude a determination that they are in the same relevant market. Second, regardless of "low" cross-price elasticity, the acquisition removed an actual or potential

[2] Following the District Court, we refer to Appellee-Defendant Lundbeck and its predecessor Ovation, Inc. as "Lundbeck."

constraint on a monopolist's ability to exercise monopoly power and was therefore anticompetitive and illegal under Section 7 of the Clayton Act and Section 2 of the Sherman Act. And third, the court's finding of "low" cross-price elasticity should be rejected because it cannot be reconciled with the rest of its findings and is otherwise riddled with errors.

Strictly speaking, the court made a "cross-elasticity" finding only indirectly, extrapolating from an institutional peculiarity. The court believed that because many doctors choose drugs based on quality rather than price, hospitals that actually purchase the drugs and choose whether to stock them in their formularies would be unable to foster price competition among drug manufacturers. And yet, on every other dimension the court's findings show the products to be closely interchangeable economic substitutes. Moreover, much of the court's own reasoning was based on doctors' differing views as to safety and side effects. That is to say, the court found as a fact that *these products compete head to head on the basis of quality.* The ruling therefore directly conflicts with *United States v. Continental Can Co.,* 378 U.S. 441 (1964), and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), which hold that antitrust law protects quality competition as well as price competition. Quality competition benefits consumers in its own right, and it

drives innovation. Indeed, it is where price competition lacks vigor that non-price competition is most important.

With respect to price competition, the court essentially placed the burden on the government to prove that but for the acquisition, the two products *would have* competed on price. However, even if price were the only concern, that is too stringent a test. Under the incipiency standard of Section 7, and Section 2's heightened concern over acquisitions by monopolists, it is sufficient that Lundbeck has preempted the competitive constraint that separately owned drugs would have provided.

Further, even if the evidence supported each of the District Court's findings of fact individually, the cross-elasticity ruling is seriously at odds with almost the entire remainder of the opinion. The court ignored its own findings demonstrating that Lundbeck and Abbott both considered that the price of each of the products constrained the price of the other. Moreover, on the court's own findings, a determination of actual cross-price elasticity would be logically impossible in this case. It cannot be measured where, as here, the products in question were always controlled by the same monopolist owner and essentially priced the same. Finally, the court's conclusion that Lundbeck's efforts to convince doctors to use NeoProfen instead of Indocin would make no sense if the products were in the same

relevant market is exactly backwards; Lundbeck's conduct would be economically irrational if the products were not good economic substitutes.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS CLEARLY DEMONSTRATE THAT THE PRODUCTS AT ISSUE ARE CLOSELY INTERCHANGEABLE ECONOMIC SUBSTITUTES

The District Court's findings demonstrate the following beyond serious doubt: Lundbeck was the maker of two functionally interchangeable substitutes that were at best only mildly differentiated, and at the time of the challenged acquisition it faced no other competition. The court summarized its own findings as follows:

> To treat [the medical condition in question] with drugs in the United States, [doctors] may choose Indocin IV, . . . [or a] generic [substitute for Indocin IV, which became available only in 2010] . . . , or NeoProfen. [Doctors] pick NeoProfen or Indocin IV to treat [that condition] for reasons such as perceived differences in the drugs' safety, differences in side effects, or the presence or lack of long-term studies.

FF 116. The findings of fact also show that the medical community considered the drugs largely interchangeable, or at any rate lacked consensus that one was superior.[3] Most hospitals stocked either of the two drugs, but

[3] The court credited medical experts who considered the drugs interchangeable. FF 98, 102, 103, 105; *cf.* FF 101. Moreover, while some witnesses preferred one of the drugs, they were divided among those who preferred Indocin IV and those who preferred NeoProfen. *Compare* FF 100

not both. FF 94. Lundbeck's effort to distinguish them in its customers' minds was a high priority, FF 34, 81-87, but its materials show its apprehension that customers would not be convinced. FF 78-80. Lundbeck's best hope for distinguishing NeoProfen was lost when the Food & Drug Administration rejected a label for NeoProfen that had been proposed by Abbott Laboratories, from which Lundbeck acquired the drug. The FDA rejected the label because it would have stated that NeoProfen was superior to Indocin IV, and the agency found that claim unsubstantiated. FF 61. Indeed, despite Lundbeck's marketing effort, and despite NeoProfen's alleged superiority, as of the time of the decision below, Indocin IV was still prescribed substantially more often than NeoProfen. FF 94.

The findings of fact also show that Lundbeck viewed Indocin IV and NeoProfen as highly competitive. Lundbeck estimated that "NeoProfen [would] capture a significant portion of the pharmaceutical PDA market at the expense of Indocin IV." FF 79 (noting expected sales loss "due to new

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and 108 (preference for Indocin IV) *with* FF 99, 104, 106, *and* 107 (preference for NeoProfen). The court also credited "[p]ublished clinical studies indicat[ing]" that the active ingredients in the two drugs are "equally efficacious," finding as a matter of fact that each of them is "approximately 75% to 90% effective." FF 21. Finally, the court credited Lundbeck internal strategy documents finding that among the reasons that some customers discontinued NeoProfen is that "[s]afety advantages (e.g. renal function) [were] not perceived as a feature/benefit significant enough to replace Indocin IV as the first line therapy . . . ." FF 84.

competition (generic entry and NeoProfen)."); *see also* FF 80 (describing "competitive threats" to Indocin IV from NeoProfen). Indeed, the basic rationale for the acquisition was that "[a]cquiring NeoProfen will allow us to cannibalize our Indocin IV sales in a controlled manner, retain sales for both products and continue to grow total company sales in the PDA market with an exclusively protected product." FF 79.

In short, these two products were designed for the same use, and despite whatever differentiation they may actually possess, they were economic substitutes in the sense that sales of one came directly at the expense of the other.

II. IN DETERMINING THE RELEVANT MARKET, THE TRIAL COURT ERRED BY IGNORING NON-PRICE COMPETITION

The result below rested entirely on the District Court's finding that cross-price elasticity between the two drugs was "very low" and therefore the products could not be in the same relevant market. Even assuming *arguendo* that cross-price elasticity was low, it does not follow that they are in different product markets. Despite the court's apparently contrary view, core values protected by our antitrust law include quality competition and innovation over time. As the Supreme Court explained in *Continental Can*:

> Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to "recognize competition where, in fact, competition exists."

378 U.S. at 453 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962)); *accord United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988). Like the trial court in *Continental Can*, the court here "employed an unduly narrow construction of the 'competition' protected by § 7 and of 'reasonable interchangeability of use or the cross-elasticity of demand' in judging the facts of this case." 378 U.S. at 452.

A. Quality Competition and Innovation are Core Antitrust Values

Quality competition and consumer choice are values protected by the antitrust laws, even in the absence of price competitiveness in a given market. The Supreme Court has so held many times. *See, e.g., FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 459-60 (1986) (a "refusal to compete with respect to the package of services . . . , no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare"); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 605-07, 610 (1985) (noting harm from the unavailability of the all-Aspen ticket, which deprived consumers of the ability to "make their own choice on these matters of quality"); *Nat'l Collegiate Athl. Ass'n v. Bd. of Regents,* 468 U.S. 85, 102 (1984) (finding that athletic association's actions "can be viewed as procompetitive" because

they "widen consumer choice"); *cf. Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,* 441 U.S. 1 (1979) (treating musical composers as horizontal competitors even though price competition likely lacking).

The significance of non-price competition has been reaffirmed by this Court, *see, e.g., Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n,* 666 F.2d 1130, 1138 (8th Cir. 1981) (finding trade association rule illegal because it "stunts rather than develops trade . . . and limits consumer choice"), and by the other Circuits, *see, e.g., United States v. Dentsply Int'l, Inc.,* 399 F.3d 181, 194 (3d Cir. 2005) (finding it "anticompetitive [to] . . . limit[] the choices of products open to dental laboratories."); *Conwood Co., L.P. v. U.S. Tobacco Co.,* 290 F.3d 768, 789 (6th Cir. 2002) (finding antitrust injury where conduct "caused higher prices and reduced consumer choice, both of which are harmful to competition"); *Wilk v. Am. Med. Ass'n,* 895 F.2d 352, 360 (7th Cir. 1990) (boycott by doctors of chiropractors was "anticompetitive [because it] . . . interfere[s] with the consumer's free choice to take the product of his liking"); *Glen Holly Ent., Inc. v. Tektronix, Inc.,* 343 F.3d 1000, 1010-11 (9th Cir. 2003) (rejecting definition of "antitrust injury" that would recognize only increased price or decreased innovation; finding antitrust injury because defendant's conduct "detrimentally changed the market make-up and limited consumers' choice to one source of

output."); *see generally* Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L. J. 175, 189-91 & nn. 45-48 (2007) (citing cases).

Non-price competition has been of particular concern in merger review under § 7 because "expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output." *Brown Shoe Co.,* 370 U.S. at 345 n.72; *see also United States v. Philadelphia National Bank*, 374 U.S. 363, 368 (1968) (finding a bank merger illegal under § 7 because it would limit consumer choice as to "price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, [and] miscellaneous special and extra services.").

For more than two decades the *Horizontal Merger Guidelines* have recognized that mergers may be anticompetitive when they reduce non-price competition. When the antitrust enforcement agencies first issued joint merger guidelines in 1992, they took the view that, in addition to their power over price, "[s]ellers with market power . . . may lessen competition on dimensions other than price, such as product quality, service, or innovation."

U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* § 0.1 n.6 (1992). The revised *Guidelines* of 2010 go further:

> Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. . . . [The agencies' usual market definition methodology, which focuses on "small but significant and non-transitory" price changes,] is used because normally it is possible to quantify [such changes,] not because price effects are more important than non-price effects. . . .

U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* §§ 1, 4.1.2 (2010).

B. *Continental Can* and *Tenet Health Care* Control This Case

In particular, two decisions emphasizing these non-price competition values, one from the Supreme Court and one from this Circuit, control this case. First, in *Continental Can,* a maker of metal containers acquired a maker of glass containers. The Court rejected a bench verdict for defendants that found glass and metal containers to be in separate product markets. Although the trial court found significant non-price competition between the metal and glass container industries, it found the acquisition in "the category of the conglomerate combination" rather than horizontal. 378 U.S. at 449. Because of differences in manufacturing process and end use, the trial court thought "the Government failed to make 'appropriate distinctions . . .

between inter-industry or overall commodity competition and the type of competition between products with reasonable interchangeability of use and cross-elasticity of demand which has Clayton Act significance.'" *Id.* at 448-49 (quoting District Court).

The Supreme Court reversed, concluding, "that the demand for one [product] is not particularly or immediately responsive to changes in the price of the other [is] relevant . . . but not determinative of the product market issue." *Id.* at 455; *see also id.* at 450 (noting that "particular user[s] . . . do[] not shift back and forth from day to day as price and other factors might make desirable"). The Court canvassed findings and record evidence of the marketing and technological innovation efforts of can and glass companies to take each other's market share, concluding that "[t]his [rivalry] may not be price competition but is nevertheless meaningful competition between interchangeable containers," *id.* at 456, and that such competition "was of the type and quality deserving of § 7 protection and therefore the basis for defining a relevant product market," *id.* at 449.

This Court's decision in *FTC v. Tenet Health Care Corp.,* 186 F.3d 1045 (8th Cir. 1999), is also closely on point and rejects the approach to market definition taken in this case. *Tenet* reversed a district court's

geographic market definition for excluding neighboring, but more expensive hospitals. "In so doing," the district court

> underestimated the impact of nonprice competitive factors, such as quality. . . . [O]ne reason for the significant amount of migration from the [merging] hospitals to [those excluded from the market] is the actual or perceived difference in quality of care. The apparent willingness of Poplar Bluff residents to travel for better quality care must be considered. . . . [H]ealthcare decisions are based on factors other than price. . . . The district court placed an inordinate emphasis on price competition without considering the impact of a corresponding reduction in quality.

Id. at 1054.

In short, the antitrust laws protect non-price competition as well as price competition, which means that functionally interchangeable economic substitutes can be in the same relevant market even when consumers are not price sensitive.

C. The Acquisition Caused Consumer Harm From the Loss of Non-Price Competition

The District Court's findings demonstrate that Lundbeck's acquisition resulted in unambiguous consumer losses apart from any price effects. "Lundbeck stopped actively promoting Indocin IV" and "instructed its sales representatives to focus on Indocin IV's weaknesses relative to NeoProfen's anticipated benefits." FF 81. This reduction and skewing of information was a clear loss to hospitals, doctors, and patients, and a harm to the

competitive process. Indeed, in the drug field, information about safety and effectiveness is critical. Had Lundbeck not acquired NeoProfen, it would have had the incentive not only to promote Indocin IV's benefits, but to fund studies that might aid in that effort, while challenging the claims made for NeoProfen. Moreover, the acquisition caused a loss of incentive to innovate. A separate owner of either of the drugs, faced with quality competition, would strive to respond with technological innovation and quality improvements. Indeed, the most perverse consequence of the ruling is that it is especially where market failure impedes price competition that non-price rivalry is most important.

D. The Court's Holding Has Potentially Far-Reaching Consequences

The District Court's holding has potentially far-reaching consequences in other markets where competition occurs primarily, or exclusively, over non-price attributes. First, by the court's own findings of fact, price-competitiveness is likely to be attenuated as to most prescription drugs and for that matter as to most health care services. Failure to take account of non-price competition therefore could effectively exempt a fair portion of the health care sector from the antitrust laws. *Cf. Phila. Nat'l Bank,* 374 U.S. at 350 (repeals of antitrust by implication are "strongly disfavored").

The District Court's ruling would also have consequences in non-health-care markets. For example, it implies that the DOJ and FTC would be precluded from weighing the effect of Internet and other media mergers on consumers where the services are free (there is no cross-price elasticity between products that are free). It would also preclude consideration of lost editorial diversity or content in newspaper and media mergers, in which non-price competition is routinely considered. *See, e.g., United States v. Daily Gazette Co.,* 567 F. Supp. 2d 859, 870 (S.D.W.Va. 2008); *Reilly v. MediaNews Group, Inc.*, 2007 WL 1068202, at *3 (N.D. Cal. 2007); *Hawaii ex rel. Anzai v. Gannett Pac. Corp.,* 99 F. Supp. 2d 1241, 1249-50 (D. Haw. 1999), *aff'd,* 203 F.3d 832 (9th Cir. 1999) (holding newspaper merger illegal that would, among other things, "deprive newspaper readers of free and open competition in the sale of daily newspapers and their differing editorial and reportorial voices").

Moreover, in any case in which price competitiveness is dampened, but consumers value choice among non-price attributes, the District Court's ruling would produce this strange result: sellers of differentiated substitutes with low cross-price elasticity could enter into market allocation agreements without risk of antitrust liability because they are not horizontal competitors, as the products are not in the same relevant market. Lundbeck, for example,

rather than acquiring NeoProfen from Abbott Laboratories, might have just agreed with Abbott that each would sell only to selected hospitals, even though such an agreement between horizontal competitors would be plainly illegal, and the loss of choice would reflect real consumer injury given the District Court's findings that many doctors prefer one or the other of the two drugs.

III. THE COURT'S MARKET DEFINITION FAILED TO TAKE INTO ACCOUNT THAT AN INDEPENDENTLY OWNED NEOPROFEN WOULD HAVE BEEN A CONSTRAINT ON LUNDBECK'S PRICING

Even assuming *arguendo* that non-price competition is legally irrelevant, the District Court was wrong to conclude that "low" cross-price elasticity precluded the inclusion of both Indocin IV and NeoProfen in the same product market. The fact that an independently owned NeoProfen would have been a constraint on Lundbeck's pricing – indeed, the only competitive constraint – is sufficient to place it in the same relevant market.

Cross-price elasticity does not exist in a vacuum; it is a measure of substitutability of two products at particular prices. *See infra*. When the court found that cross-elasticity here was "low," it did not specify what that meant or conclude that it was so low that the potential anticompetitive effects at issue in the case could not occur. On the contrary, it is clear that NeoProfen was Indocin IV's next-closest substitute, *see* FF 11, 12 (surgery

is "second-line" treatment of PDA and significantly more expensive than drugs), and that an independently owned NeoProfen would have set a ceiling on Lundbeck's pricing of Indocin IV, and vice versa. Indeed, the court recognized this constraint explicitly when it found that, "When launching NeoProfen, an independent owner would not have disregarded Indocin IV's price." FF 63. In contrast, a common owner can raise or maintain the price of one of the drugs, knowing that the lower sales will be recaptured by the other, as Lundbeck was well aware. FF 79 ("Acquiring NeoProfen will allow us to cannibalize our Indocin IV sales in a controlled manner").

The elimination by merger of an actual or potential price constraint on a monopolist is anticompetitive, regardless of whether Indocin IV and NeoProfen are considered to be in same relevant market. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 469 n.15 (1992) ("Whether considered in the conceptual category of 'market definition' or 'market power,' the ultimate inquiry is the same—whether . . . [one] market will significantly restrain power in the [other] markets."); 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 701d (3d ed. 2008) (monopolist's "acquisition of any firm that has the economic capabilities for entry and is a more-than-fanciful possible entrant is presumptively anticompetitive"); *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966)

(monopolist's acquisition was illegal where it "eliminated any possibility of an outbreak of competition that might have occurred").

In any event, a proper definition of the relevant market would recognize such a competitive constraint. *See General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987) ("Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—*actual or potential*—to take significant amounts of business away from each other.") (internal quote marks omitted) (emphasis added). A failure to recognize such a constraint would also be inconsistent with Section 7's "incipiency" mandate. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 323 n.39 (1962) (Section 7 of the Clayton Act is designed to protect against anticompetitive dangers "in their incipiency"); *accord Midwestern Mach., Inc. v. Nw. Airlines, Inc.*, 167 F.3d 439, 442 (8th Cir. 1999).

IV. THE COURT'S MARKET DEFINITION AND THE ELASTICITY FINDING ON WHICH IT DEPENDS CANNOT BE RECONCILED WITH THE REST OF ITS FACT FINDINGS

Finally, this Court should not accept the District Court's market definition because the finding of low cross-price elasticity cannot be reconciled with the facts as found and is riddled with other errors. *See Continental Can,* 378 U.S. at 447-58 (reversing judgment as matter of law

because trial court's own findings of fact did not support its market definition); *Tenet,* 186 F.3d at 1053-55 (reversing preliminary injunction because trial court's own findings of fact conflicted with its market definition); *see also Morgenstern v. Wilson,* 29 F.3d 1291, 1295-97 (8th Cir. 1994) (reversing permanent injunction in jury trial, where market definition was based on expert opinion but "indisputable record facts contradict or otherwise render the opinion unreasonable").

A . The Elasticity Finding is Deeply Suspect on Its Face

The elasticity finding depended on the informal opinion of a Lundbeck expert, FF115,[4] and implicitly on the testimony of eight doctors who said they do not consider the price of the drug if there is a meaningful difference in safety or effectiveness. However, the court's other findings of fact demonstrate that a substantial number of doctors were largely indifferent between the two drugs. *See infra* note 3. In any event, even if

[4] Even though the court found as a fact that cross-price elasticity is "very low," FF 116, the court may have meant to imply that its ultimate finding rested merely on Plaintiffs' burden of proof. According to the court, Plaintiffs' economic expert did not offer an opinion as to cross-elasticity. FF 114; *cf.* FF 111. Yet, in its denial of Lundbeck's motion for summary judgment, the District Court recognized that even the total absence of cross-elasticity evidence does not preclude a finding in favor of Plaintiffs' proposed market. *FTC v. Lundbeck, Inc.*, 2009 WL 2215006, at *2 n.2 (D. Minn., July 21, 2009). Moreover, if the failure of proof were the court's rationale, it would be error because, as we will explain, it would be literally impossible in this case for either party accurately to estimate cross-elasticity.

most consumers are not price sensitive, that does not in itself prove that cross-price elasticity is low. *See United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) ("[I]t is possible for only a few customers who switch to alternatives to make [a] price increase unprofitable, thereby protecting a larger number of customers who would have acquiesced in higher prices."). Further, the fact that doctors, not surprisingly, may not focus on price, does not mean that cross-price elasticity is low with respect to hospitals – which clearly are price sensitive and make the actual purchase decisions – or that no hospital would be in a position to seek lower prices for itself. *Cf. 2010 Horizontal Merger Guidelines* § 3 ("Where price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers.").[5]

The expert's opinion was admittedly not based on statistical or econometric

[5] The court's findings recognize that hospitals *are* price sensitive, FF 93, and they (not doctors) make the actual drug purchases, FF 88, and that Lundbeck sought to influence non-physician members of hospital pharmacy and therapeutics committees to gain access to hospital formularies, FF 83. The court nonetheless concluded that "neonatologists are *the* relevant consumers." FF 113 (emphasis added). This was error because the question isn't an either/or issue. Plainly, while doctors are influential, the courts findings demonstrate that hospitals play at least a significant role, and the court failed to explain why hospitals could not make purchase decisions based on price by persuading indifferent doctors to use one drug or other, as Lundbeck itself sought to do. *See* FF 85.

analysis of any evidence.[6] Indeed, any estimate of the actual cross-price elasticity in this case would be impossible. Economists define cross-price elasticity as the percentage change in the quantity demanded for a product associated with each one-percent change in the price of another product. *See* 2B Phillip E. Areeda et al., *Antitrust Law* ¶ 507a (3d ed. 2007). In antitrust litigation it is estimated either by calculation of a simple statistical correlation between price changes over time or, in the less common case in which sufficient data are available, by econometric study of the relation between prices. Either approach presupposes the availability of data showing the behavior of the two products when the price of one of them changes. *See* Am. Bar Ass'n, Section of Antitrust L., *Econometrics: Legal, Practical, and Technical Issues* 269-309 (2005); Andrew M. Rosenfeld, *The Use of Economics in Antitrust Litigation and Counseling,* 1986 Colum. Bus. L. Rev. 49, 63-67.

[6] According to the court, the expert "did not calculate a specific cross-price elasticity between NeoProfen and Indocin IV, [but] he testified that that it is very low." FF 115. In fact, he offered his opinion only at trial, in reply to a question asked by the court*, id.*, and no written report or statement by him is apparently in evidence. Even on Lundbeck's characterization of his testimony, the most he did was speculate on the basis of his perception of an institutional market failure. Def.'s Post Trial Br. at 4-5. Other courts have held such unsupported expert testimony not even admissible under *Daubert*, much less as sufficient to support fact findings. *See, e.g., McLaughlin Equip. Co. v. Servaas,* 2004 WL 1629603, at *6 (S.D. Ind. 2004) ("It is insufficient for an expert to merely mention cross-elasticity of demand or supply; an analysis is required.").

Such a procedure would be impossible in this case. Prior to July 2006, only Indocin IV was available, and by that time Lundbeck had already raised its price to $1500 per three-vial course of treatment. FF 57. When Lundbeck introduced NeoProfen in July 2006, it offered the drug at $1450 per three-vial course of treatment (about one year later raising it to $1552.50). FF 62. In another case that addressed the issue on similar facts, the court ruled that proof of cross-elasticity cannot be demanded of the plaintiff because without price variation it cannot be measured. *See Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.,* 311 F. Supp. 2d 1048, 1082 (D. Colo. 2004).

Moreover, during the entire short period of their "competition" with one another, NeoProfen and Indocin IV were both owned by the same monopolist. A monopolist that owns the only two substitutes in a given market has no incentive to price them competitively with each other or with other products. Where, as here, they have always been priced by the same monopolist, any estimate of their cross-price elasticity will be severely flawed by an amplified version of the *Cellophane* fallacy—the mistake of inferring cross-elasticity (or lack thereof) in a case where one or more products was already being sold at a non-competitive price. *See* Am. Bar Ass'n, Sect. of Antitrust L., *Market Power Handbook* 59-60 (2005)

(describing the *Cellophane* fallacy); *Kodak,* 504 U.S. at 471 ("The existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power.").

Additionally, it is black letter law that when defining markets, courts should refrain from giving monopolists the benefit of inferences from facts peculiarly in their own control. *See United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) ("To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action."); *United States v. Alum. Co. of Am.,* 148 F.2d 416, 424-25 (2d Cir. 1945) (excluding "secondary" aluminum ingot from defendant Alcoa's market because Alcoa had some control over how much secondary there could be).

B. The Elasticity Finding Conflicts With the Remainder of the Opinion

The District Court's finding of low cross-price elasticity also conflicts with other findings of fact. The fact that "[w]hen launching NeoProfen, an independent owner would not have disregarded Indocin IV's price," FF 63, is evidence of significant cross-price elasticity. Moreover, upon the 2006 introduction of its new NeoProfen product, Lundbeck itself keyed the price

of NeoProfen to the price of its existing Indocin product, minus a 3% discount, to "[a]llow [sales] rep[resentatives] to spend more time selling product differentiation in the NICU vs. spending time with the pharmacy director on price . . . ." FF 82; *see id.* (also noting that small discount "will not convert the economic driven vial splitting crowd"). Also, the court found that, though Lundbeck always intended to increase the price of Indocin IV after its acquisition, Lundbeck deliberately chose not to do so until after it had completed negotiations with Abbott Laboratories for the acquisition of NeoProfen. "Lundbeck was concerned that Abbott Laboratories would demand a higher price for the rights to NeoProfen if the announcement of Indocin IV's price increase took place before Lundbeck's acquisition of the rights to NeoProfen." FF 58. But why would Abbott do any such thing if the two products were not price competitors?

The court also found that in Lundbeck's internal strategic analyses, including in a presentation to its controlling shareholder, it perceived the two drugs to be in direct price competition. *See* FF 79 (combining the two products was expected to "allow us to cannibalize our Indocin IV sales in a controlled manner . . . and continue to grow total company sales in the PDA market"); FF 80 (combination would "allow Lundbeck to realize a more stable revenue stream for both products within the PDA market"); FF 82

(NeoProfen introduced with a 3% discount to Indocin IV to "take[] away potential pharmaeconomic debate"); FF 84 (reasons that some customers were not ordering NeoProfen included "Price").

At trial, Lundbeck stressed one other point extensively, and the District Court found it as a fact, but it turns out to show quite the opposite of what Lundbeck urges. Abbott Laboratories, the previous owner of NeoProfen, had intended to introduce NeoProfen at a price significantly higher than the then-prevailing price of its only competitor, Indocin IV. FF 61. Lundbeck stressed that this fact proved that the two drugs do not compete as to price. This argument is incorrect for at least two reasons. First, that Abbott might have charged more for NeoProfen than Indocin IV would show at most that they are not perfect substitutes. It is elementary that products can be in the same product market without being perfect substitutes. *See United States v. E.I. du Pont de Nemours & Co. (Cellophane),* 351 U.S. 377, 394 (1956) (antitrust does not "require that products be fungible to be considered in the relevant market"). Second, Abbott's higher price projection was based on Abbott's anticipation that the Food & Drug Administration would approve a label for NeoProfen stating its superiority over Indocin IV. But, as mentioned above, the agency ultimately rejected such a label. FF 16, 36, 61.

C. Lundbeck's Efforts to Convince Doctors to Switch to NeoProfen Would Make No Sense Unless the Products Were Antitrust Substitutes

Lundbeck's marketing strategy, to "accelerate the conversion of first-line PDA treatment from Indocin IV to [NeoProfen]," FF 80, would make no sense if the products were not economic substitutes. A finding of seriously irrational behavior calls at least for some explanation, but the court failed utterly to supply it. As this Court has recognized, a finding of behavior "contrary to [the actor's] economic interests . . . is suspect," *Tenet,* 186 F.3d at 1054, because "antitrust law limits the range of permissible inferences from ambiguous evidence," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986).

Lundbeck was the owner of two separate products, which it acquired for tens of millions of dollars. Absent other explanation, its rational strategy would be to maximize the joint profit from selling both. And yet, it did something very different. The company invested several million additional dollars in a marketing effort to differentiate the two products on the basis of safety and side effects.[7] But if the products were not antitrust substitutes, a

[7] Lundbeck established a massive, direct-sales marketing effort involving dozens of its own sales personnel and scores more from Abbott Laboratories (for which Lundbeck paid $2 million), to convince customers of NeoProfen's superiority. FF 34, 81-87.

rational firm would not waste money trying to convince consumers that they differ; consumers would already know.

More important, Lundbeck spent significant sums to acquire those two separate drugs to treat the same condition, within six months of one another, but then devoted itself to disparaging one of them to its consumers. FF 81. There is no reason to believe on the court's fact findings that sales of NeoProfen should benefit Lundbeck any more than sales of Indocin, except for the anticompetitive reason we elaborate below. It would be peculiar indeed for the supplier of two separate, non-competing products, neither of which promises a greater margin than the other, to discourage sales of either. In this case Lundbeck not only did that, but apparently sought to kill off demand for one of them altogether.

The District Court observed that "[w]ere NeoProfen and Indocin IV in the same product market," the push to discourage Indocin IV "would not make sense." FF 116. But in fact, it made perfect sense. Lundbeck sought to convert Indocin users to NeoProfen because it expected generic competition to Indocin, which would take more sales away from Indocin than from NeoProfen. FF 64. The more it could differentiate NeoProfen in the minds of customers, the more it could insulate NeoProfen from generic competition.

D. The Court Misapplied Elementary Principles of Market Definition

The District Court evidently believed that Indocin IV and NeoProfen could not be in the same relevant product market if they would be affected differently by the entry of generic Indocin, or if they were "distinct." *See* FF 116 (concluding in penultimate sentence, "NeoProfen are Indocin IV are distinct; their side effects differ."). This reflects a fundamental misunderstanding about market definition. In particular, the court failed to appreciate that a product market might be defined differently in two different cases, even though they involve the same products, or that there can be a broader relevant market that encompasses a smaller relevant market.

For example, in a merger between two identical versions of a product, a non-merging differentiated product might be excluded because it does not sufficiently constrain the ability of the merged firm to exercise market power. *See, e.g., Archer-Daniels-Midland*, 866 F.2d at 243 (in acquisition of high fructose corn syrup plants by HFCS maker, sugar was not in the same relevant market as HFCS). However, in a merger in which the differentiated product is in fact being acquired, the differentiated products may be in the same market because products outside that wider market do not sufficiently constrain a hypothetical monopolist in the wider market. *See* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust

L.J. 129, 148 (2007) ("If one set of products or locations constitute a relevant antitrust market, it is likely that one or more larger sets of products and locations that encompass the initial market would also be an antitrust market."); *Brown Shoe*, 370 U.S. at 325 (concept of "submarkets" recognizes that narrow market may exist within a broader relevant market); *e.g., Olin Corp. v. FTC*, 986 F.2d 1295, 1301 (9th Cir. 1993) (recognizing "a submarket of the dry sanitizers market is not inherently contradictory with recognizing a dry sanitizers market").

Thus, a merger between Indocin IV and a generic equivalent might well exclude NeoProfen from the relevant market, but that is not inconsistent with a relevant market here that includes both NeoProfen and Indocin IV. A related problem is that the court was apparently led astray by Lundbeck in assuming that only if consumers switched products in response to a small price increase (5-10%) could the products be considered in the same relevant market. *See* Def. Lundbeck Inc.'s Post Trial Br. at 37-38, 42-43. However, two products can be in the same relevant market even if a significant price increase is required to get consumers to switch, if there are no other better substitutes to the products that would constrain a monopolist's pricing. *See Olin*, 986 F.2d at 1302 ("a finding of cross-elasticity is not precluded by the fact that a higher price increase is necessary to induce a switch").

CONCLUSION

There is no dispute that Lundbeck had monopoly power with respect to its Indocin IV product, regardless of whether the relevant market included NeoProfen. And there is no dispute that had NeoProfen not been acquired by Lundbeck, non-price competition would have flourished. By its acquisition, the monopolist Lundbeck preempted the possibility that price competition would also flourish. Absent extraordinary circumstances not present on the record in this case, such a monopoly-protecting merger is patently anticompetitive and illegal under Section 2 of the Sherman Act and Section 7 of the Clayton Act. Accordingly, the decision of the District Court should be reversed.

Respectfully submitted,

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