question whether Sanofi made false or misleading statements in its advertising or promotion of Auvi-Q. Thus, the court grants summary judgment against Mylan's unfair competition claim.

3. Conclusion

For these reasons, the court grants Sanofi's Motion for Summary Judgment against Mylan's Counterclaim asserting Lanham Act violations and a New Jersey common law unfair competition claim.

IV. Conclusion

For reasons explained, the court grants Mylan's Motion for Summary Judgment against Sanofi's Sherman Antitrust Act claims. The court grants Sanofi's Motion for Summary Judgment in part and denies it in part. Specifically, it grants Sanofi's Motion for Summary Judgment against Mylan's Counterclaim. But the court denies the portion of Sanofi's summary judgment motion asking the court to grant summary judgment in its favor on one element of its Sherman Antitrust Act claims. That aspect of the motion is moot in light of the court's ruling on Mylan's motion.

IT IS THEREFORE ORDERED BY THE COURT THAT Mylan's Motion for Summary Judgment (Doc. 1673) is granted.

IT IS FURTHER ORDERED THAT Sanofi's Motion for Summary Judgment (Doc. 1691) is granted in part and denied in part, as set forth in this Order.

IT IS SO ORDERED.

Dated this 17th day of December, 2020, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

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 and Appellant,

v.

MYLAN, INC.,

Defendant and Appellee,

MYLAN SPECIALTY, LP,

Defendant-Counterclaimant and Appellee.

Appeal from the District Court for the District of Kansas
The Honorable Daniel D. Crabtree (No. 2:17-md-02785)

Brief of Amicus Curiae Open Markets Institute in Support of Appellant

---

SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
1440 G Street NW
Washington, DC 20005

DAVID SELIGMAN
Counsel of Record
TOWARDS JUSTICE
2840 Fairfax Street
Suite 220
Denver, CO 80207
(720) 441-2236
david@towardsjustice.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Open Markets Institute states that it is a non-profit corporation and, as such, no entity has any ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Federal Trade Commission Materials

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Open Markets Institute is a non-profit research and advocacy organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF ARGUMENT

Mylan maintained its monopoly in the market for lifesaving epinephrine auto-injectors using practices that the Sherman Act proscribes. Epinephrine auto-injectors, such as Mylan's EpiPen, are indispensable for millions of individuals susceptible to a potentially fatal anaphylactic reaction to certain foods, insect bites, and medications. Because of Mylan's monopoly and exclusionary practices, the EpiPen is extraordinarily expensive and out of the reach of many who desperately need it. Instead of competing against a new entrant, Sanofi's Auvi-Q, by reducing the price of the EpiPen and improving its functionality, Mylan granted lucrative

[1] The parties consent to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from *amicus* curiae, no person contributed money intended to fund the brief's preparation and submission.

rebates on the monopolistic list price of the EpiPen to pharmacy benefit managers (PBMs) and third-party payors—on the condition that they list only the EpiPen in their formularies and exclude the more patient-friendly Auvi-Q from insurance coverage. The arrangement amounted to an exclusive deal between Mylan and PBMs and payors: Mylan gave PBMs and payors substantial incentives *not* to do business with rivals to Mylan. Mylan also baselessly disparaged the safety and efficacy of Auvi-Q. Because Mylan's conduct foreclosed Auvi-Q and maintained the EpiPen's monopoly position, Sanofi sued Mylan for monopolization in violation of the Sherman Act.

Despite the Sherman Act's prohibition on exclusive dealing as a method of monopoly maintenance and damning and specific facts uncovered against Mylan in discovery, the district court granted Mylan's motion for summary judgment on Sanofi's monopolization claim. In reaching this decision, the district court imposed heightened and unjustified legal burdens on antitrust enforcers challenging the exclusive dealing of monopolists. The court held that plaintiffs must show that the exclusive dealing was the product of coercion by the monopolist and foreclosed rivals from a specific percentage of the relevant market. The court further held that only rivals that are as equally efficient as the monopolist can challenge the monopolist's exclusive dealing. These requirements conflict with Sherman Act

case law and neuter the statute's protection of *all* competitors that are victims of a monopolist's exclusionary or predatory behavior.

The Sherman Act prohibits monopolization, attempted monopolization, and conspiracies to monopolize. Section 2 of the statute is "the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists." *LePage's Inc. v. 3M*, 324 F.3d 141, 169 (3d Cir. 2003) (en banc). The law prohibits actual and potential monopolists from engaging in "the willful acquisition or maintenance of that power[.]" *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). As interpreted by the courts, the Sherman Act prohibits actual and would-be monopolists from using their market dominance, superior financial power, or tortious or unethical practices to exclude and handicap rivals.

Importantly, conduct undertaken by a monopolist can be illegal even if the same conduct is benign and legal when undertaken by a firm without monopolistic power. "[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior." *LePage's*, 324 F.3d at 151–52. The late Justice Scalia made this same point in a dissent: "Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a

monopolist." *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting).

The Sherman Act restricts, among other practices, exclusive dealing by a monopolist. Exclusive dealing is a method of competition by which a monopolist uses its dominance or special inducements to pressure or coax trading partners—whether customers, distributors, or suppliers—not to do business with the monopolist's rivals. For instance, a monopolist can prevent rivals from accessing distribution channels. *United States v. Microsoft Corp.*, 253 F.3d 34, 71. (D.C. Cir. 2001) (en banc). Alternatively, it can deprive rivals of necessary inputs, such as raw materials, in the production process. *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 34 (D.D.C. 1999). Section 2 of the Sherman Act prohibits exclusive dealing that maintains a monopoly, whether done with the monopolist's upstream or downstream trading partners.

In contrast to what the district court held, the courts have *not* adopted a separate coercion requirement in exclusive dealing claims. They have instead looked at whether the monopolist's exclusive dealing unduly restricted opportunities for competitors. The Third Circuit held that once monopoly power is established, the question is whether the exclusive dealing "bar[s] a substantial number of rivals or severely restrict[s] the market's ambit." *United States v. Dentsply International, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005). The D.C. Circuit

found Microsoft's exclusive dealing with internet access providers illegal because it robbed their subscribers of effective choice by presenting Microsoft's Internet Explorer "as the default browser or as the only browser." *Microsoft*, 253 F.3d at 71. As the Eleventh Circuit wrote in 2015, "[A]n exclusive dealing arrangement can be harmful when it allows a monopolist to maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing into effective competitors." *McWane, Inc. v. FTC*, 783 F.3d 814, 832 (11th Cir. 2015). Whether the monopolist's trading partners were coerced is not part of the inquiry.

Contrary to the district court's *quantitative* foreclosure test, courts have applied a *qualitative* inquiry to the exclusive dealing of monopolists. *Dentsply*, 399 F.3d at 191. In reviewing the Federal Trade Commission's finding of liability against a monopolist's exclusive dealing, the Eleventh Circuit denied the monopolist's petition for review and upheld the Commission's decision, even though "the Commission did not quantify a percentage." *McWane*, 783 F.3d at 837. In *Microsoft*, the D.C. Circuit found the software giant liable for monopolization through exclusive dealing—without quantifying the extent to which rival internet browsers were foreclosed—because Microsoft's contracts denied customers of internet access providers effective access to browser besides Microsoft's Internet Explorer. *Microsoft*, 253 F.3d at 70–71.

The district court's equally efficient competitor test is in clear conflict with the existing case law on the Sherman Act. Courts do not withhold the protection of the Sherman Act from competitors on account of their small size or supposed inferior productive efficiency relative to a monopolist rival. Conduct that violates the Sherman Act "is *not* to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959) (emphasis added). More recently in *Microsoft*, the D.C. Circuit was unequivocal that restricting antitrust protection to only equally efficient competitors conflicted with the aim of the Sherman Act. The Court wrote, "[S]uffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will." *Microsoft*, 253 F.3d at 79.

Prohibiting exclusive dealing only when it excludes equally efficient competitors would overturn the foundations of U.S. antitrust law by providing carte blanche for monopolists to move early and quickly to stifle emerging rivals. Under this standard, monopolists could suppress new entrants and rivals before they emerged as formidable competitors and avoid liability for their exclusionary and predatory acts. Indeed, for monopolists, this early suppression of emerging rivals may be an easier path for maintaining their dominance than adopting a wait-

and-see approach. *See, e.g.*, *Lorain Journal Co. v. United States*, 342 U.S. 143, 149–153, 157 (1951) (holding that monopolistic local newspaper's effort to starve new radio station of advertising revenue violated the Sherman Act). Whether a monopolist preys on a series of small firms, or eliminates all rivals in one decisive move, the ultimate result for the public is the same: the continued burden of corporate monopoly.

ARGUMENT

I. The Sherman Act Prohibits Exclusionary, Predatory, and Other Unfair Practices That Establish, Maintain, or Extend a Monopoly

The Sherman Act prohibits monopolization, attempted monopolization, and conspiracies to monopolize.[2] Section 2 of the statute is "the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists." *LePage's Inc. v. 3M*, 324 F.3d 141, 169 (3d Cir. 2003) (en banc). The law prohibits actual and potential monopolists from engaging in "the willful acquisition or maintenance of that power[.]" *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). As a leading antitrust scholar wrote:

> Instead of forcing the parties and the lower courts to ramble through the wilds of economic theory, the legislative intent of section 2 of the Sherman

[2] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2.

> Act is to proscribe specific "means which make it impossible for other persons to engage in fair competition." Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. Ill. L. Rev. 497, 535 (quoting 21 Cong. Rec. 3152 (1890)).

The law prohibits a range of practices in which monopolists or aspiring monopolists use their dominance, superior financial resources, or generally prohibited conduct to obtain, maintain, or extend monopoly power. Among other practices, the Sherman Act bars monopolists from using exclusive dealing to restrict the growth of rivals and to maintain their own power.

A. The Sherman Act Prohibits Unfair Competition by Monopolists and Aspiring Monopolists

Members of Congress, in enacting the Sherman Act, recognized the distinction between growth through unfair methods versus growth through fair methods. They aimed to proscribe the former as monopolization and permit the latter as fair and beneficial competition. 21 Cong. Rec. 3151–52 (1890) (discussion among Senators Kenna, Edmunds, and Hoar on permissible versus impermissible

---

The Supreme Court described the antitrust laws and the Sherman Act in particular as "the Magna Carta of free enterprise." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (Marshall, J.).

acquisition of monopoly involving a hypothetical dealer of shorthorn cattle).[3] The Sherman Act, as interpreted by the courts, prohibits actual and would-be monopolists from using their market dominance, superior financial power, or tortious or unethical practices to exclude and handicap rivals. Because of their exceptional power, monopolists are subject to special rules that do not apply to non-monopolists.

First, under the Sherman Act, monopolists are not permitted to use their market dominance to perpetuate or extend their power. The law prohibits the "use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 841 (10th Cir. 2016) (quoting *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482–483 (1992)). The exercise of monopoly power in an exclusionary manner can take several forms. A monopolist can refuse to do business with rivals to handicap their ability to compete or compel trading partners to accepting terms that exclude or marginalize rivals. In a decision last year, the

[3] Senator Hoar stated, "I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business." 21 Cong. Rec. 3152 (1890).

Seventh Circuit described these practices as "simple refusals to deal" and "conditional refusals to deal" respectively. *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 453 (7th Cir. 2020).

Consider the limitations on a monopolist's freedom to deal. Monopolists cannot use their control of a critical input to cripple competition in their own market or an adjacent market. While firms have broad freedom to decide with whom to deal under the antitrust laws, this right is qualified in the case of a monopolist because of its extraordinary market power. *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). In a venerable 1920 decision, the Supreme Court recognized a firm's general right under the Sherman Act to select its business partners—but held that this right prevails only "[i]n the absence of any purpose to create or maintain a monopoly . . ." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). A monopolist cannot refuse to deal with a rival as a means of excluding it from a market. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610–11 (1985).

Second, the Sherman Act prohibits monopolists from acquiring or maintaining their dominance through their superior financial power alone. An actual or prospective monopolist *cannot* use its advantageous access to finance to price its products below the cost of production as a means of driving rivals out of the market. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 Colum.

L. Rev. 1695, 1717–18 (2013). Under the Supreme Court's current interpretation of the Sherman Act, corporations cannot employ below-cost pricing that threatens to create a dangerous probability of recouping this upfront loss through greater market power in the future. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993). *See, e.g.*, *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 950 (6th Cir. 2005) ("The trier of fact could reasonably find that Northwest recouped any losses from its predatory pricing quickly after Spirit left these routes. . . . [U]pon Spirit's exit, Northwest increased its prices on these routes to a multiple of seven from its prices during Spirit's presence.").

Third, the Sherman Act bars monopolists from using tortious or unethical acts to acquire, preserve, or extend their power. Such acts can be a form of "cheap exclusion"—conduct that involves minimal or no cost to the monopolist and lacks any redeeming qualities. Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L. J. 975, 977, 989–90 (2005). A monopolist cannot acquire or extend its dominance by engaging in widespread industrial sabotage or acts of property destruction. *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 787–88 (6th Cir. 2002). Among other forms of tortious or unethical exclusionary conduct, deception can be the basis for antitrust liability. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *Walker Process Equipment, Inc. v.*

Food Machinery & Chemical Corp., 382 U.S. 172, 176–78 (1965); *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001) (en banc).

Importantly, conduct undertaken by a monopolist can be illegal even if the same conduct is benign and legal when undertaken by a firm without monopolistic power. "[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior." *LePage's*, 324 F.3d at 151–52. In a dissent, the late Justice Scalia made this same point: "Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *See Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting).

Even as the Sherman Act prohibits monopolists from acquiring, maintaining, or extending their power through exclusionary, predatory, and other unfair methods, the law allows them to compete through non-predatory price cutting and product improvements. Monopolists are, in general, free to reduce prices (so long as they remain above cost), improve their products, and invest in new plant and equipment and research and development. *See Grinnell*, 384 U.S. at 570–71 ("The offense of monopoly under [Section 2] of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or

development as a consequence of a superior product, business acumen, or historic accident."); *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry.").

B. The Sherman Act Restricts Exclusive Dealing by a Monopolist

The Sherman Act restricts exclusive dealing by a monopolist. Exclusive dealing is a method of competition by which a firm uses its market power or special inducements to marginalize rivals. Exclusive dealing can restrict downstream or upstream trading partners from doing business with the monopolist's rivals. For example, a monopolist can prevent rivals from accessing key distribution channels. *See, e.g.*, *Microsoft*, 253 F.3d at 71 ("By ensuring that the 'majority' of all [internet access providers] subscribers are offered IE either as the default browser or as the only browser, Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly."). Alternatively, a monopolist can deprive rivals of necessary inputs such as raw materials. *See, e.g.*, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 34 (D.D.C. 1999) ("If Mylan obtained such an exclusive license, no other generic drug manufacturer could use that supplier's API to make the drug in the U.S. Mylan sought exclusive licenses for the DMFs for

lorazepam API and clorazapate API as well as one other drug not the subject of these lawsuits."). In an exclusive dealing arrangement, a monopolist uses its market muscle or incentives to deny competitors access to customers, distributors, or essential inputs, instead of competing on the merits by offering better terms and superior products. Section 2 of the Sherman Act prohibits such exclusive dealing.

First, a monopolist can impose exclusivity on trading partners and deprive rivals of essential outlets and inputs. Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, *in* How the Chicago School Overshot the Mark 141, 150 (Robert Pitofsky ed., 2008). This exclusivity is a "conditional refusal[] to deal." *Viamedia*, 951 F.3d at 453, in which a firm uses its dominance to compel trading partners not to do business with its rivals. For example, a monopolistic manufacturer can impose exclusivity on distributors because they cannot afford to lose the monopolist's business and must accept its terms. *McWane, Inc. v. FTC*, 783 F.3d 814, 837–38 (11th Cir. 2015); *United States v. Dentsply International, Inc.*, 399 F.3d 181, 196 (3d Cir. 2005). Under these circumstances, exclusivity can be "'unilaterally imposed' by fiat upon all distributors" by the monopolistic manufacturer. *McWane*, 783 F.3d at 834.

Second, a monopolist can use pricing terms that function as exclusive dealing arrangements. A district court wrote last year that "a contract need '*not* contain specific agreements not to use the [services] of a competitor' as long as

'the practical effect . . . is to prevent such use.'" *FTC v. Surescripts, LLC*, 424 F. Supp. 3d 92, 101 (D.D.C. 2020) (quoting *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 326 (1961)) (emphasis added). A monopolist may offer lower per-unit prices to a distributor that purchases most, or all, of its requirements from the monopolist. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 265 (3d Cir. 2012). Through this pricing policy, the distributor may be compelled to deal exclusively with the monopolist. *Id.* at 269. The practical choice for the distributor may be either to purchase all its needs from the monopolist or to pay a prohibitively higher per-unit price on *every* unit purchased from the monopolist. *Id.* at 282.

Third, a monopolist can induce a powerful trading partner to forgo dealing with rivals through a form of vertical collusion. It can offer the trading partner—whether a customer, distributor, or supplier—substantial payments in exchange for exclusivity. The monopolist, in effect, shares a portion of its monopoly profits to obtain exclusivity from the trading partner. The two firms jointly profit at the expense of the monopolist's rivals and other market participants. *See, e.g.*, Dan Gallagher, *The Apple-Google Deal is an Elephant in Both Rooms*, Wall St. J. (Nov. 2, 2020) (describing Google's annual payments of $8-12 billion to Apple in exchange for being the default search tool on Apple devices). Under these circumstances, the monopolist and its trading partner function as co-conspirators in the exclusive dealing agreement. *Insulate SB, Inc. v. Advanced Finishing Systems,*

Inc., 797 F.3d 538, 541–542 (8th Cir. 2015); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980).

The Sherman Act prohibits exclusive dealing that maintains a monopolist's power. A monopolist that uses exclusivity with customers, distributors, or suppliers to foreclose or impair rivals engages in "willful maintenance" of its monopoly power, as opposed to succeeding on the basis of "superior product, business acumen, or historic accident." *Grinnell*, 384 U.S. at 570–71. In listing examples of "section 2 misconduct," this Court identified a monopolist "limit[ing] the abilities of third parties to deal with rivals" as one form of conduct that can violate the Sherman Act. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013) (Gorsuch, J.). Courts have repeatedly imposed antitrust liability on monopolists that used exclusivity with customers, distributors, or suppliers to marginalize rivals and entrench their market dominance. *McWane*, 783 F.3d at 840–42; *ZF Meritor*, 696 F.3d at 286–89; *Dentsply*, 399 F.3d at 191–97, *Microsoft*, 253 F.3d at 71–74.

II. The District Court Imposed Extraordinary and Unwarranted Burdens on Antitrust Enforcers Challenging the Exclusive Dealing of Monopolists

In its order granting Mylan's motion for summary judgment, the district court imposed extraordinary and unwarranted burdens on antitrust enforcers challenging the exclusive dealing of monopolists. The court held that plaintiffs

must show that the exclusive dealing was the product of coercion by the monopolist and quantify "the market foreclosure percentage." 13-JA-2696. The Sherman Act requires neither showing. These requirements would free monopolists to use exclusive dealing to impede rivals and preserve their own dominance.

A. Coercion Is Not a Necessary Element of an Exclusive Dealing Claim

Coercion is not a necessary showing in an exclusive dealing claim. The courts have held that monopoly power and limiting the opportunities for rivals are the test for illegal exclusive dealing under Section 2 of the Sherman Act. Moreover, requiring coercion as an element of exclusive dealing claims would be unworkable and legalize otherwise improper exclusivity arrangements involving monopolists.

The courts are concerned with the exclusion of rivals, not whether the exclusive dealing arose from coercion by the monopolist. Specifically, they have looked at whether the exclusive dealing unduly restricted opportunities for competitors. The Third Circuit held that once monopoly power is established, the question is whether the exclusive dealing "bar[s] a substantial number of rivals or severely restrict[s] the market's ambit." *Dentsply*, 399 F.3d at 191. *See also LePage's*, 324 F.3d at 159 ("When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by

exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general."). The D.C. Circuit held Microsoft's exclusive dealing with internet access providers to be illegal because it restricted market access for rivals and user choice, by ensuring "the 'majority' of all [internet access providers'] subscribers are offered [Microsoft's Internet Explorer] either as the default browser or as the only browser." *Microsoft*, 253 F.3d at 71. In line with these decisions, the Eleventh Circuit wrote in 2015, "[A]n exclusive dealing arrangement can be harmful when it allows a monopolist to maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing into effective competitors." *McWane*, 783 F.3d at 832.

The one appellate decision that purported to adopt a coercion test treated it as synonymous with market dominance. The Third Circuit stated exclusive dealing is typically illegal only "where the market is highly concentrated, the defendant possesses market power, and there is some element of coercion present." *ZF Meritor*, 696 F.3d at 284. Although the court listed market power and coercion as separate elements of an exclusive dealing claim, it evaluated them as a single element. The court stated, "A highly concentrated market, in which there is one (or a few) dominant supplier(s), creates the possibility for such coercion." *Id.* at 285. Reviewing the facts in front of it, the court concluded "there was evidence that Eaton [the monopolist] leveraged its position as a supplier of necessary products to

coerce the [original equipment manufacturers] into entering into the [long-term agreements]." *Id.* Accordingly, in a monopolization suit, the coercion requirement put forth in *ZF Meritor* is subsumed under the monopoly power requirement.

An independent coercion requirement for exclusive dealing claims is unsound and unworkable policy. The courts have been clear that de facto exclusive dealing and de jure exclusive dealing will be treated the same and held that "[a]n express exclusivity requirement, . . . , is *not* necessary." *Id.* at 270 (emphasis added). In a de facto exclusive dealing arrangement, the trading partner of a monopolist may face the following choice: accept exclusivity or pay a substantially higher price on every unit purchased from the monopolist. Given the money at stake, the effective choice may be no choice at all. *Aerotec International, Inc. v. Honeywell International, Inc.*, 836 F.3d 1171, 1182 (9th Cir. 2016) (describing how "discounts and rebates conditioned on a promise of exclusivity or on purchase of a specified quantity or market share . . . may be understood as de facto exclusive dealing"). Indeed, what the monopolist labels a "loyalty rebate" can just as accurately be called a "disloyalty penalty." Einer Elhauge, U.S. Antitrust Law and Economics 404 (2d ed. 2011). Yet, this fictitious choice may be sufficient to show that the monopolist did not exercise "coercion." Moreover, the case of de facto exclusive dealing shows that coercion exists on a continuum and is not a binary. As

such, a coercion requirement fails to offer a workable standard and introduces significant subjectivity into the law of exclusive dealing.

A coercion requirement also threatens to legalize exclusive dealing (at least under Section 2) in which a monopolist enters a collusive arrangement with a powerful trading partner. In such scenarios, the trading partner (whether a customer, distributor, or supplier) is not coerced but is instead a co-conspirator. *See Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 839 (7th Cir. 2020) (describing how parties in a vertical relationship can conspire "to pass on the inflated prices"). These arrangements can be profitable to the parties to the contract but unfairly exclude competitors to the monopolist, as well as injure downstream and upstream actors outside the conspiracy.

B. Monopolists Can Violate the Sherman Act Without Foreclosing a Specified Share of the Relevant Market

A monopolist's exclusive dealing can violate the Sherman Act without foreclosing a substantial share of the relevant market. The courts have held that quantifying market foreclosure is not a necessary element of a monopolization lawsuit challenging exclusive dealing. Under Section 2 of the Sherman Act, the inquiry is qualitative and examines how the exclusive arrangements limited opportunities for the monopolist's rivals. A quantitative foreclosure test glosses over market realities. For instance, through exclusive dealing with wholesalers, a monopolist can deny the most efficient methods of distribution to rivals and cripple

their ability to compete, without theoretically foreclosing them from any end-use customers. In a market like health care in which product selection, payment, and use decisions are often made by different actors, a strict quantitative foreclosure test would immunize some harmful exclusive dealing arrangements by monopolists.

In evaluating exclusive dealing claims, the courts have applied stricter rules to monopolists than to non-monopolists. Monopolists are subject to special antitrust rules that do not apply to non-monopolists. *Supra* Part I.A. *See, e.g.*, *E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc.*, 637 F.3d 435, 441 (4th Cir. 2011) ("Conduct that might otherwise be lawful may be impermissibly exclusionary under antitrust law when practiced by a monopolist."). Accordingly, exclusive dealing can violate Section 2 of the Sherman Act without necessarily running afoul of Section 1. A court's rejection of a Section 1 theory does not foreclose imposing liability on a monopolist under Section 2. *Dentsply*, 399 F.3d at 197. The D.C. Circuit stated that "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation." *Microsoft*, 253 F.3d at 70. Another court of appeals echoed this idea and wrote, "The jury's finding against LePage's on its exclusive dealing under § 1 of the Sherman Act and § 3 of the Clayton Act does not preclude

the application of evidence of 3M's exclusive dealing to support LePage's § 2 claim." *LePage's*, 324 F.3d at 157 n.10.

Courts have applied a qualitative inquiry to the exclusive dealing of monopolists. The Third Circuit held that the test of illegality is "whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply*, 399 F.3d at 191. In the same decision, the court reviewed the array of evidence in front of it and concluded "the firm that ties up the key dealers rules the market." *Id.* at 190. In reviewing a Federal Trade Commission finding of liability against a monopolist's exclusive dealing, the Eleventh Circuit denied the monopolist's petition for review and upheld the Commission's decision, even though "the Commission did not quantify a percentage." *McWane*, 783 F.3d at 837. "[F]oreclosure is one of several factors" courts consider. *Id.* at 835. *See also In re McWane, Inc.*, 2014 WL 556261, *24 n.10 ("We need not adopt Complaint Counsel's estimate, however, to conclude that foreclosure here was both substantial and problematic."). In its landmark decision, the D.C. Circuit found Microsoft liable for monopolization through exclusive dealing—without quantifying the extent to which rival internet browsers were foreclosed—because Microsoft's contracts tied up "the 'majority' of all [internet access provider] subscribers [who were] offered IE either as the default browser or as the only browser." *Microsoft*, 253 F.3d at 70–71. After examining court

decisions on exclusive dealing, a leading antitrust attorney concluded some courts "have in fact found exclusive dealing and similar arrangements unlawful despite minimal, or even zero, levels of percentage foreclosure from access to the ultimate consumer." Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 363 (2002).

In addition to being inconsistent with precedent, a quantitative foreclosure test for exclusive dealing is imprudent policy. For instance, through exclusive dealing with distributors, a monopolist can force rivals to use inferior channels for reaching customers. Even if the monopolist does not fully foreclose competitors and still theoretically permits them to reach end users, it can impose onerous distribution costs on competitors and prevent them from growing and acquiring the scale necessary to be effective competitors. The D.C. Circuit found that Microsoft's exclusive dealing with internet access providers, "one of the two major channels by which browsers can be distributed," helped "keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly." *Microsoft*, 253 F.3d at 71. The Third Circuit similarly recognized the qualitative inferiority of direct distribution, stating "[t]he long-entrenched Dentsply dealer network with its ties to the laboratories makes it impracticable for a manufacturer to rely on direct distribution to the laboratories in any significant amount." *Dentsply*, 399 F.3d at 193. A strict quantitative

foreclosure test would ignore market realities and important distinctions between different methods of distribution.

A quantitative foreclosure test would also ignore the negative spillover effects from exclusive dealing, as illustrated in this case. Unlike in most markets, product selection, payment, and use are separate functions in prescription device and drug markets. Doctors prescribe a device or medication, insurers and patients pay for the prescribed item, and patients use it. If doctors believe that one device is generally covered by health insurance while a competing device is not, they may, as a matter of course, prescribe the former for all patients. In these circumstances, a monopolist such as Mylan can obtain exclusivity from a small fraction of payors and sow doubt among doctors about whether a competing device like Auvi-Q is covered. Given the uncertainty around insurance coverage of Auvi-Q, doctors may reasonably prescribe EpiPen to all patients and unwittingly help Mylan protect its monopoly. A strict quantitative foreclosure test would permit such exclusive dealing and ignore the realities of the epinephrine auto-injector market.

III. The District Court's Equally Efficient Test for Competitors Empowers Monopolists to Crush Nascent Rivals

The district court adopted an unjustified and dangerous equally efficient competitor test for exclusive dealing claims. The court stated that Sanofi failed to present a "triable issue whether an equally efficient competitor was unable to compete with Mylan." 13-JA-2701 (citation omitted). This equally efficient

competitor requirement conflicts with case law interpreting and applying the Sherman Act, including Section 2's prohibition on monopolization. Adopting such a requirement for antitrust plaintiffs would give monopolists free rein to crush nascent rivals who might grow into formidable competitors.

The antitrust laws protect all competitors injured by the exclusionary or predatory conduct of monopolists. The Sherman Act is broad: The first federal antitrust statute is a "comprehensive charter of economic liberty." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958). In reviewing the scope of the Sherman Act, the Court noted its breadth, writing "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

Courts do not withhold the protection of the Sherman Act from competitors on account of their small size or supposedly inferior productive efficiency relative to the monopolist. Conduct that violates the Sherman Act "is *not* to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959) (emphasis added). As "the Magna Carta of

free enterprise," the Sherman Act grants "each and every business, no matter how small, . . . the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *Topco*, 405 U.S. at 610. The D.C. Circuit was unequivocal that restricting antitrust protection to only equally efficient competitors conflicted with the aim of the Sherman Act. The Court wrote, "[S]uffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will." *Microsoft*, 253 F.3d at 79.

The law on monopolization is clear that all competitors are entitled to participate in markets free from exclusionary and predatory practices by monopolists. The established two-part test for monopolization requires monopoly power and unfair competitive acts to acquire, maintain, or extend that monopoly. *Grinnell*, 384 U.S. at 570–71; *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1192 (10th Cir. 2009). The government can challenge monopolization *regardless* of the size or the apparent or actual efficiency of the unfairly excluded rivals. Firms excluded by a monopolist can obtain damages or injunctions in private lawsuits if they can additionally establish that their injury arose from conduct prohibited by the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). This Court has applied the same three-part test to private monopolization

lawsuits. *Aspen Highlands Skiing Corp., v. Aspen Skiing Co.*, 738 F.2d 1509, 1518–23 (10th Cir. 1984), *aff'd by Aspen*, 472 U.S. at 611.

Prohibiting exclusive dealing only when it excludes equally efficient competitors would invite and encourage monopolists to move early and quickly to stifle rivals. Under this standard, monopolists could suppress new entrants and rivals before they emerged as formidable competitors so they could avoid liability for their exclusionary and predatory acts. Indeed, for monopolists, this early suppression of emerging rivals may be an easier path for maintaining their dominance than adopting a wait-and-see approach. *See, e.g.*, *Lorain Journal*, 342 U.S. at 149–153, 157 (holding that monopolistic local newspaper's effort to starve a new radio station of advertising revenue violated the Sherman Act). Whether a monopolist preys on a series of small firms, or eliminates all rivals in one decisive move, the result for the public may be the same: the continued burden of corporate monopoly. As the Supreme Court wrote, "Monopoly can as surely thrive by the elimination of . . . small businessmen, one at a time, as it can by driving them out in large groups." *Klor's*, 359 U.S. at 213.

CONCLUSION

This Court should reverse the district court's decision granting Mylan's motion for summary judgment.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a) because the brief contains 6,338 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface and type style requirements of Circuit Rule 32(A) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

/s/ David Seligman
David Seligman

Counsel for Open Markets Institute

Dated: June 4, 2021