No. 21-3005

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, L.P,
Defendant-Counterclaimant and Appellee.

On Appeal from the United States District Court
for the District of Kansas, No. 2:17-MD-02785 (Crabtree, J.)

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1, *amicus curiae* the Chamber of Commerce of the United States of America certifies that it is a non-profit organization, that it does not have a parent corporation, and that no publicly held corporation owns more than ten percent of its stock.

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INTEREST OF AMICUS CURIAE[1]

Amicus the Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. One important function of the Chamber is to represent its members' interests in matters before the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases of concern to the nation's business community.

This is such a case. Aggressive competition, even by monopolists, benefits consumers. Accordingly, under antitrust law, monopolists are free to enter exclusive contracts so long as they do not anticompetitively foreclose opportunities for competitors to compete in the relevant market. Any rule that departs from this principle—especially a rule that exclusive dealing by a monopolist is illegal without economic analysis of its actual competitive effects, as *amicus* Open Markets Institute (OMI) advocates here—would deter businesses from competing aggressively on price and other dimensions, including by subjecting them to costly

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[1] No counsel for any party authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the Chamber, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

antitrust litigation, to the detriment of competition and consumers. The Chamber, therefore, believes it is imperative that the decision below be affirmed.

All parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

In its brief, Mylan demonstrates that the district court properly found that Sanofi failed to raise any genuine issue of fact regarding whether Mylan's exclusive-dealing arrangements violated Section 2 of the Sherman Act. The Chamber does not seek in this brief to replicate Mylan's briefing. Instead, the Chamber focuses on fundamental principles that should guide the Court and on arguments advanced by *amicus* OMI in support of Sanofi.

OMI suggests that a dominant firm should be liable for monopolization simply for having engaged in exclusive dealing, and the courts should not look to economic evidence to assess the competitive effects, let alone closely examine such effects. But this Court and the Third Circuit (like other courts) have held that exclusive-dealing arrangements, including by a monopolist, may be condemned only after fact-intensive economic analysis of their actual competitive effects, in part because of the significant procompetitive benefits that many such arrangements bring. That is precisely the type of analysis the district court conducted here. An approach like OMI's is antithetical to the purpose of antitrust

law: It would chill aggressive competitive behavior, slackening competition and increasing prices for consumers.[2]

OMI does not identify any district court error in evaluating competitive effects under the rule of reason, but instead claims (at 16-17) that "the district court imposed extraordinary and unwarranted burdens on antitrust enforcers challenging the exclusive dealing of monopolists." Specifically, it argues that the district court improperly *required* Sanofi to prove that Mylan's exclusive arrangements were the result of "coercion" and to "quantify" the percentage of the market that Mylan's conduct allegedly foreclosed. But in fact the district court treated those as significant factors to consider under the rule of reason, in accord with well-settled precedent. OMI also argues (at 6) that the court erroneously applied an "an equally efficient competitor test" to reject Sanofi's exclusive-dealing claim, thereby denying Sanofi the protection of the antitrust laws because it is a nascent rival in the relevant market. But the court's consideration of whether an equally efficient rival could compete adhered closely to precedent. Nowhere did the court suggest

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[2] Because this multidistrict litigation case was transferred from the District of New Jersey, the Third Circuit's precedent at least "merits close consideration." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); *see Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1546 (10th Cir. 1996); *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 699 & n.12 (9th Cir. 2011).

that Sanofi was precluded from relief simply because it might be a smaller or less-efficient rival in the relevant market.

ARGUMENT

I. PRECEDENT AND FUNDAMENTAL ANTITRUST PRINCIPLES REQUIRE THAT COURTS CAREFULLY ASSESS THE ACTUAL COMPETITIVE EFFECTS OF A MONOPOLIST'S EXCLUSIVE-DEALING ARRANGEMENT

A. OMI Advances a Rule of Illegality Indifferent to Actual Competitive Effects

According to OMI (at 14), "[i]n an exclusive dealing arrangement, a monopolist uses its market muscle or incentives to deny competitors access to customers, distributors, or essential inputs." It describes (at 14-15), in broad terms, three such categories of practices: "compel[ing] trading partners not to do business with its rivals"; "offer[ing] lower per-unit prices to a distributor that purchases most, or all, of its requirements from the monopolist"; and "offer[ing] the trading partner—whether a customer, distributor, or supplier—substantial payments in exchange for exclusivity."

In OMI's view (at 15), these arrangements by a monopolist should be categorically "prohibit[ed]" by the Sherman Act, without close consideration of their effects on competition in any given case, let alone careful economic analysis. Indeed, quoting one journal article—but no case law—it claims (at 7-8) that the "'legislative intent of section 2 of the Sherman Act'" was to "'proscribe specific'" types of practices rather than to "'forc[e] … courts to ramble through the wilds of

economic theory'" (quoting Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. Ill. L. Rev. 497, 535).

Consistent with these views, OMI criticizes the district court's grant of summary judgment to Mylan without identifying any ways in which Sanofi created a genuine issue of fact regarding whether Mylan's conduct *harmed competition*. Rather, it argues that Mylan has illegally maintained a monopoly *merely because* Mylan is an alleged monopolist and has engaged in exclusive contracting. In short, OMI advocates what is in effect a rule of *per se* liability for monopolists that use exclusive-dealing arrangements. As discussed in the next section, such an approach would be contrary to sound antitrust principles and foreclosed by judicial precedent.[3]

B. Exclusive Dealing by a Monopolist Typically Benefits Consumers and Therefore Must Be Evaluated—and Is Commonly Upheld—Under Detailed Rule-of-Reason Analysis

"The principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013) (cleaned up); *see also, e.g.*, *FTC v. AbbVie Inc*, 976 F.3d 327, 356 (3d Cir. 2020) ("The purpose of antitrust law is to protect consumers

[3] Although OMI frames this case as solely involving exclusive dealing, this case, as Mylan explains (at 9-11, 15, 40, 46-49), involves a variety of discounts, only some of which were conditioned on exclusivity. For many of the discounts at issue, there is a significant question whether a "price-cost test" should apply. *See* Op. 76-81; Mylan Br. 66. The Chamber does not address that question here.

from arrangements that prevent competition in the marketplace" (quotation marks omitted)), *cert. denied sub nom. AbbVie Inc. v. FTC*, No. 20-1293, 2021 WL 2519407 (U.S. June 21, 2021). "[M]istaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect." *National Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2161 (2021) (cleaned up). Thus, in applying antitrust law, "[a]lways, the goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* at 2151 (cleaned up); *see Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (court should not adopt antitrust standard that "could well deprive consumers of the efficiencies" brought by given business practice). In furthering this goal, courts are guided by the maxim that the antitrust laws are "concern[ed] with the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

An approach that deems monopolists' exclusive-dealing arrangements illegal without reference to economic principles and competitive effects undermines this fundamental goal. Exclusive dealing simply "entails a commitment" by one firm "to deal only with a particular" other firm. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1374 (10th Cir. 1979). Contrary to OMI's definition

(at 14), exclusive dealing by a monopolist does not invariably "deny competitors access" to exclude competition. To the contrary, courts have long recognized that even when used by a monopolist, exclusive dealing often benefits consumers by promoting dependability of supply, investment by suppliers or customers, and more. Indeed, "competition for the [exclusive] contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress." *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004). Consequently, OMI's approach would be counterproductive, punishing firms for engaging in aggressive competition and forcing customers to pay inflated prices.

The proper approach to evaluating a monopolist's exclusive-dealing arrangements is the one adopted by the district court, this Court, the Third Circuit, and many other courts: condemn the arrangement only if—after carefully considering the economics and fully appraising any resulting competitive harms *and* benefits—it is evident that the arrangement deprives rivals of a substantial opportunity to compete on the merits and harms consumers. Only this rule-of-reason approach encourages monopolists to compete aggressively, to consumers' benefit, and properly limits antitrust law to intervening only to address conduct that actually harms competition. The approach OMI suggests would instead force

monopolists to pull their punches, weakening the competitive process and inflating prices to consumers.

As this Court has put it: "Because [exclusive-dealing] arrangements may actually enhance competition, … they are not deemed per se illegal." *Perington Wholesale,* 631 F.2d at 1374. "To prove a violation, a plaintiff must show the exclusive dealing arrangement has [foreclosed] or probably will foreclose competition in a substantial share of a line of commerce." *Id.* at 1375. What is "important" in evaluating such arrangements is "the nature and tendency of the agreement." *Id.* at 1374.

The Third Circuit's decision in *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 269 (3d Cir. 2012), reached the same conclusion and provides guidance for conducting a detailed analysis of an exclusive-dealing arrangement's effects on competition under the rule of reason. The plaintiff and the defendant were competing producers of truck transmissions, and the plaintiff accused the defendant—which had "long been a monopolist," *id.* at 264—of using exclusivity arrangements with purchasers of its product to unlawfully maintain its monopoly, *id.* at 265-267. The court acknowledged that "[t]he primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position." *Id.* at 270. Yet, the court declared that the *rule of reason* applied to the exclusive-dealing claim, and that under that standard, "an exclusive

dealing arrangement will be unlawful only if its probable effect is to substantially lessen competition in the relevant market." *Id.* at 268 (quotation marks omitted).

The court in *ZF Meritor* explained that "[e]xclusive dealing arrangements are of special concern when imposed by a monopolist" because "a dominant firm may be able to foreclose rival suppliers from a large enough portion of the market to deprive such rivals of the opportunity to achieve the minimum economies of scale necessary to compete." 696 F.3d at 271. But on the other hand, the court noted, it "'is widely recognized that in many circumstances, exclusive dealing arrangements may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.'" *Id.* at 270 (quoting *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010)). Consequently, the court stated, "competition *to be* an exclusive supplier may constitute a vital form of rivalry, which the antitrust laws should encourage." *Id.*[4]

Given these divergent potential competitive effects, a categorical rule is inappropriate for exclusive-dealing arrangements, even when used by a

[4] *See also, e.g.*, *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992) ("[W]hat occurred after the implementation of the [exclusive] contract with Dr. Killebrew was only a reshuffling of competitors."); *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) ("incumbent and other, competing anesthesiology groups have a strong incentive continually to improve the care and prices they offer in order to secure the exclusive positions").

monopolist. Instead, the Third Circuit held, such arrangements should be judged under the rule of reason, and ultimately their legality should "depend[] on whether [the arrangement] will foreclose competition in such a substantial share of the relevant market so as to adversely affect competition." *ZF Meritor*, 696 F.3d at 271. In making this assessment, the Third Circuit observed, courts "consider" textured economic analysis of "the percentage of the market foreclosed" and "the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market." *Id.* (quotation marks omitted).

Performing this analysis, the Third Circuit found that, given all the facts and circumstances, the *particular conduct* in *ZF Meritor* was unlawful. The court emphasized that the defendant foreclosed a substantial share of the market by "enter[ing] into long-term agreements with every direct purchaser in the market, and under each agreement, imposed what could be viewed as mandatory purchase requirements of at least 80%, and up to 97.5%." 696 F.3d at 286; *see id.* at 287. The court observed that the direct purchasers "were not free to walk away from the agreements." *Id.* at 287. Moreover, the evidence did not indicate that the exclusivity arrangements had offsetting procompetitive benefits; indeed, the direct purchasers "voiced objections" to them. *Id.* at 288-289.

ZF Meritor's treatment of an exclusive-dealing claim grounded in Section 2 accords with the precedent of the Supreme Court and other circuits. For example,

in *Tampa Electric Co. v. Nashville Coal Co.*, on which *ZF Meritor* relied, the Supreme Court declared that "protracted requirements contracts"—i.e., long-term exclusive-supply arrangements—"have not been declared illegal per se." 365 U.S. 320, 333 (1961). In a passage echoed in *ZF Meritor*, the Court explained that exclusive-dealing arrangements may "assure supply," "make possible the substantial reduction of selling expenses, give protection against price fluctuations, and … offer the possibility of a predictable market"—all procompetitive benefits. *Id.* at 334 (quotation marks omitted). Accordingly, "an exclusive-dealing arrangement[] … does not violate [antitrust law] unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Id.* at 327. And the Supreme Court prescribed a detailed, case-specific assessment of the extent of competitive foreclosure: "[t]o determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Id.* at 329.

The story is similar with another leading case, *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001): a nuanced analysis of the actual

competitive effects of the challenged conduct. The court observed: "Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern." *Id.* at 58. Thus, "[p]ermitting an antitrust action to proceed any time a firm enters into an exclusive deal would both discourage a presumptively legitimate business practice and encourage costly antitrust actions." *Id.* at 69; *see id.* at 70. Synthesizing "a century of case law on monopolization," the court concluded that claims that a monopolist engaged in illegal exclusionary conduct should be evaluated under a rule of reason, whereby the plaintiff must show that the conduct "harm[s] the competitive *process*" and that the harm "outweighs the procompetitive benefit" of the conduct. *Id.* at 58-59.

The D.C. Circuit's conclusion that Microsoft's contracts were unlawful reflected the court's careful application of these standards. For example, the court noted that Microsoft's agreements excluded its main competitor almost completely from "one of the two major [distribution] channels." *Microsoft*, 253 F.3d at 70-71. And Microsoft's justification—"to preserve its [monopoly] power" in an adjacent market—was not, the court stated, "a procompetitive justification" at all. *Id.* at 71.

Similarly, in *McWane, Inc. v. FTC*, the Eleventh Circuit announced that "exclusive dealing arrangements are not per se unlawful." 783 F.3d 814, 832 (11th Cir. 2015). Agreeing with *ZF Meritor* and *Microsoft*, the Eleventh Circuit determined that exclusive-dealing arrangements are evaluated under the rule of

reason, with "substantial foreclosure" a necessary but not "sufficient" factor; courts must also consider "evidence that the challenged conduct has affected price or output, … the degree of rivals' exclusion, the duration of the exclusive deals, and the existence of alternative channels of distribution." *Id.* at 835. The court also observed that "courts often take a permissive view of [exclusive-dealing] contracts on the grounds that firms compete for exclusivity by offering procompetitive inducements (e.g., lower prices, better service)." *Id.* at 834; *see id.* at 827.

Careful analysis of actual competitive effects has commonly led courts to uphold exclusive-dealing arrangements, even when used by monopolists. *See, e.g.*, *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 399-400, 403-408 (3d Cir. 2016) (noting that "customers had the ability to switch to competing products [but] simply chose not to do so"); *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, 859 F.3d 408, 409-410 (7th Cir. 2017) ("no evidence that [the dominant hospital's] exclusive contracts have a significant exclusionary effect, since most of the contracts expire every year or two, giving other hospitals … a shot at obtaining the next contract by outbidding" it); *Omega Environment, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997) ("the short duration and easy terminability of these agreements negate substantially their potential to foreclose competition").

II. The District Court's Analysis Accords With Precedent and Sound Antitrust Principles

OMI objects (at 16) that "the district court imposed extraordinary and unwarranted burdens on antitrust enforcers challenging the exclusive dealing of monopolists." Specifically, it claims (at 16-17) that the court required plaintiffs to "show that the exclusive dealing was the product of coercion by the monopolist and quantify the market foreclosure percentage" (quotation marks omitted). It disregards that the district court considered these factors as part of its fact-intensive rule-of-reason analysis, in accord with precedent and sound antitrust principles. Further, it claims (at 24) that the court improperly applied an "equally efficient competitor test," but the court used it exactly as precedent instructs.

A. The District Court's Treatment of Coercion Was Proper

OMI's complaint about the district court's treatment of coercion lacks merit. It appears to argue that by assessing whether Mylan engaged in "coercion," the district court improperly went beyond determining whether Mylan "unduly restrict[ed] opportunities for competitors" (at 17) or left its trading partners "no choice at all" but to accept Mylan's terms (at 19). In fact, the court did not go beyond what OMI appears to acknowledge is proper consideration of alleged coercion; the court understood "coercive conduct" to entail a monopolist using "threat[s]" to leave its "customers no choice but to agree to exclusivity provisions," Mem. and Order ("Op.") 95-96, Dkt. No. 2254-1, *In re EpiPen (Epinephrine*

Injection, USP) Marketing, Sales Practices and Antitrust Litigation, No. 17-md-2785 (citing *McWane*, 783 F.3d at 834, *ZF Meritor*, 696 F.3d at 285, and *Dentsply*, 399 F.3d at 190, 196), and the court found no evidence of such coercive conduct here.

The court rightly considered the lack of evidence of coercion. As the Third Circuit has said, exclusive-dealing arrangements are "generally" unlawful "only where … there is some element of coercion present" (along with other circumstances). *ZF Meritor*, 696 F.3d at 284; *see also, e.g.*, *Race Tires*, 614 F.3d at 77-78 ("although we do not hold that coercion is an essential element of every successful antitrust claim, we conclude that coercion is a fundamental consideration in the *present* circumstances"); *see also Dentsply*, 399 F.3d at 190, 196 (defendant "impose[d] an 'all-or-nothing' choice on the dealers" and "threaten[ed] to sever access" to both the product at issue and other products); *LePage's Inc. v. 3M*, 324 F.3d 141, 158 (3d Cir. 2003) ("Discounts conditioned on exclusivity are problematic when the defendant is a dominant firm in a position to force manufacturers to make an all-or-nothing choice." (quotation marks omitted)).

That courts, including the Supreme Court, have long examined coercion as a factor in antitrust cases refutes OMI's assertion (at 19-20) that judicial consideration of coercion is "unworkable." *See also Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528,

542-543 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions …."); *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 17 (1964) ("a supplier may not use coercion on its retail outlets to achieve resale price maintenance"). Indeed, as the passages from *Dentsply* and *LePage*'s that were quoted above and relied on by the district court demonstrate, courts have understood coercion to involve the use of monopoly power to deny trading partners of a choice and readily applied that concept to evaluate whether conduct is illegally exclusionary. *See Dentsply*, 399 F.3d at 190, 196; *LePage*, 324 F.3d at 158; *see also Eisai*, 821 F.3d at 403; *ZF Meritor*, 696 F.3d at 287 (trading partners were "were not free to walk away from the agreements and purchase products from the supplier of their choice").

OMI argues (at 18-19) that *ZF Meritor* "subsumed" coercion into the issue of "monopoly power." That is incorrect given *ZF Meritor*'s conception of coercion as the *use* of market power to deny trading partners any choice. As OMI acknowledges (at 18), *ZF Meritor* "listed" market power and coercion "separate[ly]"—and intentionally so. The Third Circuit stated that a "highly concentrated market … *creates the possibility for … coercion*," such as "leverag[ing]" the monopolist's market power "to coerce [a trading partner] into entering into" long-term exclusive arrangements. *ZF Meritor*, 696 F.3d at 285

(emphasis added). In other words, market power is a prerequisite for coercion, not the coercion itself.

At the same time, the district court did not *require* proof of coercion. Rather, following the Third Circuit's instruction in *ZF Meritor*, the district court treated the issue of "whether defendant engaged in coercive behavior" as one "factor[] courts consider." Op. 84 (quoting *ZF Meritor*, 696 F.3d at 271-272); *see also* Op. 93. Thus, the court's conclusion that Sanofi "fail[ed] to present a triable issue of coercion," Op. 100, merely meant that Sanofi's case might have survived the summary judgment motion had there been evidence of coercion; the court did not find that the absence of such evidence, by itself, compelled judgment against Sanofi. What warranted judgment was the absence of *any* "triable issue" showing that the rebate contracts were illegal under the court's multi-factor rule-of-reason analysis. *See* Op. 108.

Finally, the district court's finding that there was no genuine issue of fact regarding coercion here was on firm ground. The court noted that the evidence showed that "some payors solicited exclusive offers from both Mylan and Sanofi," Op. 100; *see also* Op. 93-94, "[i]n many instances, payors *rejected* Mylan's exclusive offers," Op. 94, and when payors agreed to exclusivity for EpiPen, it was because "Mylan had offered a lower price," Op. 97. In other words, there was robust competition between Sanofi and Mylan *for* exclusivity arrangements with

their trading partners, who were "free to … purchase products from the supplier of their choice"—something that, as noted above, is "vital" and "the antitrust laws should encourage." *ZF Meritor*, 696 F.3d at 270, 287. That conclusion was sound, for as the Third Circuit has declared, "if customers are free to switch to a different product in the marketplace but choose not to do so, competition has not been thwarted—even if a competitor remains unable to increase its market share." *Eisai*, 821 F.3d at 403.

B. The District Court's Treatment of Market Foreclosure Was Proper

OMI's contention that the district court wrongly required Sanofi to quantify the percentage of the alleged relevant market foreclosure fares no better. Its brief is ambiguous as to whether it believes the court erred by requiring *some* quantification of market foreclosure for an exclusive-dealing claim under Section 2 or by requiring proof that a *particular threshold percentage* of the relevant market was foreclosed. *See* OMI Br. at 17, 20-23. Either way, its argument fails.

As OMI correctly acknowledges (at 20), Section 2 requires proof that the monopolist's exclusionary dealing "foreclos[es] a *substantial share* of the relevant market." *See supra* pp.8-11. Quantification of the foreclosed share is, therefore, a logical, useful, and appropriate factor in evaluating whether the plaintiff has met (or can meet) that standard. As the D.C. Circuit said in *Microsoft*, "[b]ecause an exclusive deal affecting a small fraction of a market clearly cannot have the

requisite harmful effect upon competition," the plaintiff's burden includes proving "a significant degree of foreclosure," which "serves a useful screening function." 324 F.3d at 69; *see also Eisai*, 821 F.3d at 404 ("identification of a few dozen hospitals out of almost 6,000 in the United States is not enough to demonstrate "'substantial foreclosure'"). Thus, the Third Circuit has held that "[t]o demonstrate substantial foreclosure, a plaintiff must … prove the degree of foreclosure," but "[t]here is no fixed percentage at which foreclosure becomes substantial." *Eisai*, 821 F.3d at 403 (quotation marks omitted); *see also ZF Meritor*, 696 F.3d at 271 (in evaluating antitrust challenges to exclusive-dealing arrangements, "courts consider … the percentage of the market foreclosed").

For example, in *Microsoft*, the D.C. Circuit declared 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." 253 F.3d at 70. The court then found that the plaintiff met its burden by showing that Microsoft imposed exclusive deals with "fourteen of the top fifteen" providers in "one of the major [distribution] channels," "ensuring that the majority of all" consumers were supplied Microsoft's internet browser to the exclusion of competitors' browsers. *Id.* at 70-71. In *LePage's*, the Third Circuit, after recounting that discussion in *Microsoft*, considered the precise effect of the defendant's exclusionary conduct on

the plaintiff's share in the relevant market. *See* 324 F.3d at 158-159, 161-162. And in *McWane*, the Eleventh Circuit emphasized that, "[a]lthough the [FTC] did not quantify a percentage" of market foreclosure, "it did note that the two largest distributors, who together controlled approximately 50-60% of distribution," acceded to the defendant's exclusive-dealing arrangement. 783 F.3d at 837.

In any event, the district court's analysis did not turn on the quantification of the percentage of market foreclosure. The court did not reject Sanofi's claim for failing to quantify the percentage—indeed, Sanofi adduced evidence purporting to show that Mylan's conduct foreclosed 31% of the market, Op. 104—let alone for failing to show that the percentage exceeded a minimum threshold requirement. Rather, the court concluded—as a *qualitative* matter—that Mylan's conduct simply did not exclude competitors from the relevant market. Because "Mylan's rebate contracts were short in duration and easily terminable," Sanofi had ample opportunity to compete for business, including by obtaining exclusive-dealing arrangements of its own, whether upon the natural termination of Mylan's contracts, upon a payor's early termination, or upon a payor's "frequent[]" demand to "renegotiate[] … to secure better pricing." Op. 105. Insofar as the district court looked to a particular percentage of foreclosed market share, it was only to confirm this analysis: "the summary judgment facts don't present a triable issue of foreclosure when it is undisputed that Auvi-Q had access to 80% of the

commercial market within two years of its coming to the EAI market." Op. 107-108.[5]

Similarly, contrary to OMI's contention (at 24), the district court did not require that the "spillover" effect foreclose a certain minimum percentage of the market. Instead, the court stated—quite reasonably—that "without *any* evidence showing the quantity of foreclosure attributable to any alleged 'spillover' effect," it could not conclude that the spillover effect had caused substantial foreclosure; moreover, even where the spillover effect occurred, payors "weren't prevented from accessing" Sanofi's product. Op. 106-107. In other words, the spillover-effect argument also failed because Sanofi failed to adduce *qualitative* evidence of market foreclosure.

C. The District Court's Consideration of the Effect on Equally Efficient Rivals Was Proper

OMI argues (at 24) that the district court departed from precedent by applying "an unjustified and dangerous equally efficient competitor test for exclusive dealing claims," namely, that Sanofi had to show a genuine issue as to

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[5] OMI suggests (at 22-23) that an academic article concluded that a violation can be found "'despite minimal, or even zero, levels of percentage foreclosure'" (quoting Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 362 (2002)). But that article was making a distinct point that exclusive dealing may be unlawful even if it does not foreclose all channels of "access to the *ultimate* consumer," *id.* (emphasis added), and the court here never indicated otherwise.

"whether an equally efficient competitor was unable to compete with Mylan." This test, OMI claims (at 25), would "withhold the protection of the Sherman Act from competitors on account of their small size or supposedly inferior productive efficiency relative to the monopolist," and thus "give monopolists free rein to crush nascent rivals who might grow into formidable competitors." That distorts the district court's opinion, which faithfully applied well-established precedent.

The court did consider whether Sanofi had shown a "triable issue whether an equally efficient competitor was unable to compete with Mylan," Op. 111 (quotation marks omitted), specifically in the context of finding that Mylan did not violate the Sherman Act by "leveraging its non-contestable demand for EpiPen to force payors to agree to cover EpiPen and exclude Auvi-Q," Op. 108. That analysis fully accorded with precedent. *See, e.g.*, *Eisai*, 821 F.3d at 406 (rejecting claim that "the Lovenox Program restricted rival sales by bundling each customer's contestable demand for Lovenox … with the customer's incontestable demand for Lovenox" because "[e]ven if bundling of different types of demand for the same product could, in the abstract, foreclose competition, nothing in the record indicates that an equally efficient competitor was unable to compete with Sanofi"); *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 906-909 (9th Cir. 2008). At no point did the court suggest that Sanofi was precluded from obtaining relief for a

Sherman Act violation because Sanofi was a small, less efficient, or nascent rival in the relevant market.[6]

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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[6] Of course, "Sanofi is one of the world's largest pharmaceutical companies." Op. 6.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) in that, according to the word-count feature of the word-processing system used to prepare the brief (Microsoft Word), the brief contains 5,178 words, excluding the portions exempted by Rule 32(f).

CERTIFICATE OF DIGITAL SUBMISSION

No privacy redactions were required in this brief and hence no such redactions were made. The electronic version of the brief has been scanned for viruses by Cylance Protect (version 2.0.1540.8, updated continuously) and is, according to that program, free of viruses. The electronically filed version of the brief is an exact copy of the paper version that will be filed with the clerk.

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CERTIFICATE OF SERVICE

On this 22nd day of September 2021, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system.

/s/ Seth P. Waxman
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