UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION, Plaintiff, v. ABBVIE INC. et al., Defendants.	CIVIL ACTION Case No. 14-cv-5151

PLAINTIFF FEDERAL TRADE COMMISSION'S BENCH BRIEF REGARDING THE HYPOTHETICAL MONOPOLIST TEST (CORRECTED)

At opening argument, this Court asked Defense Counsel: "Are there cases where[the Hypothetical Monopolist Test] has been used in cases that don't involve mergers." (Trial Tr. (Feb. 7, 2018) at 54:12-13). In response, Defense Counsel incorrectly represented that the Third Circuit has never accepted the use of the hypothetical monopolist test in non-merger cases and that the use of the hypothetical monopolist test in the context of the pharmaceutical industry is inconsistent with the Third Circuit's decision in *Mylan Pharm. Inc. v. Warner Chilcott PLC*, 838 F.3d 421 (3d Cir. 2016). (Trial Tr. (Feb. 7, 2018) at 54:14-17, 54:22-55:1, 55:6-9).[1] Because the Federal Trade Commission's economic expert, Professor Carl Shapiro, will apply the hypothetical monopolist test to this case, the Federal Trade Commission writes to correct this misunderstanding of the state of the law.

Background

The monopoly power inquiry in this case asks whether Defendants' conduct delaying generic competition for AndroGel 1% harmed consumers by maintaining higher prices for AndroGel than otherwise would have prevailed. The FTC intends to offer the results of Professor

[1] Cited trial transcripts are attached as Exhibit A.

Shapiro's application of the hypothetical monopolist test ("HMT") to assess "the structure and composition of the relevant market" as one form of indirect evidence that Defendants possessed monopoly power during the relevant period. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) (monopoly power may be proven indirectly "from the structure and composition of the relevant market").

The HMT incorporates both "reasonable interchangeability" and "cross-elasticity of demand between in-market products" to systematically evaluate economic substitutability and determine whether an identified group of products qualifies as a relevant product market *Babyage.com v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575, 581 (E.D. Pa. 2008). The test starts with a narrow set of products (the candidate market) and asks whether a hypothetical monopolist selling all of the products in the candidate market could profitably impose a small but significant non-transitory increase in price ("SSNIP," taken to be 5% or more) in the proposed market. *Id.*; U.S. Dep't of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines § 4.1.2. If the answer is yes, then the market is correctly defined. *Id.* Conversely, if a hypothetical monopolist could not profitably impose a price increase of 5% or more, then the relevant product market is too narrow and must be expanded to include other products. *Id.*

Argument

A. The Third Circuit and other courts have widely endorsed the use of the hypothetical monopolist test in non-merger cases

Courts and economists routinely apply the HMT to define relevant product markets. Contrary to Defendants' assertion that "[i]n the Third Circuit," the HMT "has never been accepted in a case that was not about a business merger," (Trial Tr. (Feb. 7, 2018) at 54:14-17) the Third Circuit Court of Appeals and district courts in this Circuit have expressly endorsed its use in the context of assessing monopoly or market power in non-merger antitrust cases.

The Third Circuit, for instance, applied the HMT in a case involving a challenge to a collective bargaining agreement, affirming the district court's conclusion "that the relevant market was large trade show venues in the Northeast or possibly across the United States." *Atl. Exposition Servs., Inc. v. SMG*, 262 F. App'x 449, 452 (3d Cir. 2008) (affirming summary judgment and explaining the relevant market is "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere."). In *Babyage.com*, another court in this District accepted plaintiffs' use of the HMT to define the relevant market in a case where plaintiffs alleged that the defendant's use of resale price maintenance agreements had violated Sherman Act §§ 1 and 2. 558 F. Supp. 2d at 583, 585. And in *Radio Music License Comm., Inc. v. SESAC Inc.*, No. 12-cv-5807, 2013 WL 12114098, at *9-10, *14-15 (E.D. Pa. Dec. 23, 2013), the court accepted the plaintiffs' use of the HMT to define the relevant market in a non-merger case involving claims that the defendant's licensing practices violated Sherman Act §§ 1 and 2.[2] Courts in other circuits have similarly approved of the use of the HMT in the context of defining a relevant product market in antitrust cases that do not involve mergers.[3]

B. Use of the hypothetical monopolist test in the pharmaceutical context is consistent with the Third Circuit's *Mylan* decision

[2] *See also Transweb, LLC v. 3M Innovative Props.*, Civ. Case No. 10-4413, 2012 WL 10634568 at *6-7 (D. NJ. July 13, 2012) (accepting the use of the hypothetical monopolist test in denying a motion to exclude plaintiff's economic expert in a patent infringement case that included claims of *Walker Process* antitrust violations).

[3] *See, e.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 829-30 (11th Cir. 2015) (exclusive dealing case where application of HMT was appropriate); *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 34-35 (S.D.N.Y. 2016) (same); *Encana Oil & Gas, Inc. v. Zaremba Family Farms, Inc.*, No. 12-cv-369, 2015 WL 12883545, at *4 (W.D. Mich. Sept. 18, 2015) (§ 1 case where "[o]ne method for determining reasonable interchangeability is the SSNIP test"); *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 218-19 (S.D.N.Y. 2014) (accepting HMT analysis to define relevant market in § 2 case); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 987 (C.D. Cal. 2012) ("[T]he SSNIP methodology may, under appropriate circumstances, provide an acceptable framework with which to define a relevant product market for purposes of antitrust analysis under Section 2 of the Sherman Act."); *Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 352 (S.D.N.Y. 2009) (§ 2 case explaining HMT is "another tool used to define a relevant market").

Defendants asserted in their opening that the use of the HMT "is inconsistent with the Third Circuit controlling *Mylan* decision, which dealt specifically with competition involving brand and generic drugs." (Trial Tr. (Feb. 7, 2018) at 54:22-55:1). This is incorrect.

First, the Third Circuit did not reject the HMT in *Mylan*. Nowhere in its opinion does the Third Circuit analyze the use of or even mention the HMT.

Second, *Mylan* is clear that monopoly power requires both functional and economic interchangeability. *Mylan*, 838 F.3d at 435-36. Economic interchangeability is shown by cross-elasticity of demand, defined as "a relationship between two products, usually substitutes for each other, in which a price change for one product affects the price of the other." *Id*. The hypothetical monopolist test that Professor Shapiro employs incorporates the evidence of "cross-elasticity of demand between in-market products." *Babyage.com*, 558 F. Supp. 2d at 581. This is the type of evidence that plaintiffs failed to offer in *Mylan*, where the only cross-elasticity of demand evidence was defendants' "unrebutted expert evidence showing cross-elasticity of demand between Doryx and other tetracyclines." *Mylan*, 838 F.3d at 437.

Third, the result in *Mylan* appears to be consistent with application of the HMT. Where the defendant is alleged to be engaging in anticompetitive conduct to obstruct competition and prevent prices from falling, the HMT asks whether the price will fall significantly, usually by at least 5%, in the presence of that competition.[4] In *Mylan*, however, the generic entered – at least initially – at a higher (not lower) price than branded Doryx. *See Mylan Pharm. Inc. v. Warner Chilcott plc*, Civ. No. 12-3824, 2015 WL 1736957, at *4, *8 (E.D. Pa. Apr. 16, 2015). The initial fact pattern in *Mylan*, where the price did not fall, would not satisfy the HMT.

[4] U.S. Dep't of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines § 4.1.2 n.5.

Finally, *Mylan* does nothing to change the state of the law regarding the applicability of evidence of cross-elasticity of demand to cases involving pharmaceutical markets. Courts routinely analyze evidence of cross-elasticity of demand—like the type incorporated in the HMT—in determining the relevant market in cases involving the pharmaceutical industry, just like in any other industry. For example, in *United Food & Commercial Workers Local 1776 v. Teikoku Pharma USA*, the Court found in favor of plaintiffs' proposed market of branded Lidoderm and its generic equivalents on the basis of plaintiffs' evidence "that during the relevant time there was no significant cross-elasticity of demand between Lidoderm and any product other than generic Lidoderm." No. 14-md-02521-WHO, 2017 WL 5068533, at *21 (N.D. Cal. Nov. 3, 2017); *see also In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-02503-DJC, 2018 WL 563144, at *5-10 (D. Mass. Jan. 25, 2018) (considering evidence of cross-elasticity of demand in case involving oral tetracyclines for the treatment of acne).

Conclusion

The correct response to this Court's question at opening argument is that courts in the Third Circuit and elsewhere have widely adopted the HMT in non-merger cases, and the *Mylan* decision did not change that.

Dated: February 14, 2018

Respectfully submitted,

/s/ Patricia M. McDermott

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Certificate of Service

I hereby certify that on February 14, 2018, I caused the foregoing Plaintiff Federal Trade Commission's Bench Brief Regarding the Hypothetical Monopolist Test to be filed with the United States District Court for the Eastern District of Pennsylvania using the Court's ECF system. I also caused courtesy copies of the foregoing brief to be hand delivered to the Court.

/s/ Matthew B. Weprin
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