No. 21-3005

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: EPIPEN (EPINEPHRINE INJECTION, USP) MARKETING, SALES PRACTICES AND ANTITRUST LITIGATION

SANOFI-AVENTIS U.S., LLC,

Plaintiff, Counterclaim Defendant – Appellant,

v.

MYLAN INC.,

Defendant – Appellee,

and

MYLAN SPECIALTY, LP,

Defendant, Counterclaimant – Appellee.

On Appeal from the United States District Court for the District of Kansas, No. 2:17-MD-02785-DDC-TJJ, Hon. Daniel D. Crabtree

BRIEF OF AMICI CURIAE INTERNATIONAL CENTER FOR LAW & ECONOMICS AND SCHOLARS OF LAW AND ECONOMICS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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September 22, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae International Center for Law & Economics states that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law and economics methodologies to inform public policy debates and has longstanding expertise in the evaluation of antitrust laws.

Amici also include scholars of antitrust, law, and economics at leading universities and research institutions across the United States. Their names, titles, and academic affiliations are listed in Appendix A. All have longstanding expertise in, and have conducted extensive research on, antitrust law and economics.

Amici have an interest in the proper development of antitrust jurisprudence. They believe that reversal of the district court's decision, based on the arguments put forward by appellant and its amici, risks undermining the goals of antitrust law, ultimately harming consumers not just in the market under investigation but also throughout the economy. Specifically, accepting appellant's arguments would mean recognition of a nebulous theory of harm, without basis in sound economics.

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[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici represent that no counsel for any of the parties authored any portion of this brief and that no entity, other than amici or their counsel, monetarily contributed to the preparation or submission of this brief.

Such a decision would further risk deterring companies from engaging in beneficial, procompetitive conduct. Amici accordingly believe that this Court should affirm the decision below, reaffirming the central importance of the error-cost framework that informs sound antitrust rules and standards and avoiding reliance on ambiguous statements of subjective intent – which may characterize vigorous competition, providing no sound basis for imposition of antitrust liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sanofi is seeking to overturn the district court's grant of summary judgment in favor of Mylan, which held that Mylan's EpiPen rebate agreements (loyalty discounts) did not foreclose Sanofi from competing in the market for epinephrine auto-injectors. As this brief argues, finding in favor of Sanofi would mark a misguided departure from the error-cost framework that has been the linchpin of modern antitrust enforcement. Loyalty discounts – and the lower prices they bring – routinely benefit consumers. The Court accordingly should not endorse a dubious theory of harm that does not adequately distinguish between procompetitive and anticompetitive behavior, as doing so would chill firms' incentives to compete on price.

Anticompetitive (that is, consumer-harming) strategies capable of foreclosing even efficient competitors are difficult – often impossible – to distinguish from vigorous competition (which *benefits* consumers). Courts are compelled to rely on a limited set of observable parameters to infer whether a firm's behavior falls under one or the other category. This process entails significant pitfalls. *See* Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What's the Question?*, 2012 Colum. Bus. L. Rev. 151, 184-85 ("The key challenge facing any proposed analytical framework for evaluating monopolization claims is distinguishing pro-competitive from anticompetitive conduct. Antitrust errors are inevitable because much of what is potentially actionable conduct under the antitrust laws frequently actually benefits consumers, and generalist judges are called upon to identify anticompetitive conduct with imperfect information.").

When it comes to allegedly anticompetitive *lowering* of prices – predation, discounts, and rebates – low prices themselves are the posited mechanism for anticompetitive foreclosure and thus a key component of the liability regimes pertaining to pricing practices. Yet low prices are also precisely the consumer benefit that antitrust law ordinarily seeks to preserve, especially when these low prices are sustained in the long run. In almost every circumstance, rebates and discounts represent welfare-enhancing price competition; nevertheless, economic theory teaches that strategic pricing can be anticompetitive. As Judge Easterbrook described, "[l]ow prices and large plants may be competitive and beneficial, or they may be exclusionary and harmful. We need a way to distinguish competition from exclusion without penalizing competition." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 26 (1984). In short, false positives in these settings may be especially costly because they penalize consumer-benefiting low prices.

The challenge for courts is distinguishing between robust competition and anticompetitive conduct when a primary indicator of both – low prices – is the same. Although the dividing line will always be imperfect such that it is not always clear when anticompetitive conduct is occurring, the academic literature and the courts have established guiding rules and standards designed to minimize error, maximize ease of administration, and protect consumer welfare. Sanofi's approach, by contrast, would increase the risks of wrongly imposing antitrust liability and, in turn, harming consumers, while being more difficult to administer.

ARGUMENT

I. SOUND ANTITRUST RULES FORECLOSE SANOFI'S PRICING-BASED ARGUMENTS

Antitrust law – after considering all error and administration costs – seeks to develop rules that promote consumer welfare. Antitrust judgments may err in two directions: They may permit anticompetitive (output-reducing) behaviors, or they may prevent procompetitive (output-enhancing) conduct. In crafting antitrust doctrines, courts should aim to minimize the sum of welfare losses from these two sets of errors *plus* the costs of administration. *See, e.g.*, *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) ("Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."); Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. Econ. & Org. 95, 99-100 (2002) ("[T]he test of a good legal rule is not primarily whether it leads to the correct decision in a particular case, but rather whether it does a good job deterring anticompetitive behavior throughout the economy given all of the relevant costs, benefits, and uncertainties associated with diagnosis and remedies."); *see generally* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984); Geoffrey A. Manne, *Error Costs in Digital Markets*, *in Global Antitrust Institute Report on the Digital Economy* 33 (Joshua D. Wright & Douglas H. Ginsburg eds., 2020). The Supreme Court has repeatedly endorsed this "decision-theoretic" approach, which maximizes the social welfare antitrust generates. *See*, *e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018) ("Any other analysis would lead to 'mistaken inferences' of the kind that could 'chill the very conduct the antitrust laws are designed to protect.'") (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993)); *see generally* Thomas A. Lambert & Alden F. Abbott, *Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies*, 11 J. Competition L. & Econ. 791 (2015); Thomas A.

Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. Rev. 871 (2011).

A. When it comes to pricing behavior, the courts have recognized that rules that discourage discounting can be antithetical to the purpose of antitrust law, as lower prices help consumers in the short term, even if predatory pricing has the potential to harm consumers in the longer term. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.").

There are, naturally, myriad nuances and complexities within the broad category of discount pricing. The simplest expression of discount pricing can be found in Supreme Court case law concerning predatory pricing. In *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.*, the Supreme Court found that below-cost pricing should not be subject to potential liability under the antitrust laws unless a plaintiff shows (1) "that the prices complained of are below an appropriate measure of its rival's costs" and (2) "that the competitor had a reasonable prospect . . . of recouping its investment in below-cost prices." 509 U.S. at 222-24; *see also Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318-19 (2007). This rule was designed to decrease the risk of false positives.

Notably, the Supreme Court in *Brooke Group* identified below-cost pricing as an element of liability without reasoning that below-cost pricing is a necessary prerequisite to exclusion of rivals that are, at least potentially, equally efficient, leading to consumer harm. Indeed, scholars have shown that prices that are low but above cost can maintain or enhance the discounter's market power by precluding rivals that are currently less efficient from attaining the scale that would enable them to match or exceed the discounter's efficiency. *See generally* Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits*,*"* 12 Geo. Mason L. Rev. 119, 122-28 (2003). Despite this possibility, the *Brooke Group* Court required below-cost pricing as an element of liability because

> the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, *or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting*. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.

509 U.S. at 223 (emphasis added; citation and internal quotation marks omitted).

Thus, the overriding concern for the Supreme Court in the context of price cuts is adopting an administrable rule that avoids false positives – which would saddle consumers with higher prices and depress competition – even if this sometimes comes at the expense of permitting false negatives. *See Pac. Bell Tel.*

Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low."). As this Court has noted (citing *Brooke Group* as an example), "most every rule proves over- or under-inclusive in some way. We often accept a degree of over- and under-inclusion as the price that must be paid for the benefits associated with a clear rule of law." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.).

B. The *Brooke Group* rule for finding antitrust liability – animated by screening out false positives – has been extended to loyalty discounts. *See*, *e.g.*, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (finding that the *Brooke Group* standard applied to challenged discounts and rejecting reliance on cases involving "bundling or tying" because "only one product . . . is at issue here"). In that context, there can be no liability unless the unit price of the product at issue, after the entire loyalty discount or rebate is applied to all the buyer's purchases, is below the seller's incremental cost.[2] Suppose, for example, that a seller's cost is $70/unit, its normal retail price is $100/unit, and it offers a 25% discount on all purchases if the buyer purchases at

[2] Average variable cost, rather than marginal cost, is often used as the touchstone because it is easier to assess in the context of litigation and may be a workable proxy for marginal cost.

least 80% of its requirements from the seller. That discount is legal because the discounted unit price of $75 is above the seller's cost. Any equally efficient rival could meet that discount without pricing below cost.

Bundled discounts, by contrast, present a more difficult context for courts to create accurate and administrable rules that enhance consumer welfare because courts must determine whether and how to guard against the exclusion of an equally efficient competitor in one product of the bundle.[3] This difficulty is exemplified by the diversity of approaches that courts have taken regarding how to address bundled discounts resulting in above-cost bundled discounts.

The Third Circuit, in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), required the defendant to adduce a procompetitive justification for its conduct. This approach is likely to chill procompetitive bundled discounts, as offering a business justification and showing that it could not be achieved in a less exclusionary fashion can be difficult; the court's approach accordingly increases the risk of wrongly imposing antitrust liability. *See* Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 Minn. L. Rev. 1688, 1718-26 (2005). The Ninth Circuit, by contrast, created a safe harbor for certain bundled discounts in

[3] *See* Aaron M. Panner, *Viewpoint: Bundled Discounts and the Antitrust Modernization Commission*, eSapience Ctr. for Competition Pol'y, at 5-6 (2007) (highlighting difficulty of identifying the undiscounted price of a particular product and the incremental cost of the competitive product in a multi-product bundle).

Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007), *amended by* 515 F.3d 883 (9th Cir. 2008). Under the "discount attribution test," there is no liability for offering a bundled discount if, after attributing the entire dollar amount of the discount to the competitive product in the bundle (i.e., the one the complaining rival produces), that product is priced above the discounter's incremental cost.

C. As described in the opinion of the district court, Mylan's various discounts on its EpiPen product are properly characterized as loyalty discounts – that is, they apply to a single product (not a multi-product bundle). Accordingly, applying the *Brooke Group* safe harbor should be straightforward: unless a plaintiff can show that a particular loyalty discount constitutes actual predatory (i.e., below-cost) pricing, the court's inquiry is at an end. *See Concord Boat*, 207 F.3d at 1062-63. According to the district court, "Mylan never priced EpiPen below its costs to produce it." Dist. Ct. Op. 76 (Aplt. App. Vol. 13, at 2666). We do not understand Sanofi to challenge that finding or to argue that Mylan's discounts ever led to sales at prices below incremental cost.

Under *Brooke Group* and the sound error-avoidance principles that animate that decision, that factual finding alone is sufficient to sustain the no-liability finding with respect to Mylan's challenged pricing behavior. The question is not whether there is any theory under which Mylan's pricing could have had the effect of foreclosing competition by a potentially efficient competitor.[4] Anything is *possible*. The question is whether a rule that permits scrutiny of above-cost pricing of a single product, like the pricing challenged here, runs an unacceptable risk of false positives, such that the game is not worth the candle. The Supreme Court answered that question in *Brooke Group* – such scrutiny will deter consumer-benefiting conduct – and that answer has withstood the test of time.

D. Sanofi would have this Court subject Mylan's loyalty discounts to the sort of scrutiny that would ordinarily apply to discounts applied to multi-product bundles. The apparent theory is that a defendant may have an "entrenched" share of the market, such that rivals are capable of competing only with respect to some subset of that market. Under this theory, whatever overall discount that defendant grants to a particular purchaser should be allocated only to the supposedly "contestable" share of the market – that is, if 50% of the market is "entrenched"

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[4] As Thomas Lambert observes, antitrust exclusionary conduct has been defined in at least four different ways: "For more than a decade now, antitrust commentators have debated how to define unreasonably exclusionary conduct. Four possible universal definitions have emerged: (1) Judge Richard Posner's 'equally efficient rival' approach, (2) post-Chicago theorists' 'raising rivals' costs' approach, (3) the consumer welfare effects test set forth in the leading antitrust treatise, and (4) the profit sacrifice or 'no economic sense' test the U.S. Department of Justice ('DOJ') once endorsed." Thomas A. Lambert, *Defining Unreasonably Exclusionary Conduct: The 'Exclusion of a Competitive Rival' Approach*, 92 N.C. L. Rev. 1175, 1179 (2014) (footnotes omitted). While there are significant divergences between these approaches, they all entail at least some limits to ensure that antitrust enforcement does not chill welfare-increasing conduct.

and 50% is "contestable," an apparent discount of 10% on all units sold (assuming that the entire discount is lost if the purchaser makes even a single purchase from some other seller) should be treated as a discount of 20% on the "contestable" units.

At the outset, it is worth emphasizing that whatever one thinks of this approach, at the end of the day, any liability rule – to be consistent with *Brooke Group* and its progeny – must *still* require a showing that the discount (however allocated) results in below-incremental-cost sales. In other words, if the full unit price of the product is $100, the incremental cost $75, the discount in the above example would *still* be deemed per se lawful because, even allocating the full discount to the "contestable" units, the price remains above incremental cost. Again, we do not understand Sanofi to be arguing (and we are aware of no evidence to establish) that Mylan made any below-cost sales under this attribution approach either.

In any event, there would be significant additional drawbacks to adoption of any liability rule that depends on treating some portion of a defendant's share of a market as "entrenched."[5] Any such approach risks error, is difficult to administer,

[5] We distinguish here between a circumstance where a defendant is said to have an entrenched share by virtue of reputation or consumer preference and situations where competing sellers are legally barred from making sales in some portion of the market as a result of regulatory restrictions or protected monopoly.

and thus is likely to harm consumers. Chief among the administration issues created are the questions of (i) when a market segment should be deemed "non-contestable" or "entrenched" and (ii) whether an incumbent's discounts, while nominally pertaining to non-contestable sales, should be attributed to the "contestable" part of the market. One might argue in favor of such an attribution rule that, if a market segment is truly non-contestable, it would be irrational for a putative monopolist to grant discounts on those sales (because doing so would represent a departure from profit maximization). The only explanation, purportedly, is that, in reality, those discounts are designed to protect sales made in a contestable market segment.[6]

Cf. Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 399, 406 (3d Cir. 2016) (rejecting argument that portion of market for drug was non-contestable because competitor did not have FDA approval for certain indications, given that competitors had not shown they were unable to obtain such approval).

[6] This argument fails on its own terms because there may be good reasons for discounting schemes even in monopoly markets without any threat of entry. For instance, a monopolist may grant rebates on non-contestable sales as a way of price-discriminating. Not only does this not entail any profit-sacrifice – price discrimination generally entails higher profits – but it can also increase consumer social welfare by expanding output. Similarly, rebates may – as here – be *customer*-driven, when they constitute a form of payment to an intermediary such as a pharmacy benefit manager ("PBM"). Particularly in circumstances such as those in this case, such agreements enable group purchasing organizations like PBMs to trade off product variety for volume-driven price reductions. *See*, *e.g.*, Daniel A. Crane & Joshua D. Wright, *Can Bundled Discounting Increase Consumer Prices Without Excluding Rivals?*, 5 Competition Pol'y Int'l 209, 217 (2009) ("PBMs[ ] and other buyer cooperatives that strategically employ bundled discounts are organized precisely in order to solve a collective action problem. By

One key difficulty with this approach is that (at least in the absence of a legal prohibition on competitive sales) treating any segment of the market as not contestable seriously distorts competitors' ex ante incentives. For example, to the extent that a defendant is said to have an "entrenched" share due to brand loyalty or other consumer preference, such advantages are legitimate fruits of investment in development of such brand loyalty or reputation for quality. Treating such consumer preference as a legitimate basis for the imposition of liability will discourage such investment. Moreover, a rival who reckons that failure to penetrate some market segment will potentially give rise to a claim of unlawful foreclosure has correspondingly less incentive to compete, knowing that it can attempt to sue for damages in the event the firm's entry is unsuccessful.

If a defendant can avoid antitrust scrutiny only by keeping its prices higher (i.e., eschewing discounts that might be subject to scrutiny if attributed to a subset of overall sales), consumers will end up paying higher prices. In many cases, such higher prices will do nothing to promote competition in the long run, but will simply create a price umbrella for rivals to enjoy and also diminish firms' incentive to secure (supposedly) non-contestable demand by creating innovative products,

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collectively committing to trade variety for lower prices, the purchasing organization prevents the seller from exploiting the individual members' variety preferences to obtain higher prices."). Accordingly, even when markets are deemed non-contestable, it is misguided to presumptively allocate rebates entirely to the contestable segment.

educating consumers about them, and building brand loyalty. In short, a rule that attributes discounts in this fashion would dilute ex ante incentives to build brand loyalty and to compete vigorously for every sale, all the while preventing discounting that would provide immediate benefits to buyers. Contrary to the purpose of antitrust, consumers would be harmed in the short run and the long run.

E. On the facts found by the district court, it makes no difference that Mylan allegedly used its price discounts to obtain exclusive contracts with certain PBMs. As courts have recognized for decades, every sale and every sales contract "forecloses" some portion of the market and is "exclusive" as to those sales. *See Barry Wright Corp.*, 724 F.2d at 236 ("[V]irtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market[.]").

The district court found that the exclusive contracts at issue in this case did not foreclose any portion of the market for any significant length of time, as they were short-term and easily terminable. Payors apparently invoked the termination provisions and renegotiated rebate agreements annually, and sometimes even more frequently. Dist. Ct. Op. 89 (Aplt. App. Vol. 13, at 2679). Sales facilitated by such contracts should not be treated as somehow more pernicious than any other sales. *See*, *e.g.*, *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, 859 F.3d 408, 410 (7th Cir. 2017) (finding no exclusionary effects from contracts that expired "every year or two," thus "giving other [competitors], such as [plaintiff], a shot at obtaining the next contract by outbidding [defendant]"); 11 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1807b1 (4th ed. 2018) ("Discounts conditioned on exclusivity in relatively short-term contracts are rarely problematic."). Accordingly, the mechanism a defendant may employ to obtain such contracts – if not otherwise illegitimate – should be subject to no greater scrutiny for this reason.

II. EVIDENCE OF INTENT TO HARM RIVALS SHOULD BE TREATED AS PRESUMPTIVELY IRRELEVANT TO LIABILITY UNDER SECTION 2

All of the safe-harbor and attribution rules discussed above, whatever their specific content, share a significant advantageous feature: they depend on objective and at least theoretically knowable facts about prices, costs, and market characteristics. Understandably, lawyers are often inclined to consider – when evaluating the potential anticompetitive impact of challenged conduct – evidence of the defendant's subjective intent to harm rivals. It might seem natural enough that if a defendant has admitted – in documents brought to light only through the mechanism of discovery – that a particular strategy is intended to "exclude" rivals and secure the market for the defendant, such documents should be taken as strong support for imposition of liability.

What may seem "natural enough" is often economics in error. Evidence of a defendant's subjective intent to harm rivals cannot substitute for antitrust rules based on objective facts without sacrificing the benefits of the error-cost framework on which modern antitrust law is based. Internal business documents, particularly those reflecting on a defendant's intent, are not, of course, improper for all evidentiary purposes. But, because liability under the antitrust laws turns on the likely anticompetitive *effect* of conduct, and because all businesses effectively *hope* to engage in conduct that excludes, forecloses, or raises the costs of their competitors, internal documents reflecting such intent often have little bearing on establishing the requisite effects for antitrust liability. *See* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 Ariz. L. Rev. 609, 650-51 (2005) ("It would be quite impossible for us to assert that there can be no probative value, in the abstract, of adducing corporate documentary evidence to try to prove anticompetitiveness. Nevertheless, such evidence is potentially prejudicial and certainly insufficient to assess the competitive character of challenged behavior."). Clearly, intent to preserve a monopoly is no more consistent with anticompetitive exclusion than it is with run-of-the-mill price competition. *See*, *e.g.*, Herbert Hovenkamp, *The Monopolization Offense*, 61 Ohio St. L.J. 1035, 1039 (2000) ("[A]ny competitively energetic firm 'intends' to prevail over its actual or potential rivals. . . . Indeed, in most circumstances involving monopoly, the 'intent' to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively.”). Competing to preserve a (near) monopoly position is not the same as *anticompetitively* maintaining it. The district court said as much in its summary judgment decision below:

> But, as our Circuit has explained, “intent to harm a rival, protect and maximize profits, or do all the business if they can, is neither actionable nor sanctioned by the antitrust laws.” *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969 (10th Cir. 1994) (citation and internal quotation marks omitted); *see also A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (“Firms ‘intend’ to do all the business they can, to crush their rivals if they can. . . . Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business.”).

Dist. Ct. Op. 102-03 (Aplt. App. Vol. 13, at 2692-93).

Indeed, this Court has recognized the danger of false positives. “Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring vigorous competition – and wind up punishing only the guileless who haven’t figured out not to write such things down.” *Novell*, 731 F.3d at 1078.

In addition to this untenable risk of error, a rule predicating liability on an alleged monopolist’s intent would also be unworkable. As Judge Posner once observed, “[a]ny doctrine that relies upon proof of intent is going to be applied erratically at best. Judges and juries don’t always understand that the availability of evidence of improper intent is often a function of luck and of the defendant’s legal sophistication, not of the underlying reality." Richard A. Posner, *Antitrust Law: An Economic Perspective* 190 (1976).

There are many reasons for disregarding evidence of a seller's intent. Internal communications between employees are not always a fair reflection of a company's competitive strategy – they might, for instance, mistake aggressive pricing for pricing that actually threatens anticompetitive effects. There is also a risk that documents cherry-picked from the multitude of documents that modern firms produce on a daily basis will give a false impression of a defendant's internal deliberations. Finally, documents of this sort are often too imprecise to provide a useful distinction between anticompetitive conduct and legitimate price competition. This view is well-encapsulated by the Eighth Circuit in *Morgan v. Ponder*:

> The statements made by [defendants] – "we will not be underbid"; "we'll do whatever it takes"; "name your price" – are prime examples of remarks which, if portrayed by plaintiffs' attorneys as damning evidence of predatory intent, may lead juries to erroneously condemn competitive behavior. These are phrases often legitimately used by business people in the heat of competition. They provide no help in deciding whether a defendant has crossed the elusive line separating aggressive competition from unfair competition.

892 F.2d 1355, 1359 (8th Cir. 1989) (citation omitted); *cf. In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 872-73 (7th Cir. 2015) (Posner, J.) (explaining why supposed "smoking gun" email was anything but).

Finally, and above all, intent is a poor predictor of anticompetitive *effect* – harm to consumers – without which intent is largely irrelevant.[7] The intent to deploy an anticompetitive strategy says almost nothing about the actual restriction of competition. For instance, Sanofi argues that Mylan "resolved to crush the innovator at inception" by raising prices to make subsequent discounts more attractive. Sanofi Br. 17. But there is no argument (and Sanofi makes none) that such conduct is prohibited under antitrust law. If Mylan reduced its prices when confronted with strong competition, such reductions benefited consumers. This is hardly less true on the assumption that prices had been elevated previously. If anything, a history of higher prices would make a rival's lower prices (even if matched by the defendant) more attractive, not less. Sanofi's argument fairly suggests that whatever market power Mylan may have had before Auvi-Q's entry was eroded by that entry. Such competition benefits consumers. But it will benefit consumers *less*, not more, if a defendant is penalized for competing vigorously in response.

Similarly, the argument that PBMs "couldn't refuse" Mylan's offer – even if Mylan indeed intended to make its offer irresistible – does not convert such an

[7] We hasten to add that the goose/gander rule applies: as the Areeda & Hovenkamp treatise observes, "[w]henever a restraint appears *unreasonable* in the light of . . . [its] redeeming virtues and alternatives, the defendant's innocent mental state will not save it." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1506 (2d ed. 2003) (emphasis added).

offer into an act of anticompetitive foreclosure. The primary effect of these offers was straightforwardly lower prices. The district court found, furthermore, that Mylan did not coerce PBMs to purchase EpiPen. Dist. Ct. Op. 94-99 (Aplt. App. Vol. 13, at 2684-89). The same could be said for alleged product giveaways coupled with training programs – on their face, such marketing methods benefit consumers; they do not harm them. And that is true even if one credits the claim that "Mylan's internal documents make clear the program was 'designed primarily to further [its] domination of the relevant market' by strengthening network effects and solidifying its entrenched share." Sanofi Br. 55-56. The proper question is not whether Mylan "designed" its program to further its market power, but whether the program did so in a way that harmed competition and consumers.

The upshot is that intent is no substitute for economic evidence of actual anticompetitive foreclosure.

CONCLUSION

For the foregoing reasons, the Court should reject any claim based on the allegedly exclusionary effect of pricing not shown to be below incremental cost.

Respectfully submitted,

/s/ *Aaron M. Panner*

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,117 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface (Times New Roman, 14 point).

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September 22, 2021

APPENDIX A

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September 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on September 22, 2021, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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