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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STALEY, et al.,
Plaintiffs,
v.
GILEAD SCIENCES, INC., et al.,
Defendants.

Case No. [19-cv-02573-EMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTIONS TO DISMISS**

Docket Nos. 143, 149, 158, 159

Plaintiffs in this putative class action are:

- (1) individuals who purchased and/or paid for some or all of the purchase price for certain HIV medications and
- (2) health and welfare trust funds/plans that purchased or provided reimbursement for some or all of the purchase price for certain HIV medications.

Plaintiffs have filed suit against companies that are the new drug application holders¹ for, or otherwise manufacture, sell, and/or distribute, those HIV medications, namely:

- (1) Gilead²;
- (2) Bristol-Myers Squibb (“BMS”)³;
- (3) Japan Tobacco; and

¹ Before a drug manufacturer can sell a drug on the market, it must get approval from the Food and Drug Administration (“FDA”). It does so by submitting a new drug application. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 142 (2013).

² Plaintiffs have formally sued multiple Gilead entities: Gilead Sciences, Inc.; Gilead Holdings, LLC; Gilead Sciences, LLC; and Gilead Sciences Ireland UC.

³ Plaintiffs have formally sued multiple BMS entities: Bristol-Myers Squibb Company and E.R. Squibb & Sons, L.L.C.

1 (4) Janssen.⁴

2 The bulk of Plaintiffs' claims against Defendants are antitrust claims, both federal and state
3 (Counts 1-6 and 8-13). Plaintiffs have also asserted a claim based on violation of state consumer
4 protection laws (Count 7). Currently pending before the Court are four motions to dismiss, one
5 filed by each defendant named above. Two amicus briefs have also been submitted: one from the
6 Federal Trade Commission ("FTC") and one from a group of nonprofit organizations that do HIV-
7 related work.

8 Having considered the parties' briefs and accompanying submissions, as well as the oral
9 argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part the motions to
10 dismiss.

11 **I. FACTUAL & PROCEDURAL BACKGROUND**

12 The operative complaint is the corrected consolidated class action complaint ("CAC"). In
13 that pleading, Plaintiffs allege as follows.

14 A. Regulatory Background

15 1. New Drugs and Generic Drugs

16 Drug manufacturers must obtain approval from the Food and Drug Administration
17 ("FDA") before they can market and sell their drugs. If a drug manufacturer wants to sell a new
18 drug, it must file a New Drug Application ("NDA") with the FDA. *See* CAC ¶ 68. Another
19 process applies to generic drugs.

20 [O]nce the FDA has approved a brand-name drug for marketing, a
21 manufacturer of a generic drug can obtain similar marketing
22 approval through use of abbreviated procedures. The Hatch-
23 Waxman Act permits a generic manufacturer to file an Abbreviated
24 New Drug Application ["ANDA"] specifying that the generic has
25 the "same active ingredients as," and is "biologically equivalent" to
26 the already-approved brand-name drug." In this way the generic
27 manufacturer can obtain approval while avoiding the "costly and
28 time-consuming studies" needed to obtain approval "for a pioneer
drug." The Hatch-Waxman process, by allowing the generic to
piggyback on the pioneer's approval efforts, "speed[s] the
introduction of low-cost generic drugs to market."

28 ⁴ Plaintiffs have formally sued multiple Janssen entities: Johnson & Johnson and Janssen R&D Ireland.

1 *FTC v. Actavis, Inc.*, 570 U.S. 136, 142 (2013).

2 “The FDA assigns generic drugs that are pharmaceutical equivalents of branded drugs an
3 ‘AB’ rating.” CAC ¶ 71. State laws “either require or permit pharmacies to substitute AB-rated
4 generic equivalents for branded prescriptions (unless the prescribing doctor has specifically
5 ordered otherwise).” CAC ¶ 91.

6 2. Generic Manufacturers and Paragraph IV Certifications

7 New drugs, of course, are often protected by patents which, in theory, prevent the sale of
8 generic versions of the new drugs – at least until the patents expire. Those patents, however, like
9 any patents, may be challenged before their expiration dates.

10 A generic manufacturer may effectively raise a challenge to a patent by including in its
11 ANDA what is known as a Paragraph IV certification – *i.e.*, a statement that the brand drug is
12 covered by a patent but that the patent is invalid or will not be infringed by the generic drug. *See*
13 CAC ¶ 75. A generic manufacturer has an incentive to include a Paragraph IV certification so that
14 it can sell the generic drug before the patent on the brand drug expires on its own terms.

15 In addition, the *first* generic manufacturer to file an ANDA with a Paragraph IV
16 certification gets an added benefit: it is “entitled to 180 days of ANDA Exclusivity,” meaning that
17 the FDA cannot approve any other generic version of the drug “until 180 days after the first-filer
18 enters the market.” CAC ¶ 77 (emphasis added). As the Supreme Court has noted, ANDA
19 Exclusivity “can prove valuable, possibly worth several hundred million dollars. Indeed, the
20 Generic Pharmaceutical Association said in 2006 that the vast majority of potential profits for a
21 generic drug manufacturer materialize during the 180-day exclusivity period.” *Actavis*, 570 U.S.
22 at 144. (ANDA Exclusivity can be forfeited under certain circumstances.⁵) “The first-filing
23 generic manufacturer is guaranteed [the] exclusivity period even if it settles litigation with a patent
24 owner without resolving the invalidity or noninfringement issues.” *AIDS Healthcare Foundation,*
25 *Inc. v. Gilead Sciences, Inc.*, No. C 16-00443 WHA, 2016 U.S. Dist. LEXIS 87578, at *4-5 (N.D.

26 _____
27 ⁵ For example, if the first filer does not get tentative approval of the generic drug within 30
28 months, the ANDA Exclusivity is forfeited. *See* CAC ¶ 78. The first filer also forfeits if “it fails
to market its generic drug within 75 days after another manufacturer obtains a final decision that
the brand manufacturer’s patents are invalid or not infringed.” CAC ¶ 78.

1 Cal. July 6, 2016).

2 In turn, when a Paragraph IV certification is made, a brand manufacturer has an incentive
3 to sue the generic manufacturer for patent infringement because, if it does so within 45 days of
4 receiving the Paragraph IV certification, it may delay approval of the ANDA. More specifically,
5 if the brand manufacturer files suit within 45 days, then the FDA is automatically barred from
6 granting approval to the generic manufacturer's ANDA "until the earlier of (a) the passage of 30
7 months, or (b) the issuance of a decision by a court that the patent is invalid or not infringed."
8 CAC ¶ 76.

9 Notably, even if a generic manufacturer wants to file an ANDA with a Paragraph IV
10 certification as soon as possible (given the above), it cannot do so in all circumstances. In
11 particular, "where the FDA has approved a new chemical entity ['NCE'] (a drug substance that the
12 FDA has not previously approved), no other manufacturer may seek FDA approval for a product
13 containing that drug substance until five years after the FDA first approved it." CAC ¶ 86. Thus,
14 the FDA cannot accept an ANDA from a generic manufacturer if the generic drug contains a NCE
15 until the five-year "NCE Exclusivity" period has expired. *See* CAC ¶ 87. NCE Exclusivity thus
16 "operates independent of any patent protection." *AIDS Healthcare*, 2016 U.S. Dist. LEXIS 87578,
17 at *7.

18 B. Science Background

19 1. cART Regimen

20 The modern HIV treatment regimen is known as cART, which stands for combination
21 antiretroviral therapy. *See* CAC ¶ 1. A combination – or "cocktail" – is usually made up of:

- 22 (1) Two NRTIs (nucleotide/nucleoside analogue reverse transcriptase inhibitors); and
23 (2) A third agent (also known as a core agent).

24 *See* CAC ¶¶ 2, 56. A cocktail may also include a third class of drug – namely, a booster. Boosters
25 not taken for any anti-HIV property in the drug but rather for their ability to inhibit the breakdown
26 of some third agents. *See* CAC ¶¶ 64-65.

27 "The need to use multiple drugs in cART regimens can be a barrier to patient compliance."
28 CAC ¶ 63. Thus, to reduce the burden on the patient, multiple drugs are often coformulated

1 together into a single pill known as an FDC, which stands for fixed-dose combination. *See* CAC ¶
 2 63. An FDC can be made up of drugs made by one manufacturer or by more than one
 3 manufacturer, if the manufacturers can reach agreement.

4 2. Gilead's Drugs

5 Gilead makes various drugs that are used in cART regimens. The main ones at issue in the
 6 instant case are as follows:

- 7 • TDF and TAF (NRTIs). Tenofovir is one of the principal NRTIs used in cART
 8 regimens. It is one of the principal NRTIs because it has medical benefits over
 9 other NRTIs. *See* CAC ¶¶ 58, 382 (alleging that other NRTIs need to be triple
 10 phosphorylated for the drug to be activated, but Tenofovir only needs to be
 11 phosphorylated twice); CAC ¶¶ 383-90 (discussing additional problems with other
 12 NRTIs, *e.g.*, side effects). Because Tenofovir cannot be administered orally by
 13 itself, Gilead developed two different “prodrugs” of Tenofovir that allow it to be
 14 swallowed: TDF and TAF. *See* CAC ¶¶ 57, 59 (alleging that “[p]rodrugs are
 15 pharmacologically inactive compounds that can be more efficiently absorbed and
 16 then converted into the active form of the drug within the body”). TAF is
 17 essentially the successor drug to TDF and is superior to TDF (*e.g.*, fewer side
 18 effects). A generic version of TDF became available in December 2017. *See* CAC
 19 ¶ 98. There is no generic TAF available yet. “Tenofovir is almost always used
 20 alongside another NRTI” because, when an HIV virus becomes resistant to the
 21 other NRTI, “the virus’s susceptibility to Tenofovir increases.” CAC ¶ 60
 22 (emphasis omitted).
- 23 • FTC (an NRTI). FTC is one of the NRTIs commonly used with Tenofovir in
 24 cART regimens. *See* CAC ¶ 60. Generic FTC will become available in September
 25 2020. *See* Opp’n at 9; CAC ¶ 357.
 - 26 ○ Even though there is no generic FTC available yet, there is another drug –
 27 3TC – that Gilead does not manufacture and that may be used as a
 28 substitute for FTC. *See* CAC ¶ 61 (alleging that “[b]oth the United States

1 Department of Health and Human Services . . . and the World Health
 2 Organization . . . guidelines stipulate that the drugs, when used for HIV
 3 treatment, can be used interchangeably”). Generic 3TC has been available
 4 since 2012. *See* CAC ¶¶ 62, 97-98.

- 5 • TDF/FTC (an FDC). Gilead makes an FDC made up of two of the above NRTIs –
 6 *i.e.*, TDF/FTC. It appears that generic TDF/FTC will become available in
 7 September 2020. *See* Opp’n at 9, 51; CAC ¶ 357.
- 8 • COBI (a booster). There is no generic COBI available yet. *See* CAC ¶¶ 64-65.
 - 9 ○ Even though there is no generic COBI available yet, there is another drug –
 10 RTV – that Gilead does not manufacture and that may be used as a
 11 substitute for COBI. Generic RTV has been available since March 2018.
 12 *See* CAC ¶¶ 65, 112.

13 C. Anticompetitive Conduct

14 The anticompetitive conduct identified in Plaintiffs’ CAC falls into the following three
 15 categories:

- 16 (1) Agreements between Gilead and one of the other defendants that contain “No-
 17 Generics Restraints.”
- 18 (2) Patent settlement agreements between Gilead and a generic manufacturer, Teva,
 19 under which Teva agreed to delay entry into the market in exchange for certain
 20 benefits.
- 21 (3) Gilead’s commercialization of one of its drugs known as TAF.

22 1. Agreements with No-Generics Restraints

23 TDF, FTC, and TDF/FTC were critical drugs for Gilead’s business because of the medical
 24 benefits of Tenofovir over other NRTIs. By their terms, the patents protecting TDF were not due
 25 to expire until January 2018. As for the patents protecting FTC and TDF/FTC, they were not due
 26 to expire until September 2021 and January 2024, respectively. *See* CAC ¶ 96. However, Gilead
 27 expected to face generic competition for TDF, FTC, and TDF/FTC far earlier – *i.e.*, in 2009, 2011,
 28 and 2011 – because the patents protecting the drugs were weak and thus generic manufacturers

1 would challenge the patents. *See, e.g.*, CAC ¶ 96 (indicating, *e.g.*, that the NCE Exclusivity for
2 TDF expired in October 2006, so if a generic manufacturer thereafter filed an ANDA with a
3 Paragraph IV certification, then Gilead would bring a patent infringement suit which would delay
4 the ANDA process for about 30 months – *i.e.*, until 2009).

5 To protect its vulnerable NRTIs, Gilead began – starting in December 2004 – to enter into
6 agreements with other drug manufacturers, in particular, those who made third agents (instead of
7 NRTIs).⁶ Under a typical agreement, Gilead and the other drug manufacturer would agree to
8 coformulate a FDC made up of (1) Gilead’s vulnerable NRTIs and (2) the other drug
9 manufacturer’s third agent, which had a longer patent life (assuming that Gilead’s NRTIs would
10 face generic competition in 2009, 2011, and 2011, respectively). The agreement would also
11 contain a provision that, even when generic versions of Gilead’s NRTIs became available (*e.g.*, if
12 the patents were successfully challenged), the other drug manufacturer would not, on its own,
13 offer a competing FDC made of (1) generic versions of Gilead’s NRTIs and (2) the other drug
14 manufacturer’s third agent. Plaintiffs call this provision a “No-Generics Restraint” and, for ease
15 of reference, the Court shall do the same.

16 According to Plaintiffs, they are not claiming as anticompetitive conduct any agreement to
17 coformulate a FDC. Indeed, they concede that the FDCs benefit people with HIV, making
18 available to them products that would not otherwise exist.⁷ What Plaintiffs do contest are the No-

19 _____
20 ⁶ The rough timeline is as follows:

- 21 • December 2004: Gilead entered into an agreement with BMS (the Atripla Agreement).
- 22 • March 2005: Gilead entered into an agreement with Japan Tobacco.
- 23 • July 2009: Gilead entered into an agreement with Janssen (the Complera Agreement).
- 24 • June 2011: Gilead entered into another agreement with Janssen (the Prezcoibix Agreement). This agreement allegedly protected one of Janssen’s vulnerable drugs, not Gilead’s.
- 25 • October 2011: Gilead entered into a second agreement with BMS (the Evotaz Agreement). This agreement allegedly protected one of BMS’s vulnerable drugs, not Gilead’s.
- 26 • December 2014: Gilead entered into more agreements with Janssen (the Odefsey Agreement and the Symtuza Agreements). The Symtuza Agreement allegedly protected one of Janssen’s vulnerable drug, not Gilead’s.

27 ⁷ And Defendants point out that the federal government has applauded some of the business
28 collaborations. *See* Gilead Mot. at 9 (citing to comments made by the Secretary of Health & Human Services with respect to business collaboration between Gilead and BMS on a FDC commercially known as Atripla).

1 Generics Restraints in the agreements because, as alleged, the restraints effectively protect
 2 Gilead’s NRTIs by precluding the other drug manufacturer from selling FDCs that incorporate
 3 generic versions of Gilead’s NRTIs *even after the patents protecting the NRTIs expire*.
 4 (According to Plaintiffs, Gilead entered into “reciprocal” agreements with BMS and Janssen
 5 wherein Gilead and the other company agreed to pair in a FDC one of Gilead’s drugs (the booster
 6 known as COBI) with one of the other company’s vulnerable drugs.)

7 The agreements with the No-Generics Restraints – by themselves – only provided limited
 8 protection for Gilead’s NRTIs. When generic versions of the NRTIs became available,
 9 individuals with HIV could, at least in theory, buy generic TDF, generic FTC, and/or generic
 10 TDF/FTC as “standalones” – *i.e.*, instead of as part of a FDC. But, as Plaintiffs allege, there are
 11 benefits to purchasing and using a FDC over purchasing and using standalone components to that
 12 FDC. *See* CAC ¶ 63 (alleging that “[t]he need to use multiple drugs in cART regimens can be a
 13 barrier to patient compliance”). Moreover, according to Plaintiffs, Gilead also took affirmative
 14 steps to move its customer base from standalone TDF, FTC, and/or TDF/FTC to the FDCs, as the
 15 FDCs would be protected by the No-Generics Restraints.⁸ *See, e.g.*, CAC ¶ 4 (alleging that the
 16 No-Generics Restraints “gave Gilead an enormous financial incentive to move prescriptions from
 17 its standalone version of TDF to the FDCs, which would be insulated from generic competition
 18 even after the TDF[] patents expired”). According to Plaintiffs, once individuals with HIV have
 19 moved over to the FDCs, they are not likely to move back “to the original product or regimen,
 20 even if a generic version of the original product becomes available at a much lower price” for
 21 various reasons – *e.g.*, “[d]octors who have switched patients from one HIV product or HIV drug
 22 regimen to another are very reluctant to switch patients back.” CAC ¶ 181. Also, “[s]witching
 23 costs (*e.g.*, the need for another visit to the doctor for a new prescription) impair a move back,”
 24 and “pharmaceuticals are ‘experience’ goods that consumers and physicians are hesitant to change
 25 if they are working.”⁹ CAC ¶ 181.

26 _____
 27 ⁸ Plaintiffs suggest that Gilead was able to do this through use of “large sales forces that visit
 doctors’ offices and persuade them to prescribe” certain products. *See* CAC ¶ 368.

28 ⁹ Plaintiffs also allege that “doctors typically are not aware of the relative costs of brand

1 Plaintiffs further note that, once a person is prescribed an FDC, it is not possible for the
2 pharmacist to fill the prescription with standalone components for the FDC (*i.e.*, standalone
3 generic TDF, FTC, and/or TDF/FTC along with standalone of the other company’s drug). This is
4 because standalone components of an FDC are not AB-rated to the FDC. *See* CAC ¶ 183
5 (alleging that “[g]eneric versions of TDF and/or FTC are not AB-rated to, and therefore not
6 automatically substitutable for, the TDF-based FDCs”); *see also* Opp’n at 3(asserting that,
7 “[u]nder state drug-substitution laws, pharmacists receiving a prescription for the FDC cannot
8 dispense generic versions of the standalone components”).

9 According to Plaintiffs, one effect of the No-Generics Restraints was that Gilead decided
10 to shelve further development of TAF (the superior successor drug to TDF) – *i.e.*, Gilead no
11 longer had to roll out TAF in order to be competitive in the market but rather could “make more
12 profits by defeating generic competition to TDF and then rolling out TAF much later as part of a
13 line extension.” CAC ¶ 214; *see also* CAC ¶ 202 *et seq.* (explaining that TAF is a superior
14 product compared to TDF because the former has significantly less risk of side effects).

15 Plaintiffs add that, although Gilead has now rolled out TAF, it has done so in an
16 anticompetitive way, including, *e.g.*, by making agreements with the other defendants to protect
17 TAF, *even after the patents on that drug expire*, through No-Generics Restraints. *See* CAC ¶ 192
18 (alleging that “Defendants are *repeating this anticompetitive cycle again* with respect to the TAF-
19 based FDCs”) (emphasis added); CAC ¶ 428 (alleging that, “[u]nless enjoined by this Court,
20 Defendants’ unlawful conduct will have additional and intensified anticompetitive effects once
21 generic versions of [*inter alia*] TAF . . . become available”).

22 2. Patent Settlement Agreements with Teva

23 The prospect of generic competition for Gilead’s vulnerable NRTIs (*i.e.*, TDF, FTC, and/or
24 TDF/FTC) became a concrete reality by 2008 when Teva began to challenge the patents protecting
25 the drugs through Paragraph IV certifications. Other generic manufacturers followed suit. *See*
26 CAC ¶ 313. According to Plaintiffs, these challenges to TDF, FTC, and/or TDF/FTC prompted

27 _____
28 pharmaceuticals and, even when they are aware of costs, are largely insensitive to price
differences because they do not pay for the products.” CAC ¶ 368.

1 Gilead to get moving with TAF – in particular, moving its customer base over from TDF-based
 2 FDCs to TAF-based FDCs, which would also be protected by No-Generics Restraints. *See* CAC ¶
 3 314.

4 Gilead was able to settle its patent infringement lawsuits with Teva and get Teva to agree
 5 to delay entry into the market for the above drugs (a benefit for Gilead); in exchange, Gilead gave
 6 Teva Most-Favored Entry (“MFE”) and Most-Favored Entry Plus (“MFEP”) clauses in the
 7 settlement agreements, a benefit over *other* generic manufacturers. As described in the complaint:

8 An agreement with an MFE clause arises when the brand
 9 manufacturer and the “first-filer” – the generic manufacturer that
 10 filed the first ANDA with a Paragraph IV certification – settle the
 11 patent litigation, with the generic manufacturer agreeing to delay
 12 entering the market until a specified date. The MFE clause provides
 that if any other generic manufacturer (a “second-filer”) succeeds in
 entering the market before that date, the first-filer may enter at the
 same time.

13 CAC ¶ 317. According to Plaintiffs, a MFE is anticompetitive in nature not only because it delays
 14 the first filer’s entry into the market but also because it “delay[s] generic entry by reducing a
 15 second-filer’s incentive to try to enter the market before the first-filer.” CAC ¶ 317; *see also* CAC
 16 ¶ 319 (alleging that a MFE eliminates the possibility that a second filer could enter the market
 17 before the first filer).

18 As for a MFEP clause, it

19 provides that the brand manufacturer will not grant a license to any
 20 second-filer to enter the market until a defined period of time after
 21 the first-filer enters. The clause might provide, for example, that the
 brand manufacturer will not grant a license to any second-filer to
 enter the market until 180 days after the first-filer enters.

22 CAC ¶ 320 (emphasis in original). It thus affirmatively favors the first filer with whom the
 23 manufacturer has negotiated. According to Plaintiffs, a MFEP delays generic entry both by
 24 delaying the entry of the first filer and “dramatically reduc[ing] a second-filer’s incentive to try to
 25 enter the market before the first-filer.” CAC ¶ 320.

26 Gilead ultimately entered into two different settlement agreements with Teva.

- 27 • The first agreement (dated April 2013) applied to TDF. *See* CAC ¶ 340. Gilead’s
 28 patents protecting TDF were to expire, by their own terms, in January 2018. *See*

1 CAC ¶ 96. “Under the agreement, Teva agreed to delay marketing its generic
2 [TDF] and any TDF-containing product until December 15, 2017” – *i.e.*, just a few
3 weeks before the TDF patents were due to expire. CAC ¶ 342. Teva was willing to
4 put off its entry date until such a late date because it received, in exchange, the
5 MFE and MFEP clauses in the settlement agreement. The MFEP clause “provided
6 that Gilead would not grant any other manufacturer a license to enter the market
7 with generic [TDF] until at least *six weeks* after Teva’s agreed entry date.” CAC ¶
8 343 (emphasis added).

- 9 • The second agreement (dated February 2014) applied to TDF/FTC and a drug that
10 Gilead coformulated with BMS that contains TDF/FTC. (The commercial name
11 for that drug is Atripla.) The agreement was reached after the parties had tried the
12 patent infringement case and were awaiting certain decisions from the trial court.
13 *See* CAC ¶ 354. Under the agreement, Teva agreed not to launch generics for
14 TDF/FTC and the other drug until September 2020 – “just one year before the end
15 of the patent term” for FTC. CAC ¶ 357. In exchange, Teva was given MFE and
16 MFEP clauses in the settlement agreement. “The MFEP provided that Gilead
17 would not grant a license to any other manufacturer to enter the market . . . until at
18 least *six months* after Teva’s agreed entry date.” CAC ¶ 357 (emphasis in original).

19 3. Commercialization of TAF

20 As noted above, Plaintiffs maintain that one effect of the No-Generics Restraints was that
21 Gilead could shelve TAF (the successor drug to TDF) – *i.e.*, Gilead no longer had to roll out TAF
22 in order to be competitive in the market but rather could “make more profits by defeating generic
23 competition to TDF and then rolling out TAF much later as part of a line extension.” CAC ¶ 214;
24 *see also* CAC ¶ 202 *et seq.* (explaining that TAF is a superior product compared to TDF because
25 the former has significantly less risk of side effects). Plaintiffs also maintain that, although Gilead
26 has now rolled out TAF, it has done so in an anticompetitive way – for instance, by making
27 agreements with the other defendants to protect TAF, even after the patents on the drug expire,
28 through No-Generics Restraints.

1 According to Plaintiffs, however, this was not the only way that Gilead commercialized
2 TAF in an anticompetitive way. Plaintiffs assert that Gilead had the goal of moving over
3 prescriptions from TDF-based FDCs to TAF-based FDCs precisely because the FDCs (unlike any
4 standalone drugs) would be protected by the No-Generics Restraints. To move over to TAF-based
5 FDCs, Gilead took steps to: (1) make the TDF-based FDCs less desirable, and (2) ensure that
6 TAF standalone could or would not be used in conjunction with other standalone drugs in place of
7 a TAF-based FDC. For example:

- 8 • Gilead intentionally degraded the safety of one of its TDF-based FDCs,
9 commercially known as Stribild (*i.e.*, by keeping the strength of TDF at a certain
10 level when a lower level would produce fewer side effects), and further artificially
11 raised the price of the drug. *See generally* CAC ¶ 242 *et seq.*
- 12 • When Gilead released TAF standalone (after withholding it from the market from
13 about 2015-2016), Gilead labeled the drug as a treatment for chronic Hepatitis B
14 only (and not HIV as well)¹⁰ and further intentionally degraded the drug (*i.e.*, by
15 selling it at a strength that produced more side effects instead of a lower strength).
16 *See generally* CAC ¶ 250 *et seq.*

17 **II. PLAINTIFFS' CAUSES OF ACTION**

18 Based on, *inter alia*, the above allegations, Plaintiffs have asserted the following causes of
19 action:

- 20 (1) Conspiracy to monopolize in violation of §§ 1 and 2 of the Sherman Act (against all
21 Defendants and implicating all three categories of anticompetitive conduct). *See* 15
22 U.S.C. §§ 1-2.
- 23 (2) Conspiracy to monopolize in violation of state antitrust laws (against all Defendants
24 and implicating all three categories of anticompetitive conduct).
- 25 (3) Monopolization in violation of § 2 of the Sherman Act (against Gilead only and
26

27 ¹⁰ According to Plaintiffs, theoretically, doctors could prescribe TAF for an off-label use – *i.e.*, to
28 treat HIV. “But, in fact, substantial numbers of doctors will not do so. And federal law (21
C.F.R. § 202.1) makes it unlawful for a pharmaceutical manufacturer to actively encourage
doctors to prescribe the product for off-label use.” CAC ¶ 307.

1 implicating all three categories of anticompetitive conduct). *See id.* § 2.

2 (4) Monopolization in violation of state antitrust laws (against Gilead only and implicating
3 all three categories of anticompetitive conduct).

4 (5) Attempted monopolization in violation of § 2 of the Sherman Act (against Gilead only
5 and implicating all three categories of anticompetitive conduct). *See id.*

6 (6) Attempted monopolization in violation of state antitrust laws (against Gilead only and
7 implicating all three categories of anticompetitive conduct).

8 (7) Violation of state consumer protection laws (against all Defendants and implicating all
9 three categories of anticompetitive conduct).

10 (8) Conspiracy in violation of § 1 of the Sherman Act (against Gilead and Janssen only and
11 implicating the No-Generics Restraints only). *See id.* § 1.

12 (9) Conspiracy in violation of state antitrust laws (against Gilead and Janssen only and
13 implicating the No-Generics Restraints only).

14 (10) Conspiracy in violation of § 1 of the Sherman Act (against Gilead and Japan
15 Tobacco only and implicating the No-Generics Restraints only). *See id.*

16 (11) Conspiracy in violation of state antitrust laws (against Gilead and Japan Tobacco
17 only and implicating the No-Generics Restraints only).

18 (12) Conspiracy in violation of § 1 of the Sherman Act (against Gilead and BMS only
19 and implicating the No-Generics Restraints only).

20 (13) Conspiracy in violation of state antitrust laws (against Gilead and BMS only and
21 implicating the No-Generics Restraints only).

22 **III. LEGAL STANDARD**

23 Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include “a short and plain
24 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
25 complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil
26 Procedure 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss
27 after the Supreme Court’s decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic*
28 *Corp. v. Twombly*, 550 U.S. 544 (2007), a plaintiff’s “factual allegations [in the complaint] ‘must .

1 . . . suggest that the claim has at least a plausible chance of success.” *Levitt v. Yelp! Inc.*, 765 F.3d
 2 1123, 1135 (9th Cir. 2014). The court “accept[s] factual allegations in the complaint as true and
 3 construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St.*
 4 *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But “allegations in a
 5 complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient
 6 allegations of underlying facts to give fair notice and to enable the opposing party to defend itself
 7 effectively.” *Levitt*, 765 F.3d at 1135 (internal quotation marks omitted). “A claim has facial
 8 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 9 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The
 10 plausibility standard is not akin to a probability requirement, but it asks for more than a sheer
 11 possibility that a defendant has acted unlawfully.” *Id.* (internal quotation marks omitted).

12 IV. ANTITRUST CLAIMS BASED ON

13 OVERARCHING CONSPIRACY – COUNTS ONE AND TWO

14 In Counts One and Two of the CAC, Plaintiffs allege an overarching conspiracy involving
 15 all Defendants and implicating all three categories of anticompetitive conduct. Defendants move
 16 to dismiss the causes of action on the basis that Plaintiffs have failed to adequately allege all
 17 Defendants were involved in one overarching conspiracy. Defendants underscore that nowhere in
 18 the CAC do Plaintiffs suggest that there was any collective agreement among BMS, Japan
 19 Tobacco, and Janssen to assist Gilead. *See, e.g.*, BMS Mot. at 12-13 (asserting that “[n]ot a single
 20 factual allegation supports the theory that all defendants knowingly and willfully joined together”
 21 to assist Gilead in protecting its drugs from competition; adding that “Plaintiffs here allege only
 22 that Gilead over the course of a decade, entered into separate, bilateral agreements with BMS,
 23 Janssen, and Japan Tobacco”).

24 In response, Plaintiffs admit that BMS, Japan Tobacco, and Janssen were each acting
 25 separately, and not acting collectively, with Gilead. *See, e.g.*, Opp’n at 44 (asserting that “[e]ach
 26 of BMS, Janssen, and Japan Tobacco separately, not acting collectively, conspired with Gilead”).
 27 And consistent with this admission, Plaintiffs do not make any claim that, *e.g.*, BMS or Japan
 28 Tobacco could be held liable for the alleged conspiracy between Janssen and Gilead to restrain

1 trade in or monopolize the market for the Janssen/Gilead coformulated FDCs and their generic
2 equivalents.

3 Plaintiffs, however, do argue that there is a viable overarching conspiracy claim based on a
4 broader product market – *i.e.*, the market for cART drugs. *See* Opp’n at 42 (arguing that each
5 non-Gilead defendant conspired with Gilead to maintain its cART monopoly); *see also* CAC ¶¶
6 442, 451 (for Counts One and Two, referring to “monopoly power in the cART Market”). That is,
7 Plaintiffs contend that there was a conspiracy to restrain trade in or monopolize the market for
8 cART drugs; that each non-Gilead defendant knew of and contributed to that conspiracy by
9 separately conspiring with Gilead; and that each non-Gilead defendant is therefore liable for the
10 conspiracy “even if the defendant did not know all the conspirators [*i.e.*, the other non-Gilead
11 defendants], did not participate in the conspiracy from its beginning or participate in all its
12 enterprises, or otherwise know all its details.” *United States v. Grasso*, 724 F.3d 1077, 1086 (9th
13 Cir. 2013) (addressing criminal case involving conspiracy to defraud); *cf. United States v.*
14 *Friedman*, 593 F.2d 109, 117 (9th Cir. 1979) (in criminal case involving drug conspiracy, stating
15 that “[t]he standard for determining the existence of a single conspiracy is whether there was a
16 single overall agreement among the co-conspirators to perform various functions to carry out the
17 objectives of the conspiracy”; “the performance by a conspirator of separate and independent acts
18 in furtherance of the conspiracy is not inconsistent with the existence of a single overall
19 agreement”).

20 The Court dismisses Plaintiffs’ overarching conspiracy claim because, as discussed below,
21 Plaintiffs have not adequately alleged a cART product market. *See* Part VIII, *infra*. In addition,
22 Plaintiffs have failed to adequately allege that each non-Gilead defendant knew of its connection
23 to a conspiracy to restrain trade in or monopolize that broader product market (as opposed to the
24 narrower product markets consisting of each FDC coformulated by a non-Gilead defendant and
25 Gilead, and its generic equivalent).¹¹ *Cf. Grasso*, 724 F.3d at 1086 (9th Cir. 2013) (stating that,

26
27 ¹¹ Notably, Plaintiffs do not allege that a non-Gilead defendant got any benefit out of the
28 agreements that Gilead had with the other non-Gilead defendants. It is not obvious why
knowledge of a conspiracy should be inferred under these circumstances absent specific
supporting facts.

1 “[w]here the defendant has a connection (even if slight) to the conspiracy, the government must
 2 also show that the defendant’s connection to the conspiracy is knowledgeable; ‘that is, the
 3 government must prove beyond a reasonable doubt that the defendant knew of his connection to
 4 the charged conspiracy’” – *i.e.*, that “the defendant was aware of ‘the unlawful object toward
 5 which the agreement [was] directed’”). Plaintiffs have leave to amend.

6 **V. ANTITRUST CLAIMS BASED ON NO-GENERIC RESTRAINTS –**
 7 **COUNTS THREE THROUGH SIX AND COUNTS EIGHT THROUGH THIRTEEN**

8 In the remaining antitrust claims – Counts Three through Six and Counts Eight through
 9 Thirteen – Plaintiffs claim anticompetitive conduct based on one or more of the three categories
 10 identified above. Here, the Court addresses the first category of anticompetitive conduct, *i.e.*, the
 11 No-Generics Restraints contained in the agreements that Gilead entered into with the other
 12 defendants. As noted above, Plaintiffs maintain that they are not challenging Defendants’
 13 agreements to create FDCs (which are beneficial to individuals with HIV). Rather, Plaintiffs
 14 contest only the No-Generics Restraints in the agreements.

15 **A. Ancillary Restraints Doctrine**

16 According to Defendants, even if the agreements did contain No-Generics Restraints (as
 17 discussed below, not all defendants agree that there are, in fact, such restraints in the contracts at
 18 issue), the No-Generics Restraints are, effectively, per se valid under the ancillary restraints
 19 doctrine. The gist of Defendants’ ancillary restraints argument is that, where competitors enter
 20 into a joint venture (or other business collaboration), it is reasonable to have a provision barring
 21 members of the joint venture from competing with the joint venture – or else there would be no
 22 incentive to enter into the joint venture in the first place. In other words, here, where Gilead and
 23 another defendant entered into agreement to create an FDC made up of Gilead’s drugs and the
 24 other defendant’s drug, it was reasonable to include a provision that would keep the contracting
 25 parties from creating a competing FDC using generic versions of those drugs. Defendants
 26 underscore that this prevented competition only with respect to the *specific* FDC at issue; it would
 27 not bar the contracting parties from using their drugs in other ways, including as standalones or in
 28 combination with different drugs to create different FDCs.

1 In evaluating this argument, the Court begins with the principle that, as a general matter,
2 agreements between competitors – what are known as “horizontal agreements” – are suspect from
3 an antitrust perspective. *See Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1092 (6th Cir. 1996)
4 (stating that “‘horizontal’ restraints – that is, agreements among competitors at the same level of
5 the market structure – are particularly suspect because they typically serve no purpose other than
6 to stifle competition”); *cf. Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th
7 Cir. 2004) (noting that “horizontal agreements are generally more suspect than vertical
8 agreements”). That being said, not all horizontal agreements are antitrust violations. Joint
9 ventures or other business collaborations between competitors can actually be procompetitive –
10 offering to the market a product that could not otherwise be offered in the absence of the joint
11 undertaking.¹² *Cf. NCAA v. Board of Regents*, 468 U.S. 85, 102 (1984) (noting that “the NCAA
12 plays a vital role in enabling college football to preserve its character, and as a result enables a
13 product to be marketed which might otherwise be unavailable[;] [i]n performing this role, its
14 actions widen consumer choice – not only the choices available to sports fans but also those
15 available to athletes – and hence can be viewed as procompetitive”); *Addamax Corp. v. Open*
16 *Software Found, Inc.*, 152 F.3d 48, 52 (1st Cir. 1998) (noting that “[j]oint venture enterprises . . . ,
17 unless they amount to complete shams, are rarely susceptible to per se treatment”; in fact,
18 “[w]here the venture is producing a new product . . . there is patently a potential for a productive
19 contribution to the economy”).

20 Consistent with the above, the Supreme Court has held that the creation of a joint venture
21 is not deemed invalid per se but rather is evaluated under the rule of reason.¹³ *See Texaco Inc. v.*

22

23 ¹² Although the Court shall hereinafter refer to “joint ventures” only, it notes that it is not limiting
24 its discussion to joint ventures alone – *i.e.*, the ancillary restraints doctrine also has application to
25 other business forms or structures such as business collaborations. *See Texaco Inc. v. Dagher*, 547
26 U.S. 1, 7 (2006) (noting that the ancillary restraints doctrine “governs the validity of restrictions
27 imposed by a legitimate business collaboration, such as a business association or joint venture, on
28 nonventure activities”).

26 ¹³ Cases often address joint ventures in the context of § 1 of the Sherman Act since § 1 covers
27 agreements to restrain trade. There is no reason not to apply a similar analysis to § 2 claims for
28 conspiracy to monopolize as such claims require a showing of anticompetitive conduct.
Furthermore, the parties have not made any argument that the § 1 and § 2 conspiracy claims
should be treated differently in this regard.

1 *Dagher*, 547 U.S. 1, 6 n.1 (2006) (indicating that the creation of a joint venture can be
 2 anticompetitive; whether it is anticompetitive must be assessed “under the rule of reason”); *see*
 3 *also Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007) (stating that,
 4 under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding
 5 whether a restrictive practice should be prohibited as imposing an unreasonable restraint on
 6 competition”; in contrast, where the per se illegality rule applies, there is no “need to study the
 7 reasonableness of an individual restraint in light of the real market forces at work”). In contrast,
 8 where there is, in fact, a legitimate joint venture, and the only issue is whether specific conduct of
 9 the joint venture violates antitrust law, then a court must decide what mode of analysis to apply:
 10 the rule of per se illegality or the rule of reason. *See In re ATM Fee Antitrust Litig.*, 554 F. Supp.
 11 2d 1003, 1012 (N.D. Cal. 2008).

12 In their opposition, Plaintiffs contend that they are challenging to whether joint ventures
 13 were, in fact, created. That is, Plaintiffs assert that, as a factual matter, not all of the agreements at
 14 issue actually create joint ventures, and, at the very least, it is a factual question whether the joint
 15 ventures are legitimate – both of which thereby make dismissal at the 12(b)(6) phase of
 16 proceedings improper. For purposes of this order, the Court assumes the agreements constituted
 17 joint ventures and that the only issue for the Court to resolve is whether the specific conduct of the
 18 joint ventures – *i.e.*, the No-Generics Restraints – plausibly constitutes anticompetitive conduct.

19 Here, there is no dispute that Plaintiffs have adequately alleged that the No-Generics
 20 Restraints are *some* kind of restraint on trade. Plaintiffs have alleged that the non-Gilead
 21 defendants are not able to offer certain FDCs that compete with the joint venture FDCs – *i.e.*, the
 22 same FDCs except using generic versions of Gilead’s drugs after the patents on Gilead’s drugs
 23 expire. The only question is, as noted above, whether the restraints are valid or invalid under
 24 antitrust law.

25 In addressing this specific issue, the Court would ordinarily be confronted with the
 26 question of whether to apply the rule of per se illegality or instead the rule of reason. *See ATM*
 27 *Fee*, 554 F. Supp. 2d at 1010 (noting that “the decision of what mode of analysis to apply . . . is
 28 entirely a question of law for the Court,” although that legal question “might involve factual

1 disputes”); accord *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57,
 2 61 (1st Cir. 2004). Defendants argue, however, that the Court need not apply even the rule of
 3 reason because the No-Generics Restraints may, in effect, be deemed per se *valid* under the
 4 ancillary restraints doctrine. According to Defendants, under this doctrine, so long as a restraint
 5 supports or benefits the (legitimate) joint venture,¹⁴ then it is deemed per se valid under the
 6 Supreme Court’s decision in *Dagher*; the restraint is not even subject to a rule-of-reason analysis.
 7 Defendants rely on the following language from *Dagher*: “Under the [ancillary restraints]
 8 doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade,
 9 and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business
 10 association, and thus valid.” *Dagher*, 547 U.S. at 7.

11 The Court rejects Defendants’ argument. The above language, taken in isolation, might
 12 suggest that once a restriction supports or benefits the joint venture, it is deemed per se valid.
 13 However, as Plaintiffs point out, the context of *Dagher* must be taken into account. In *Dagher*,
 14 the plaintiffs simply claimed that a pricing policy of a joint venture was per se illegal; they did *not*

15
 16 ¹⁴ Lower courts have varied somewhat as to how they define “ancillary restraint.” See, e.g., *In re*
 17 *Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345-46 (3d Cir. 2010) (“Ancillary restraints are
 18 ‘those that are part of a larger endeavor whose success they promote.’”); *Schering-Plough Corp. v.*
 19 *FTC*, 402 F.3d 1056, 1072 (11th Cir. 2005) (“Ancillary restraints are generally permitted if they
 20 are ‘reasonably necessary’ toward the contract’s objective of utility and efficiency.”); *Sullivan v.*
 21 *NFL*, 34 F.3d 1091, 1102 (1st Cir. 1994) (“[A] ‘restraint’ that is ancillary to the functioning of . . .
 22 a joint activity [is] one that is required to make the joint activity more efficient”); *Rothery*
 23 *Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (“To be ancillary,
 24 . . . an agreement eliminating competition must be subordinate and collateral to a separate,
 25 legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it
 26 serves to make the main transaction more effective in accomplishing its purpose.”); *Polk Bros.,*
 27 *Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) (“[A]ncillary restraints . . .
 28 are part of a larger endeavor whose success they promote.”); *L.A. Mem’l Coliseum Comm’n v.*
Nat’l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984) (“[T]he ancillary restraints doctrine
 teaches that some agreements which restrain competition may be valid if they are ‘subordinate and
 collateral to another legitimate transaction and necessary to make that transaction effective.’”);
 see also *Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 339 (2d Cir. 2008)
 (Sotomayor, J., concurring) (“The [ancillary restraints] doctrine recognizes that a restraint that is
 unnecessary to achieve a joint venture’s efficiency-enhancing benefits may not be justified based
 on those benefits. Accordingly, a challenged restraint must have a reasonable procompetitive
 justification, related to the efficiency-enhancing purposes of the joint venture, before that restraint
 will be analyzed as part of the venture.”).

The Supreme Court has noted that “[t]he classic ‘ancillary’ restraint is an agreement by the
 seller of a business not to compete within the market.” *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*,
 485 U.S. 717, 729 n.3 (1988).

1 “put forth a rule of reason claim.” *Id.* at 7 n.2. Because they did not assert a rule-of-reason claim,
 2 a conclusion that the pricing policy was not per se illegal meant, by default, that it was valid. *See*
 3 *also id.* at 7 (“If [the joint venture’s] price unification policy is anticompetitive, then respondents
 4 should have challenged it pursuant to the rule of reason. But it would be inconsistent with this
 5 Court’s antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture
 6 as *per se* unlawful.”).

7 Moreover, the Court does not view *Dagher* as some kind of sea change that displaced the
 8 prior law – as articulated by both the Supreme Court and the lower courts – that the rule of reason
 9 applies to ancillary restraints. *See, e.g., Nat’l Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679,
 10 689 (1978) (stating that the rule of reason “has been regarded as a standard for testing the
 11 enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction,
 12 such as an employment contract or the sale of a going business”); *Addamax*, 152 F.3d at 52 (in a
 13 pre-*Dagher* case, stating that “conduct that is strictly ancillary to [the joint venture’s] productive
 14 effort . . . is evaluated under the rule of reason”); *Polk Bros.*, 776 F.2d at 188-89 (in a pre-*Dagher*
 15 case, stating that “[a] court must distinguish between ‘naked’ restraints, those in which the
 16 restriction on competition is unaccompanied by new production or products, and ‘ancillary’
 17 restraints, those that are part of a larger endeavor whose success they promote”; ancillary restraints
 18 are evaluated under the rule of reason); *L.A. Mem’l*, 726 F.2d at 1395 (in a pre-*Dagher* case,
 19 stating that “[t]he ancillary restraint must . . . be tested under the rule of reason, the relevance of
 20 ancillarity being it ‘increases the probability that the restraint will be found reasonable’”); *Aydin*
 21 *Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983) (in a pre-*Dagher* case, stating that “[t]he
 22 proper function of ancillarity in antitrust analysis ‘is to remove [in some instances] the per se label
 23 from restraints otherwise falling within the category’[;] [w]hether a restraint that does not fall
 24 within a per se category is ancillary to a valid agreement is relevant only in the sense that
 25 ancillarity increases the probability that the restraint will be found reasonable”). If the Supreme
 26 Court had intended to overturn both its and the lower courts’ approach to the ancillary restraints
 27 doctrine, *i.e.*, replacing the rule of reason with a per se valid rule, it would have made that ruling
 28 more clearly. Furthermore, post-*Dagher*, the Supreme Court has indicated that the rule of reason

1 continues to apply to ancillary restraints. *See Am. Needle v. NFL*, 560 U.S. 183, 203 (2010)
 2 (stating that, “[w]hen ‘restraints on competition are essential if the product is to be available at
 3 all,’ *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to
 4 the flexible Rule of Reason”); Areeda & Hovenkamp, *Antitrust Law* ¶ 1906 (noting that, in
 5 *American Needle, Inc.*, the Supreme Court applied the rule of reason in assessing a restraint in a
 6 license agreement that restricted NFL team members’ ability to license their own individually
 7 owned intellectual property separately). Similarly, lower courts have continued to apply the rule
 8 of reason to such restraints. This includes the Federal Circuit as reflected in its decision *Princo*
 9 *Corp. v. ITC*, 616 F.3d 1318 (Fed. Cir. 2010), a case on which Defendants heavily rely. *See id.* at
 10 1336 (stating that “[t]he ‘ancillary restraints’ that are often important to collaborative ventures,
 11 such as agreements between the collaborators not to compete against their joint venture, are also
 12 assessed under the rule of reason). *See also Major League Baseball*, 542 F.3d at 339 n.7
 13 (Sotomayor, J., concurring) (stating that “an ancillary restraint is not necessarily lawful[;] [i]ts
 14 competitive benefits and harms must still be weighed, as part of the joint venture, under a rule-of-
 15 reason analysis”).

16 Ultimately, the Court understands *Dagher* as the Sixth Circuit has – *i.e.*, with pre-*Dagher*
 17 law distinguishing between “naked” and “ancillary” restraints, and with *Dagher* adding a third
 18 category of restraint to the mix, namely, “restraints that are *core* to the joint venture’s efficiency
 19 enhancing purpose.” *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 724-
 20 25 (6th Cir. 2019) (emphasis added). Per *Dagher*, where a core restraint is at issue, the ancillary
 21 restraints doctrine is entirely inapplicable. *See Dagher*, 547 U.S. at 7-8 (“agree[ing] . . . that the
 22 ancillary restraints doctrine *has no application here*, where the business practice being challenged
 23 involves the core activity of the joint venture itself – namely, the pricing of the very goods
 24 produced and sold by [the joint venture]”) (emphasis added). The Sixth Circuit has indicated that
 25 core restraints are those that are “‘integral to the running of the joint venture’” whereas “[a]
 26 restraint is ancillary if it bears a reasonable relationship to the joint venture’s success.” *Med. Ctr.*,
 27 922 F.3d at 725. Defendants do not, in their papers, claim that the No-Generics Restraints are core
 28 restraints that fall outside the application of the ancillary restraints doctrine. Furthermore, even if

1 they had, the Court concludes that that position lacks merit.

2 In *Dagher*, the challenged pricing policy was a core restraint because it was required “in
3 order to make the venture work” and the restraint “did not impose any limitations on nonventure
4 activities” – *i.e.*, “setting a common price for commonly produced gasoline placed no limits on the
5 *separate* activities of the joint venturers.” Areeda & Hovenkamp, Antitrust Law ¶ 1906 (emphasis
6 added); *see also Dagher*, 547 U.S. at 7 (2006) (noting that the ancillary restraints doctrine
7 “governs the validity of restrictions imposed by a legitimate business collaboration, such as a
8 business association or joint venture, *on nonventure activities*” – activities outside of the joint
9 venture) (emphasis added).

10 The situation in the instant case is different. Plaintiffs have put at issue a restraint on
11 nonventure activities of the non-Gilead defendants – activities outside the joint production of their
12 FDCs. Furthermore, it is far from clear that the No-Generics Restraints were required to make the
13 joint ventures between Gilead and the non-Gilead defendants work. Whereas the pricing policy in
14 *Dagher* “was very likely unavoidable” because “once the [joint venture] was found to be lawful,
15 common pricing of a commonly produced product followed as a matter of course,” Areeda &
16 Hovenkamp, Antitrust Law ¶ 1906, the same cannot be said for the No-Generics Restraints
17 because they prevented the non-Gilead defendants from using generic versions of Gilead’s drugs
18 *even after the patents protecting those drugs expired*.

19 Accordingly, the Court denies Defendants’ motions to dismiss the antitrust claims based on
20 the ancillary restraints doctrine. The No-Generics Restraints are not *per se* legal. They are subject
21 to review under, at the very least, the rule of reason.

22 Because the Court rejects Defendants’ ancillary restraints *per se* argument, it now turns to
23 the specific agreements that Gilead entered into with BMS, Japan Tobacco, and Janssen.

24 B. Agreements with BMS

25 The Court first addresses the agreements between Gilead and BMS.

26 There are two agreements between Gilead and BMS:

- 27 (1) The Atripla Agreement (December 2004). Atripla is the commercial name for the FDC
28 that Gilead and BMS coformulated. Atripla is made of (1) TDF/FTC (Gilead’s drugs)

1 and (2) EFV (BMS's drug).

2 (2) The Evotaz Agreement (October 2011). Evotaz is the commercial name for another
3 FDC that Gilead and BMS coformulated. Evotaz is made up of (1) COBI (Gilead's
4 drug) and (2) ATV (BMS's drug).

5 1. Atripla Agreement

6 The Atripla Agreement was purportedly for the benefit of Gilead – *i.e.*, to protect its
7 vulnerable NRTIs. Gilead and BMS make several arguments as to why the Atripla Agreement
8 cannot plausibly be seen as anticompetitive.

9 First, Gilead and BMS assert that it makes no sense that they entered into the agreement to
10 protect Gilead's drugs (TDF, FTC, and TDF/FTC), because Gilead's drugs actually had longer
11 patent lives compared to BMS's drug (EFV). *See* BMS Reply at 1 (noting that “[t]he patents
12 covering the BMS components for Atripla expired before Gilead's, not after”) (emphasis omitted);
13 *see also* CAC ¶ 127 (alleging that “[t]he principal patents that protected BMS's EFV . . . were not
14 scheduled to expire until 2018”); CAC ¶ 96 (alleging that the patents for TDF would expire “by
15 their own terms” in January 2018; the patents for FTC in January 2021; and the patents for the
16 combination drug TDF/FTC in January 2024). Although this is technically true (at least for FTC
17 and TDF/FTC), Plaintiffs have alleged that Gilead expected to encounter generic competition to
18 TDF, FTC, and TDF/FTC “as early as 2009, 2011, and 2011, respectively, if generic
19 manufacturers successfully challenged the patents.” CAC ¶ 96.

20 Second, Gilead and BMS seem to argue that the Atripla Agreement does not actually
21 contain a No-Generics Restraint. But Plaintiffs have pointed to a provision in the agreement that
22 is plausibly a No-Generics Restraint. That provision is § 2.9(a) of the Atripla Agreement. It
23 provides in relevant part as follows:

24 For the avoidance of doubt, nothing in this Agreement . . . shall be
25 deemed to restrict or prohibit either Member Party or any of its
26 Affiliates from . . . developing, manufacturing and commercializing
27 combination products (**other than the Combination Product**) for
the treatment of HIV infection or otherwise, including, without
28 limitation, any product containing such Party's Single Agent
Product(s) and/or Double Agent Product.

Ostrander Decl., Ex. A (Atripla Agreement § 2.9(a)) (emphasis added). In other words, under §

1 2.9(a), both Gilead and BMS were free to make FDCs “other than the Combination Product,” and,
 2 according to Plaintiffs, “[t]he ‘Combination Product’ that the conspirators are prohibited from
 3 making outside their collaboration is a product comprising the pharmaceutical ingredients (brand
 4 *or generic*) TDF/FTC/EFV.” Opp’n at 30 (emphasis in original). “Combination Product” is not
 5 clearly defined in the agreement as brand or generic TDF/FTC/EFV. *See* Ostrander Decl., Ex. A
 6 (Atripla Agreement § 1.50) (emphasis added) (defining “Combination Product” as “the fixed-dose
 7 co-formulated product developed pursuant to this Agreement containing, as its only active
 8 pharmaceutical ingredients per single daily dose, 300 mg TDF, 200 mg FTC and 600 mg EFV”).
 9 However, to the extent “Combination Product” has any ambiguity, that ambiguity cannot be
 10 resolved at the 12(b)(6) phase of proceedings.

11 Third, Gilead and BMS argue that, even if § 2.9(a) is considered some kind of No-
 12 Generics Restraint, there are additional provisions in the Atripla Agreement that effectively
 13 temper the restraint and render it valid from an antitrust perspective. *See* BMS Reply at 2. In
 14 particular, Gilead and BMS point out:

- 15 • That the Atripla Agreement expressly contemplates that generic versions of the
 16 parties’ drugs will become available and that either party is allowed to terminate
 17 because of the availability of a generic version of the other party’s drug(s). *See*,
 18 *e.g.*, Ostrander Decl., Ex. A (Atripla Agreement § 14.5) (providing that “[e]ither
 19 Member Party (the ‘Continuing Member Party’) may terminate this Agreement by
 20 notice to the other member Party (the ‘Terminated Member Party’) in the event that
 21 there is the Launch in the Territory of at least one (1) Generic Version of all of the
 22 Single Agent Products (or the Double Agent Product¹⁵) of the Terminated
 23 Member Party (a ‘Generic Version Launch’) and the Continuing Member Party
 24 delivers notice of termination within thirty (30) days after the Generic Version
 25 Launch”).

26
 27 ¹⁵ “‘Single Agent Product’ shall mean each of Viread [TDF], Emtriva [FTC], and Sustiva [EFV].”
 28 Ostrander Decl., Ex. A (Atripla Agreement § 1.196). “‘Double Agent Product’ shall mean
 Truvada, the co-formulated product developed by Gilead containing, as its only active
 pharmaceutical ingredients, TDF and FTC.” Ostrander Decl., Ex. A (Atripla Agreement § 1.77).

- That, even if the No-Generics Restraint does not allow a party to create a competing FDC using generic versions of the other party’s drugs, a party is still allowed to create a competing FDC that is *comparable* in nature. *See* CAC ¶ 140 (alleging that the Atripla Agreement “prohibited BMS from making a *generic* version of Atripla when generic TDF and generic FTC became available, but did *not* prohibit BMS from making a *comparable* version comprising generic TDF, 3TC (instead of Gilead’s FTC), and EFV”) (emphasis in original).

While Gilead and BMS’s first point above is fair, the Court finds that there is nevertheless a factual question as to whether the specific No-Generics Restraint is anticompetitive under, at the very least, the rule of reason. As Plaintiffs point out, even though the Atripla Agreement has a termination provision, arguably, there was an incentive *not* to terminate because the terminating party would have to pay the terminated party royalty payments for three years. *See* CAC ¶ 124 (alleging that, “if BMS elected to terminate Gilead’s interest [because generic versions of both TDF and FTC were available], BMS would be required to pay a substantial penalty to Gilead, comprising three years of additional royalty payments, at declining percentages over the three years[;] [t]he purpose and effect of the penalty provision was to dissuade BMS from terminating Gilead’s participation in the joint venture even after its patents on TDF and/or FTC expired”); *see also* Ostrander Decl., Ex. A (Atripla Agreement § 14.6(b)(i)-(ii) (providing, *inter alia*, that “[t]he Continuing Member Party shall pay or cause the JV to pay to the Terminated Party” royalty payments).

Gilead and BMS question how much of an incentive there actually was because the termination provision in the Atripla Agreement was actually invoked – and by Gilead, not BMS (even though the agreement was supposedly to protect Gilead’s vulnerable drugs). *See* CAC ¶ 141 (alleging that “Gilead recently terminated BMS’s participation in the Atripla joint venture, triggering Gilead’s obligation to make the penalty payments described above”). Although this is a fair point, the Court still cannot say, at this early juncture in proceedings, that the No-Generics Restraint, as tempered by the termination provision, is valid as a matter of law. As alleged by Plaintiffs, the point of the Atripla Agreement was to protect Gilead’s drugs; thus, even if Gilead

1 ultimately decided to terminate because of a turn of events (*i.e.*, the TDF patents having longer
 2 lives than anticipated such that the EFV patents would expire first), that does not mean that there
 3 was not a substantial incentive on the part of BMS not to terminate.

4 As for the second point made by Gilead and BMS, here, it is a closer call. Plausibly, the
 5 No-Generics Restraint in the Atripla Agreement provided that the parties could not offer any FDC
 6 made up of brand or generic TDF, FTC, and EFV specifically. But the restraint did not prevent
 7 the parties from offering a *comparable* FDC. Accordingly, once the TDF patents were to expire
 8 (whether by their own terms or based on a successful challenge to them), BMS could sell an FDC
 9 made up of generic TDF, 3TC (a comparable to FTC), and EFV. And that is what seems to have
 10 happened. As Plaintiffs allege in the CAC, when generic TDF became available (in December
 11 2017), BMS licensed Mylan Pharmaceuticals to produce a comparable FDC that competed with
 12 Atripla – formulated with generic TDF, 3TC, and EFV. *See* CAC ¶ 140. Thus, the No-Generics
 13 Restraint did not restrict all competition after the patents on TDF expired. Nonetheless, it still is a
 14 factual question as to whether the restriction on generics alone (as opposed to comparables) had
 15 enough anticompetitive effects to be deemed an antitrust violation.

16 2. Evotaz Agreement

17 Gilead and BMS entered into the Evotaz Agreement some seven years after the Atripla
 18 Agreement. Plaintiffs maintain that, while the Atripla Agreement was designed to protect
 19 Gilead’s vulnerable drugs (TDF, FTC, and TDF/FTC), the Evotaz Agreement was designed to
 20 protect BMS’s vulnerable drug (ATV).¹⁶ Plaintiffs cite to the following provision as the No-
 21 Generics Restraint: “During the Term, without the prior written consent of BMS, (i) Gilead shall
 22 not . . . make, use, sell, [etc.] . . . in the Field in the Territory, the Combination Product (including
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 24
 25
 26

27 ¹⁶ As alleged by Plaintiffs, BMS expected generic competition for ATV as early as 2012, if
 28 generic manufacturers were successful in challenging the patents protecting the drug. *See* CAC ¶
 132. This date was earlier than the date that Gilead’s patents protecting COBI would expire (*i.e.*,
 2029). *See* CAC ¶ 133.

1 any Generic Combination Product).¹⁷ Ostrander Decl., Ex. C (Evotaz Agreement § 14.2(a)).¹⁸

2 Unlike the Atripla Agreement, which the parties expressly labeled a “Collaboration
3 Agreement,” the Evotaz Agreement was expressly characterized as a “License Agreement.”
4 According to Gilead and BMS, the Evotaz Agreement is, as a matter of law, a lawful agreement
5 because (1) a patent is a lawful monopoly and (2) the Evotaz Agreement simply reflects Gilead’s
6 right to grant to BMS an exclusive license to use the COBI patents in certain ways. *See* Ostrander
7 Decl., Ex. C (Evotaz Agreement § 8.1(a)) (providing that “Gilead hereby grants to BMS an
8 exclusive (even as to Gilead and its Affiliates and except as provided in Section 8.4), royalty-
9 bearing license . . . under the Gilead Technology” to develop and commercialize the Licensed
10 Combination Product (*i.e.*, COBI + ATV) and “not to Exploit the COBI API individually or in
11 combination with any other API other than in the Licensed Combination Product”). The
12 defendants cite to *Rail-Trailer Co. v. ACF Industries, Inc.*, 358 F.2d 15, 16-17 (7th Cir. 1966),
13 where the court stated:

14 [A] patentee may . . . grant an exclusive license for the manufacture
15 of the patented device, which license serves to exclude the patentee
16 himself from engaging in the manufacture of the device, and which
17 action, *without more*, does not constitute an illegal restraint of trade
or violation of the anti-trust laws. This is so because the restraint
arises from the patent grant and a lawful transfer of a part of the
rights to which that grant attached.

18 *Id.* at 16-17 (emphasis added).

19 Plaintiffs argue that the “without more” language is significant and that “exclusive licenses
20 cannot avoid antitrust scrutiny where they are used in anticompetitive ways.” *King Drug Co. of*
21 *Florence, Inc. v. SmithKline Beecham Corp.*, 791 F.3d 388, 393, 407 (3d Cir. 2015); *cf.* 35 U.S.C.

23 _____
24 ¹⁷ “‘Combination Product’ shall mean a fixed-dose co-formulated product in oral dosage form
containing, as its only APIs, [ATV] and COBI” Ex. C (Evotaz Agreement § 1.48).
25 “‘Generic Combination Product’ shall mean a generic version of the Combination Product that is
approved for marketing in the Field under an [ANDA]” Ex. C (Evotaz Agreement § 1.90).

26 ¹⁸ The Evotaz Agreement also contains a similar No-Generics Restraint that restricts BMS:
27 “During the Term, without the prior written consent of Gilead (i) BMS shall not . . . make, use,
sell, [etc.] . . . in the Field in the Territory, the Combination Product (including any Generic
28 Combination Product).” Ostrander Decl., Ex. C (Evotaz Agreement § 14.3(a)). However, for
purposes of the instant case, the relevant No-Generics Restraint is § 14.2(a) given Plaintiffs’
theory that the Evotaz Agreement was designed to protect BMS’s vulnerable drug.

1 § 209(a)(4) (providing that “[a] Federal agency may grant an exclusive or partially exclusive
2 license on a federally owned invention . . . only if . . . granting the license will not tend to
3 substantially lessen competition or create or maintain a violation of the Federal antitrust laws”).

4 For example, in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), two companies that
5 offered bar review courses were in competition with each other in Georgia.

6 In early 1980, they entered into an agreement that gave [the Georgia
7 company] an exclusive license to market [the Delaware company’s]
8 material in Georgia and to use its trade name The parties agreed
9 that [the Delaware company] would not compete with [the Georgia
10 company] in Georgia and that [the Georgia company] would not
11 compete with [the Delaware company] outside of Georgia.

12 *Id.* at 47. The Supreme Court held that “agreements between competitors to allocate territories to
13 minimize competition are illegal.” *Id.* at 49 (further stating that agreements “not to compete in the
14 other’s territories . . . are anticompetitive regardless of whether the parties split a market within
15 which both do business or whether they merely reserve one market for one and another for the
16 other”).

17 According to Plaintiffs, here, the exclusive license in the Evotaz Agreement has been also
18 been used in an anticompetitive way – *i.e.*, through the No-Generics Restraint that is contained in
19 the agreement. As noted above, the relevant No-Generics Restraint in the Evotaz Agreement
20 prohibited Gilead from making, using or selling the “Combination Product (including any Generic
21 Combination Product).” Ostrander Decl., Ex. C (Evotaz Agreement § 14.2(a)). In effect, Gilead
22 promised not to sell a competing FDC using generics even after the vulnerable ATV patents
23 expired. This would give BMS’s ATV extended protection even after the patents on the drug
24 would have expired.

25 Gilead and BMS suggest that this is necessarily a consequence of an exclusive license –
26 *i.e.*, with an *exclusive* license, the patent holder is not just giving someone else the right to use the
27 patent but also giving up the patent holder’s own right to use the patent (in effect, not to
28 “compete”). *Cf.* 35 U.S.C. § 271(d)(4) (providing that a patent owner is not guilty of patent
misuse because it has, *e.g.*, “refused to . . . use any rights to the patent”). But what patent law

1 permits (*i.e.*, exclusive licenses) is not dispositive of legality for antitrust purposes.¹⁹ A patent
2 license may be impermissibly anti-competitive.

3 For example, in *Actavis*, 570 U.S. at 136, the Supreme Court was asked to consider a
4 settlement in a patent infringement case where the patentee paid the alleged infringer instead of
5 the other way around – what is known as a reverse payment settlement agreement. More
6 specifically, the Supreme Court had to determine whether a reverse payment settlement agreement
7 “can sometimes unreasonably diminish competition in violation of antitrust laws.” *Id.* at 141.

8 During proceedings below, the Eleventh Circuit had held that

9 a reverse payment settlement agreement generally is “immune from
10 antitrust attack so long as its anticompetitive effects fall *within the*
11 *scope* of the exclusionary potential of the patent.” And since the
12 alleged infringer’s promise not to enter the patentee’s market
expired before the patent’s term ended, the Circuit found the
agreement legal and dismissed the FTC complaint.

13 *Id.* The Supreme Court rejected the proposition that, so long as the anticompetitive effects were
14 within the scope of the exclusionary potential of the patent, there could be no antitrust violation.

15 *See id.* at 147 (stating that, just because anticompetitive effects fall within the scope of the
16 exclusionary potential of the patent, that does not “immunize the agreement from antitrust
17 attack”); *see also King Drug*, 791 F.3d at 399 (noting that, “in *Actavis*, the Supreme Court rejected
18 the ‘scope of the patent’ test, a categorical rule that reverse payment patent settlements in the
19 Hatch-Waxman context were immune from antitrust scrutiny so long as the asserted
20 anticompetitive effects fell within the scope of the patent”). “[T]his Court has indicated that
21 patent and antitrust policies are *both* relevant in determining the ‘scope of the patent monopoly’ –
22 and consequently antitrust immunity – that is conferred by a patent.” *Actavis*, 570 U.S. at 147
23 (emphasis added); *see also id.* at 151 (discussing precedent and holding that these cases “seek to
24 accommodate patent and antitrust policies, finding challenged terms and conditions unlawful
25 unless patent law policy offsets the antitrust law policy strongly favoring competition”).

26 The Third Circuit’s decision in *King Drug* also illustrates that an exclusive license

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28 ¹⁹ Indeed, as noted above, Defendants have taken the position that what constitutes patent misuse
under patent law does not establish what is *per se* illegal under antitrust law.

1 permissible under patent law is not necessarily immune from scrutiny under antitrust law. In *King*
2 *Drug*, defendants were (1) GSK, the manufacturer of a brand drug (Lamictal), and (2) Teva, the
3 manufacturer of a generic version of that drug.

4 In earlier litigation, Teva had challenged the validity and
5 enforceability of GSK's patents on lamotrigine, Lamictal's active
6 ingredient. Teva was also the first to file an application with the
7 FDA alleging patent invalidity or nonenforceability and seeking
8 approval to produce generic lamotrigine tablets and chewable tablets
9 for markets alleged to be annually worth \$2 billion and \$50 million,
10 respectively. If the patent suit resulted in a judicial determination of
11 invalidity or nonenforceability – or a settlement incorporating such
12 terms – Teva would be statutorily entitled to a valuable 180-day
13 period of market exclusivity, during which time only it and GSK
14 could produce generic lamotrigine tablets. (The relevant statute
15 permits the brand to produce an “authorized generic” during the
16 exclusivity period.)

17 After the judge presiding over the patent litigation ruled the patent's
18 main claim invalid, GSK and Teva settled. They agreed Teva would
19 end its challenge to GSK's patent in exchange for early entry into
20 the \$50 million annual lamotrigine chewables market and GSK's
21 commitment not to produce its own, “authorized generic” version of
22 Lamictal tablets for the market alleged to be worth \$2 billion
23 annually.

24 *King Drug*, 791 F.3d at 393-94.²⁰ The plaintiffs in *King Drug* filed suit against both GSK and
25 Teva, asserting that the no authorized generics agreement (“no-AG agreement”) violated antitrust
26 law.

27 In response, GSK and Teva argued, *inter alia*, that the no-AG agreements “are in essence
28 ‘exclusive licenses’ and patent law expressly contemplates exclusive licenses.” *Id.* at 406. The
29 Third Circuit rejected the companies' position, stating as follows:

30 [T]he “right” defendants seek is not in fact a patentee's right to grant
31 licenses, exclusive or otherwise. Instead, it is a right to use valuable
32 licensing in such a way as to induce a patent challenger's delay. . . .
33 [In *Actavis*, where the Supreme Court held that reverse-payment
34 settlements can sometimes violate antitrust law], the patentee gave
35 the challenger a license to enter 65 months before patent expiration,
36 plus a reverse payment of “millions of dollars.” This reverse
37 payment was not immunized, of course, simply because of that
38 early-entry “license.” Similarly, the fact that a patent holder may
39 generally have the right to grant licenses, exclusive or not, does not

40 ²⁰ See also *In re Actos End Payor Antitrust Litig.*, No. 13-CV-9244 (RA), 2015 U.S. Dist. LEXIS
41 127748, at *15 (S.D.N.Y. Sept. 22, 2015) (noting that an authorized generic is one sold by the
42 brand or through a licensed third-party generic manufacturer).

1 mean it also has the right to give a challenger a license along with a
 2 promise not to produce an authorized generic – i.e., a promise not to
 3 compete – *in order to induce the challenger “to respect its patent
 4 and quit [the competitor’s] patent invalidity or noninfringement
 5 claim without any antitrust scrutiny.”* In the *Actavis* Court’s review,
 the question is not one of patent law, but of antitrust law, the latter
 of which invalidates “the improper use of [a patent] monopoly.”
 And as we read the Court’s opinion, even exclusive license cannot
 avoid antitrust scrutiny where they are used in anticompetitive ways.

6 *King Drug*, 791 F.3d at 406-07 (emphasis in original and added).

7 To be sure, *Actavis* and *King Drug* are not on all fours with the instant case. For example,
 8 in both *Actavis* and *King Drug*, the patent holder gave a license (on certain terms) to protect its
 9 own patents; here, Gilead (the patent holder) allegedly gave BMS a license to protect BMS (not
 10 Gilead itself) after the patent protections for the BMS drug expired. But there is no material
 11 distinction. In both situations, a patent right (*i.e.*, to give an exclusive license) has been used to
 12 restrain competition in an allegedly anticompetitive way. That is, Gilead agreed not to sell a
 13 competing FDC *even after the patents on BMS’s drugs expired*. The alleged restraint on trade is
 14 not Gilead’s giving BMS an exclusive license to make and use COBI + ATV; it is that Gilead is
 15 giving up the right to make COBI + ATV generic *even after the patents on ATV expire*. Such a
 16 restraint is not *per se* immune from review under rule of reason analysis simply because it is
 17 framed as an exclusive license.²¹

18 3. Summary

19 For the foregoing reasons, the Court denies Gilead and BMS’s motions to dismiss the
 20 antitrust claims based on the Atripla and Evotaz Agreements.

21 C. Agreement with Japan Tobacco

22 Gilead and Japan Tobacco entered into one agreement only. That agreement, dated March
 23 2015, is titled a “License Agreement” and concerns one of Japan Tobacco’s drugs, EVG (also
 24

25 _____
 26 ²¹ This is not to say that every exclusive license may be subject to antitrust scrutiny. In many
 27 cases, such as where a manufacturer grants an exclusive license to one distributor, the licensor
 28 does not ordinarily compete with the licensee. The license in that context facilitates competition.
 In contrast, here, the licensor would ordinarily compete in the same market as the licensee but
 agrees as part of the license to withdraw from competition; thus, arguably there is at least an
 cognizable restraint of trade. Such a restraint may nonetheless be lawful under, *e.g.*, rule of
 reason, but it is not automatically immune from scrutiny.

1 referred to as JTK-303 in the agreement). Gilead and Japan Tobacco entered into the agreement
 2 because “JT [had] developed a proprietary anti-viral compound designated as JTK-303 [*i.e.*,
 3 EVG], to be used in a product or products for the treatment of HIV” and “Gilead desire[d] to
 4 obtain the exclusive right to develop and commercialize, for itself and its Affiliates such
 5 formulations and dosages of [EVG] outside of Japan, and JT desire[d] to grant Gilead such rights.”
 6 Ostrander Decl., Ex. D (EVG Agreement, Recitals). Gilead eventually developed and
 7 commercialized two drugs containing EVG: (1) Stribild (combining EVG with Gilead’s drugs
 8 TDF, FTC, and COBI) and (2) Genvoya (combining EVG with Gilead’s drugs TAF, FTC, and
 9 COBI). As noted above, Gilead expected to face generic competition for TDF, FTC, and
 10 TDF/FTC in 2009, 2011, and 2011, respectively. The main patents protecting Japan Tobacco’s
 11 drug EVG are not scheduled to expire until 2026.²² See CAC ¶ 108.

12 Similar to above, Gilead and Japan Tobacco argue that the antitrust claims predicated on
 13 this agreement should be dismissed because the agreement simply conveys an exclusive license,
 14 which is permissible under patent law. Gilead and Japan Tobacco add that Plaintiffs have not
 15 even been able to point to any actual provision in the license agreement that is a No-Generics
 16 Restraint.²³

17 As discussed above, an exclusive license without more is not an antitrust violation, but an
 18 exclusive license may be used in anticompetitive ways. Here, the problem for Plaintiffs is that
 19 there is no indication that Gilead and Japan Tobacco agreed that the exclusive license would be
 20 used in an anticompetitive way. As Gilead and Japan Tobacco point out, the agreement between
 21 the companies did not contain an express provision containing a No-Generics Restraint. Plaintiffs
 22 contend that there is no dispute that the agreement implicitly barred Japan Tobacco from selling
 23 competing FDCs using generics. But *Twombly* and *Iqbal* require specific allegations plausibly

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 25 ²² Although Gilead’s COBI patents have a longer maximum patent life – until 2029 – Plaintiffs
 26 indicate that the inclusion of COBI in Stribild and Genvoya was not that significant because Japan
 27 Tobacco could have used an available substitute for COBI (*i.e.*, RTV or generic RTV) in a
 competing FDC. See, *e.g.*, CAC ¶ 112 (noting that generic RTV became available in March
 2018).

28 ²³ Gilead and Japan Tobacco raise additional arguments in their papers but, for the reasons
 discussed below, it is not necessary to address them.

1 suggesting a conspiracy (or anti-competitive agreement). *See Twombly*, 550 U.S. at 556-57
 2 (stating that, “[w]ithout more, parallel conduct does not suggest conspiracy”; at the pleading stage,
 3 there must be “allegations plausibly suggesting (not merely consistent with) agreement”); *Iqbal*,
 4 556 U.S. at 678 (stating that, “[w]here a complaint pleads facts that are ‘merely consistent with’ a
 5 defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement
 6 to relief””). Plaintiffs have failed to do so here.

7 Accordingly, the Court grants Gilead and Japan Tobacco’s motions to dismiss the antitrust
 8 claims based on the agreement between the two companies. The dismissal is with prejudice
 9 because Plaintiffs have not suggested that they could amend to cure this deficiency.

10 D. Agreements with Janssen

11 There are four agreements between Gilead and Janssen:

12 (1) The Complera Agreement (July 2009). Complera is the commercial name for the FDC
 13 that Gilead and Janssen coformulated. Complera is made of (1) TDF/FTC (Gilead’s
 14 drugs) and (2) RPV (Janssen’s drug).

15 (2) The Odefsey Agreement (December 2014). Odefsey is the commercial name for
 16 another FDC that Gilead and Janssen coformulated – essentially the successor FDC to
 17 Complera. Odefsey is made up of (1) *TAF* and FTC (Gilead’s drugs) and (2) RPV
 18 (Janssen’s drug).

19 (3) The Prezcobix Agreement (June 2011). Prezcobix is the commercial name for an FDC
 20 that Gilead and Janssen coformulated. Prezcobix is made up of: (1) COBI (Gilead’s
 21 drug) and (2) DRV (Janssen’s drug).

22 (4) The Symtuza Agreement (December 2014). Symtuza is the commercial name for
 23 another FDC that Gilead and Janssen coformulated – essentially the successor FDC to
 24 Prezcobix. Symtuza is made up of (1) *TAF*, FTC, and COBI (Gilead’s drugs) and (2)
 25 DRV (Janssen’s drug).

26 The No-Generics Restraints for the above agreements are found at: § 17.2 in the Complera
 27 Agreement and § 17.2.1 in the Odefsey Agreement, and § 14.2(a) in the Prezcobix Agreement and
 28 § 14.3.2 in the Symtuza Agreement. At least some of the No-Generics Restraints seem to bar not

1 only competing FDCs using generics but also comparable FDCs.²⁴

2 Plaintiffs have characterized the Complera and Odefsey Agreements as agreements
3 intended to protect Gilead’s vulnerable drugs (TDF and FTC), *see* CAC ¶¶ 96, 150 (alleging that
4 Janssen’s RPV patents are not scheduled to expire until 2019 to 2025 whereas the Gilead expected
5 to face generic competition for TDF and FTC in 2009 and 2011 if generic manufacturers
6 successfully challenged the patents protecting the drugs), whereas the Prezcobix and Symtuza
7 Agreements were agreements intended to protect Janssen’s vulnerable drug (DRV). *See* CAC ¶¶
8 133, 163 (alleging that Janssen expected generic competition for DRV as early as 2013, if generic
9 manufacturers were successful in challenging the patents protecting the drug; in contrast, Gilead’s
10 patents protecting COBI would not expire until 2029).

11 With respect to the above agreements, Gilead and Janssen have essentially made only the
12 ancillary restraints argument discussed above. Janssen also makes one additional argument –

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- 15 • Ostrander Decl., Ex. E (Complera Agreement § 17.2(a)) (“During the term of this
16 Agreement, without the prior written consent of Gilead (i) [Janssen] will not import, sell or
17 offer to sell . . . (A) the Combination Product other than pursuant to this Agreement, or (B)
18 any other combination product that is a Derivative Combination Product . . .”).
- 19 • Ostrander Decl., Ex. G (Odefsey Agreement § 17.2.1) (“Without the prior written consent
20 of Gilead: (i) Janssen shall not . . . make, have made, use, sell, have sold, offer for sale, or
21 import . . . (A) a Combination Product other than pursuant to this Agreement or (B) any
22 Other Combination Product . . .”); Ostrander Decl., Ex. G (Odefsey Agreement § 1.265)
23 (“‘Other Combination Product’ shall mean any fixed-dose, co-formulated combination
24 product (other than a Combination Product) in oral dosage form that contains, as its sole
25 APIs, all three (3) of (a) TAF or TDF, (b) FTC or 3TC, and (c) RPV.”).
- 26 • Ostrander Decl., Ex. F (Prezcobix Agreement § 14.2(a)) (“During the term of this
27 Agreement, without the prior written consent of [Janssen]: (i) Gilead shall not . . . make,
28 use, sell, have sold, offer for sale, or import . . . (A) the Combination Product, or (B) any
Other Combination Product . . .”).
- Ostrander Decl., Ex. H (Symtuza Agreement § 14.3.2) (“Without the prior written consent
of Janssen, . . . Gilead shall not . . . make, have made, use, sell, have sold, offer for sale, or
import . . . (A) the STR other than pursuant to this Agreement, (B) any Other STR, or (C)
any Other Restricted Product . . .”); Ostrander Decl., Ex. H (Symtuza Agreement § 1.299)
 (“‘Other STR’ shall mean any fixed-dose, co-formulated combination product in oral
dosage form (other than the STR) that contains, as its only four (4) APIs, (a) COBI or
RTV, (b) TAF or TDF, (c) FTC or 3TC and (d) DRV or a version of ATV sold by a Person
other than BMS or any of its Affiliates or third party distributors.”); Ostrander Decl., Ex. H
(Symtuza Agreement § 1.298) (“‘Other Restricted Product’ shall mean any fixed-dose, co-
formulated combination product in oral dosage form that contains, as its only three (3)
APIs, (a) DRV or a generic version of ATV and (b) any two of the following: (i) COBI or
RTV and (b) any two of the following: (i) COBI or RTV, (ii) TAF or TDF or (iii) FTC or
3TC.”).

1 namely, that Plaintiffs have improperly named as a defendant one of the Janssen entities, Johnson
2 & Johnson (“J&J”). According to Janssen, Plaintiffs have not adequately alleged that J&J was
3 involved in any conspiracy – indeed, J&J was not a party to any of the collaboration agreements
4 identified above. Although J&J is Janssen’s corporate parent, Janssen maintains that “a corporate
5 parent cannot be held liable merely because a Sherman Act claim has been asserted against its
6 subsidiary.” Janssen Mot. at 13.

7 In response, Plaintiffs argue that Janssen has glossed over the fact that Plaintiff has used
8 the term “Janssen” in the CAC to refer to both the parent and the subsidiary – thus, “both
9 defendants [parent J&J included] negotiated and abided by the No-Generics Restraints; both
10 defendants encouraged doctors to switch prescriptions to the FDCs insulated form generic
11 competition; and both defendants shared in the monopoly profits that the unlawful agreements
12 generated.” Opp’n at 35. Plaintiffs add that they have a factual basis for asserting that J&J was
13 involved in the conspiracy:

14 [First,] the Complera/Odefsey Agreement indicates that a Johnson &
15 Johnson “Executive” has a significant management and oversight
16 role with respect to Janssen and Gilead’s collaboration, including
17 patent matters and the development of marketing materials [citing,
18 *inter alia*, the Odefsey Agreement §§ 1.103 and 6.7.1.2]. [Second,]
19 [t]he agreement also requires the parties to send copies of all
20 collaboration-related reports and communications to Johnson &
21 Johnson’s General Counsel [citing the Odefsey Agreement § 20.2].
22 Finally, in a press release attached to the agreement, Johnson &
23 Johnson’s Worldwide Chairman for Pharmaceuticals extols the
24 company’s agreement with Gilead.

25 Opp’n at 36.

26 The Court agrees that Plaintiffs have a factual basis for alleging that J&J was involved. In
27 particular, § 6.7.1.2 of the Odefsey Agreement addresses marketing materials that Gilead shall
28 develop and propose to Janssen (the subsidiary). If the parties are unable to reach agreement, they
“may refer any disputed issues to the Executives for resolution pursuant to Section 20.6. If the
Executives are unable to reach agreement with respect thereto within the Executives Review
Period, Gilead shall have final decision-making authority with respect to such matter.” Ostrander
Decl., Ex. G (Odefsey Agreement § 6.7.1.2). “Executives” is defined in the agreement as follows:
“(a) in the case of Gilead, the President and Chief Operating Officer of Gilead Parent, and (b) in

1 the case of Janssen, a Worldwide Chairman of Janssen Parent’s pharmaceutical group.” Ostrander
 2 Decl., Ex. G (Odefsey Agreement § 1.103). Given the factual basis articulated by Plaintiffs, the
 3 Court does not dismiss at this time J&J from the proceedings. The Court cannot say, as a matter
 4 of law, that J&J did not play a role in the No-Generics Restraint scheme.

5 Accordingly, the Court denies Gilead and Janssen’s motions to dismiss the antitrust claims
 6 based on the No-Generics Restraints in the Complera, Odefsey, Prezcobix, and Symtuza
 7 Agreements.

8 With respect to the antitrust claims based on the No-Generics Restraints, the Court rejects
 9 Defendants’ ancillary restraints argument. However, the Court grants Gilead and Japan Tobacco’s
 10 motions to dismiss the antitrust claims based on the specific agreement entered into by these two
 11 companies.

12 E. Antitrust Injury

13 The final issue for the Court to address is whether the remaining claims against Gilead,
 14 BMS, and Janssen should be dismissed for failure to allege antitrust injury. “[A]ntitrust injury
 15 consists of four elements: ‘(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that
 16 flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws
 17 were intended to prevent.’” *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013). The main
 18 antitrust injury arguments are addressed below.

19 1. Standalone Components of FDC

20 Defendants argue first that Plaintiffs have failed to adequately allege any anticompetitive
 21 injury because, even if the joint venture members could not make a competing FDC using
 22 generics, nothing prevented patients from buying the standalone components to the FDCs (*i.e.*, a
 23 patient could buy generic TDF and/or FTC and then, separately, the other defendant’s drug). *See*,
 24 *e.g.*, Gilead Mot. at 21; BMS Mot. at 11-12. But even if a patient could buy the standalone
 25 components of the joint venture FDC, that does not necessarily mean that the No-Generics
 26 Restraint did or does not have any anticompetitive effects. Plaintiffs have alleged that doctors
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1 were likely to prescribe brand FDCs²⁵ and that individuals who were prescribed such FDCs could
 2 not get their prescriptions filled with generic standalone components: “[u]nder state drug-
 3 substitution laws, pharmacists receiving a prescription for [an] FDC cannot dispense [in its place]
 4 generic versions of the standalone component[.]” drugs, Opp’n at 3, because “[g]eneric versions of
 5 TDF and/or FTC are not AB-rated to, and therefore not automatically substitutable for, the TDF-
 6 based FDCs.” CAC ¶ 183. Furthermore, getting standalone components would be contrary to the
 7 whole point of an FDC – *i.e.*, to get better patient compliance. *See* CAC ¶ 63 (alleging that “[t]he
 8 need to use multiple drugs in cART regimens can be a barrier to patient compliance” and “[t]o
 9 reduce this possible burden, multiple antiretroviral drugs are often coformulated together into a
 10 single pill,” *i.e.*, FDC”).²⁶

11 2. Untainted Competitor

12 Second, Defendants argue that the antitrust injury claimed by Plaintiffs is too speculative.
 13 But a reasonable jury could infer that, absent the No-Generics Restraints, the other defendants
 14 would want to make competing FDCs once the generic versions of Gilead’s vulnerable drugs
 15 became available (*i.e.*, once the patents protecting the drugs expired); that would be in their own
 16 self-interest. *Cf. King Drug*, 791 F.3d at 405 (noting that, “[a]bsent a no-AG [authorized generics]
 17 promise, launching an authorized generic would seem to be economically rational for the brand
 18 [manufacturer]”). In this regard, it is notable that, when generic TDF became available in
 19 December 2017 (generic FTC will not become available until September 2020), BMS *did* come up
 20 with a competing FDC because its No-Generics Restraint with Gilead did not bar it from making a
 21 competing FDC that was *comparable* to the FDC covered by the joint venture agreement. *See*
 22 CAC ¶ 140 (alleging that, “[w]hen generic TDF became available, BMS licensed Mylan
 23 _____

24 ²⁵ As noted above, Plaintiffs suggest that Gilead was able to do this through use of “large sales
 25 forces that visit doctors’ offices and persuade them to prescribe” certain products. *See* CAC ¶
 368.

26 ²⁶ In its motion, BMS argues that “having to take two pills a day instead of one is not the type of
 27 interest protected by the antitrust laws, which concern quantifiable *economic* injury.” BMS Mot.
 28 at 12 (emphasis in original). But Plaintiffs are claiming an economic injury – the inability to
 purchase a competing FDC made up (at least in part) of generics. The reason why Plaintiffs want
 to buy the competing FDC (*e.g.*, for convenience) should not mean there is not an economic
 injury.

1 Pharmaceuticals to product [the] comparable version [to Atripla]” – *i.e.*, generic TDF, 3TC
 2 (instead of FTC), and EFV). Furthermore, Plaintiffs fairly make the point that, “if the conspirators
 3 were not likely to have marketed competing versions of the products, Defendants would have had
 4 no reason to include the No-Generics Restraint.” Opp’n at 36.

5 Defendants make one additional argument on antitrust injury – *i.e.*, that it is speculative for
 6 Plaintiffs to assert that untainted competitors in BMS, Japan Tobacco, and Janssen’s positions
 7 would actually have challenged Gilead’s patents prior to their expiration dates (*e.g.*, instead of
 8 waiting for the TDF patents to expire in December 2017). *See, e.g.*, CAC ¶¶ 114, 130, 158.
 9 Defendants’ contention is not without force. However, that asserted injury appears to be
 10 Plaintiffs’ alternative position on antitrust injury and thus, even if credited, would not result in
 11 dismissal. Plaintiffs, however, have leave to provide a more definite statement regarding this
 12 antitrust injury theory.

13 **VI. ANTITRUST CLAIMS BASED ON TEVA PATENT**
 14 **SETTLEMENT AGREEMENTS – COUNTS THREE THROUGH SIX AND**
 15 **COUNTS EIGHT THROUGH THIRTEEN**

16 In Counts Three through Six and Counts Eight through Thirteen, Plaintiffs also claim
 17 anticompetitive conduct based on patent settlement agreements between Gilead and Teva. As
 18 noted above, the agreements contained MFE and MFEP clauses, which are what allegedly induced
 19 Teva to delay its entry into the market.

20 The MFE provided that, if any second filer entered the market
 21 before the agreed-upon date, Teva’s entry date would be moved up
 22 accordingly. . . . The MFEP provided that Gilead would not grant a
 license for a second filer to enter the market any earlier than six
 weeks [in one case or six months in another] after Teva entered.

23 Opp’n at 8. Thus, according to Plaintiffs, the two clauses “insulated Teva from the . . . risk that
 24 one or more of the several subsequent filers lined up behind it would enter on or before the agreed-
 25 upon entry dates, either by succeeding in their own lawsuits or by using the leverage of their
 26 patent challenges to negotiate an entry date equal to or earlier than Teva’s licensed entry date.”
 27 Opp’n at 51.

28 As indicated above, Plaintiffs assert that the agreements are anticompetitive because (1)

1 Teva agreed to delay its entry into the market in exchange for being given MFE and MFEP
2 provisions and (2) the MFE and MFEP provisions also served as a “disincentive” for second filers
3 to try to enter the market before Teva.

4 In its motion to dismiss, Gilead argues first that MFEs and MFEPs are basically most-
5 favored nation (“MFN”) clauses, and it is not uncommon to find MFN clauses in settlement
6 agreements. While this may be true, it that does not mean MFN clauses are automatically free
7 from antitrust scrutiny, and Gilead concedes as much. *See* Gilead Mot. at 10 (arguing that, “at
8 most, . . . MFNs can be anticompetitive in rare circumstances”) (emphasis omitted). That a MFE
9 and/or MFEP is deserving of antitrust scrutiny – especially compared to other kinds of MFN
10 clauses – is underscored by the fact that the whole point of a MFE and/or MFEP is about *entry*,
11 *i.e.*, when competition is allowed into a market.

12 Gilead argues next that the MFE and MFEP at issue here are not enough to constitute
13 anticompetitive conduct because they are actually procompetitive in nature. Gilead focuses on the
14 MFE in particular: under the MFE, if a generic manufacturer obtains an earlier entry date than
15 Teva does (*e.g.*, by prevailing in a patent infringement lawsuit initiated by Gilead), then Teva gets
16 its entry date advanced; thus, that means *more* competition – *i.e.*, from both the generic
17 manufacturer and Teva. This argument is problematic for at least three reasons: (1) it addresses
18 only the MFE, and not the MFEP (which gives Teva a preferential entry date compared to other
19 generic manufacturers); (2) it ignores Plaintiffs’ theory that Teva agreed to a delayed entry date –
20 *i.e.*, a later date than it otherwise would have – because it was given, in exchange, the benefits
21 afforded by both the MFE and MFEP; and (3) it ignores Plaintiffs’ theory that the MFE/MFEP
22 combination deterred second filers from trying to get an earlier entry date.

23 To the extent Gilead relies on the Supreme Court’s *Actavis* decision, *Actavis* does not hold
24 that an early entry date (relative to the patent expiration date) is *automatically* procompetitive. In
25 *Actavis*, the Supreme Court simply acknowledged that, as a general matter, “settlement on terms
26 permitting the patent challenger to enter the market before the patent expires would also bring
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1 about competition, again to the consumer’s benefit.” *Actavis*, 570 U.S. at 154.²⁷ To the extent the
2 New York district court in *Actos* suggested otherwise, *see Actos*, 2015 U.S. Dist. LEXIS 127748,
3 at *45 (addressing a MFE which the court denominated an “acceleration clause”; stating that, “[a]t
4 their core, the settlements at issue simply granted the Generic Defendants a compromise date of
5 generic entry – the very type of settlement sanctioned by the *Actavis* Court”), the Court is not
6 persuaded. Furthermore, the *Actos* court acknowledged that “another case may present
7 circumstances” where it would be plausible that a MFE could deter a second filer from
8 challenging a patent because, even if the second filer won, “it would be deprived of any period of
9 market exclusivity” because the first filer could “also enter the market immediately thereafter.”
10 *Id.* at *48-49. The *Actos* court simply held that, in the case before it, a deterrent effect was not
11 plausible. *See id.* at *49 (noting, *inter alia*, that, even after the patent holder and certain generic
12 manufacturers settled, another generic manufacturer continued to challenge the patent at issue).
13 Finally, the court in *In re Loestrin 24 Fe Antitrust Litigation*, 261 F. Supp. 3d 307 (D.R.I. 2017),
14 did in fact hold that a plaintiff had plausibly alleged anticompetitive effects from a MFE. *See id.*
15 at 333-34 (taking note of plaintiff’s allegations that, “with the acceleration clause in place, other
16 generics did not have the opportunity, and thus the incentive to try, to enter the market before
17 Watson’s scheduled entry”; adding that “[i]t may be that with more factual and expert discovery,
18 the . . . Defendants can establish that there were no anticompetitive effects, or that . . . the
19 ‘challenged payment was justified by some precompetitive objective[,]’ [b]ut at this juncture, the
20 Court is not prepared to hold that an acceleration clause like the one [here] may never be
21 cognizable as a component of a complex settlement agreement amounting to a large and
22 unjustified reverse payment”).

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25 ²⁷ As noted above, the *Actavis* Court ultimately held that a reverse payment settlement agreement
26 could be anticompetitive in nature, even if the alleged infringer simply made the promise not to
27 enter the patentee’s market before the patent term ended. *See Actavis*, 570 U.S. at 141.

28 The Court notes that, although there appears to have been a MFE in *Actavis*, the MFE was
not substantively discussed in the opinion. *See id.* at 145 (noting that “Actavis [the generic
manufacturer] agreed that it would not bring its generic to market until August 31, 65 months
[more than 5 years] before Solvay’s patent expired (unless someone else marketed a generic
sooner”).

1 Gilead protests still that the MFE and/or MFEP cannot be deemed anticompetitive when
2 they do not represent “reverse payments” (from Gilead to Teva) in the first place; more
3 specifically, they do not represent payments at all because “[Teva] received no compensation from
4 [Gilead], but rather, [was] compensated only through the market when [it] began selling [its]
5 generic product.” *Actos*, 2015 U.S. Dist. LEXIS 127748, at *48. It is true that the MFE and/or
6 MFEP may not be a “payment” from Gilead to Teva in the sense that cash was not being taken out
7 of Gilead’s pocket and being given to Teva – or even in the sense that Gilead was giving up a
8 benefit that it otherwise would have had for Teva’s benefit. *See, e.g., King Drug*, 791 F.3d at 404-
9 05 (stating that “no-AG [authorized generic] agreements are likely to present the same types of
10 problems as reverse payments of cash” – *e.g.*, they “may be of great monetary value [to] the first-
11 filing generic [manufacturer]” and “a brand[] [manufacturer’s] commitment not to produce an
12 authorized generic means that it must give up the valuable right to capture profits”).

13 But *Actavis* did not preclude a patent settlement agreement from being anticompetitive in
14 the absence of a reverse payment *if there were other circumstances* that posed potential anti-
15 competitive concern. *See Actavis*, 570 U.S. at 158 (suggesting that patent litigation could be
16 settled “by allowing the generic manufacturer to enter the patentee’s market prior to the patent
17 expiration, without the patentee paying the challenger to stay out prior to that point”). In the
18 instant case, Plaintiffs have pointed to indicators of anti-competitiveness. For instance, even
19 though Teva was allowed to enter the market prior to the patent expiration dates, the entry date
20 was, relatively speaking, quite late – *i.e.*, close in time to the patent expiration dates (in one case,
21 only six weeks before the patent expiration date and, in the other case, only a year before the
22 patent expiration date). Thus, this gives rise to a concern that Teva was induced to accept a late
23 entry date (*i.e.*, giving up the right to pursue its challenge to the patent and earlier entry) in return
24 for a significant benefit – even if that benefit did not come at Gilead’s expense.

25 Another yellow flag is with respect to the MFEP clause specifically. The MFEP clause, in
26 effect, gave Teva exclusivity for a period time (six weeks in one case and six months in another),
27 but Plaintiffs have alleged that, “in the case of Truvada [TDF/FTC] (and possibly Atripla as well),
28 . . . Teva had [already] forfeited” the 180-day ANDA Exclusivity “by filing to gain timely

1 tentative approval from the FDA.” Opp’n at 51. Thus, the MFEP clause was essentially
 2 “resurrect[ing]” ANDA Exclusivity or at least some kind of exclusivity where it no longer applied.
 3 Opp’n at 51. Resurrection of exclusivity could arguably be a significant deterrent to second
 4 filers.²⁸

5 The Court acknowledges that the antitrust claims here would arguably be a closer call if
 6 the Court was dealing with just a MFE clause and not, in addition, a MFEP clause. A MFE clause
 7 is not as clear a deterrent to a second filer (as compared to a first filer) because a second filer is
 8 simply prevented from doing better than the first filer but is nevertheless guaranteed *equality*
 9 (although Plaintiffs argue that it is a factual question as to whether a MFE is enough of a
 10 deterrent). *See, e.g.*, Opp’n at 52 (noting that a former executive of Apotex, “one of the largest
 11 generic manufacturers in the world,” testified before Congress that MFEs are “‘poison pill’
 12 provisions” and “represent ‘the primary anticompetitive aspects of settlements’ insofar as they
 13 ‘eliminate any incentive for a subsequent filer to continue to litigate for earlier market entry’”). In
 14 contrast, a MFEP clause guarantees a second filer that it will be in a *worse* position compared to
 15 the first filer even where there is no ANDA Exclusivity. Since the instant case presents a situation
 16 where there is both a MFE and a MFEP, it is different from those cited by Gilead, and the Court
 17 need not address the question of whether a MFE by itself can constitute anticompetitive conduct.

18 Accordingly, for the antitrust claims based on the MFE and MFEP clauses, Gilead’s
 19 motion to dismiss is denied.²⁹

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 23 ²⁸ As noted above, a “first-filing generic manufacturer is guaranteed [the ANDA] exclusivity
 24 period [of 180 days] even if it settles litigation with a patent owner without resolving the invalidity
 25 or noninfringement issues” – which serves as a disincentive for a second filer to press a patent
 challenge – *AIDS Healthcare*, 2016 U.S. Dist. LEXIS 87578, at *4-5, but resurrection of ANDA
 Exclusivity is a different matter.

26 ²⁹ Gilead suggests that the antitrust claims are predicated on Plaintiffs’ position that the patents
 27 protecting TDF, FTC, and/or TDF/FTC are weak, but there are no factual allegations to explain
 28 why the patents are weak. *See* Gilead Mot. at 30-31. While this argument is not without some
 merit, it is reasonable to infer that there were problems with the patents as Teva and the multiple
 other generic manufacturers levied patent challenges. This is not a matter that can be determined
 as a matter of law at this juncture.

1 **VII. ANTITRUST CLAIMS BASED ON GILEAD’S COMMERCIALIZATION**
 2 **OF TAF – COUNTS THREE THROUGH SIX AND**
 3 **COUNTS EIGHT THROUGH THIRTEEN**

4 Finally, in Counts Three through Six and Counts Eight through Thirteen, Plaintiffs claim
 5 anticompetitive conduct based on the way that Gilead commercialized TAF. As indicated above,
 6 Plaintiffs assert that Gilead commercialized TAF in a particular manner with the goal of moving
 7 over prescriptions from TDF-based FDCs to TAF-based FDCs because the FDCs (unlike any
 8 standalone drugs) would be protected by the No-Generics Restraints. According to Plaintiffs, to
 9 move over to TAF-based FDCs, Gilead took steps to make the TDF-based FDCs less desirable
 10 and further took purposeful steps to ensure that TAF standalone could or would not be used in
 11 conjunction with other standalone drugs in place of a TAF-based FDC. For example:

- 12 • Gilead intentionally degraded the safety of one of its TDF-based FDCs,
 13 commercially known as Stribild (*i.e.*, by keeping the strength of TDF at a certain
 14 level when a lower level would produce fewer side effects), and further artificially
 15 raised the price of the drug. *See generally* CAC ¶ 242 *et seq.*
- 16 • Gilead withheld standalone TAF from the market in or about the time period from
 17 2015-2016 and then, when it released TAF standalone, labeled the drug as a
 18 treatment for chronic Hepatitis B only (and not HIV as well) and further
 19 intentionally degraded the drug (*i.e.*, by selling it at a strength that produced more
 20 side effects instead of a lower strength). *See generally* Opp’n at 47; CAC ¶ 250 *et*
 21 *seq.*

22 Gilead argues that the antitrust claims based on the commercialization of TAF should be
 23 dismissed because the same or similar types of claims were already dismissed in a case before
 24 Judge Alsup, *i.e.*, *AIDS Healthcare*, 2016 U.S. Dist. LEXIS 87578. Because Gilead’s argument
 25 largely depends on *AIDS Healthcare*, the Court briefly discusses the case below.

26 In *AIDS Healthcare*, the plaintiff brought a § 1 tying claim and a § 2 monopolization
 27 claim, both related to TAF. In the tying claim, the plaintiff alleged that “Gilead entered into
 28 agreements with Janssen and Japan Tobacco to tie sales of TAF to sales of [the other companies’]

1 respective drugs by combining them into [FDCs].” *Id.* at *19. Judge Alsup noted that one
 2 element of a tying claim is that there be “two distinct products . . . in different markets whose
 3 sales are tied together.” *Id.* But here, TAF was not available as a standalone product as the FDA
 4 had not yet approved it. *See id.* at *20 (stating that “[t]he extent of consumer demand for
 5 standalone TAF is irrelevant because TAF *cannot* be sold as a standalone product as a matter of
 6 law”). Judge Alsup added that Gilead “had no duty to pursue FDA approval of the standalone
 7 version. To hold otherwise would require manufacturers to seek approval of each component of
 8 the drug before seeking approval of the combination drug. This could entirely undermine the
 9 FDA’s policy of encouraging the development of combination drugs.” *Id.* at *21.

10 As for the § 2 claim, there, the plaintiff alleged that “Gilead improperly bundled TAF”
 11 with Janssen and Japan Tobacco’s drugs to make certain FDCs

12 as a means of maintaining its dominance in the TAF market.
 13 Specifically, it alleges that by bundling TAF with the other
 14 ingredients, it insulated the allegedly weak patents covering TAF
 15 from challenges, because any generic manufacturer seeking to
 produce a TAF product would need to invalidate all the patents [for
 the drugs making up the FDCs] before it could win FDA approval,
 rather than just the TAF patents.

16 *Id.* at *22-23. Judge Alsup dismissed the § 2 claim for several reasons. One of the reasons was
 17 that the plaintiff had failed to allege any anticompetitive conduct. Judge Alsup acknowledged that
 18 Gilead had chosen to release TAF as part of a FDC before seeking approval for TAF as a
 19 standalone; but,

20 “[a]s a general rule, any firm, even a monopolist . . . [,] may bring its
 21 products to market whenever and however it chooses.” *Foremost*
Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 545 (9th Cir.
 22 1983). There is no legal basis for concluding that Gilead had a *duty*
 to release TAF as a standalone product. *See Allied Orthopedic*, 592
 23 F.3d at 1002 (“[A] monopolist has no duty to help its competitors
 survive or expand when introducing an improved product design.”).

24 *Id.* at *23-24 (emphasis added).

25 The above language from *AIDS Healthcare* lends some support to Gilead’s position that it
 26 was free to withhold TAF as well as free to shape the product as it saw fit. But, as indicated
 27 above, Plaintiffs’ antitrust claims here are not based on what Gilead did with TAF *alone*; they are
 28 also based on what Gilead did with TDF (*i.e.*, intentionally degrading Stribild and artificially

1 raising its price).

2 Putting aside that point, Judge Alsup’s concern in *AIDS Healthcare* seemed to be that
3 Gilead should have been free to decide how to market TAF – *i.e.*, it was not unreasonable for
4 Gilead to market the drug as part of a FDC first and put off selling the drug as a standalone. But
5 here Plaintiffs are not just alleging that TAF standalone was put off for some time; rather,
6 Plaintiffs are alleging that there was a deliberate choice to withhold TAF in order to get consumers
7 to move over from TDF-based products to TAF-based products and to do so in a particular
8 manner. Plaintiffs allege that, when TAF standalone was eventually released, it was in too high a
9 strength, and it was not given with an indication that it could be used for treatment of HIV.

10 Finally, the Court notes that the following language from *AIDS Healthcare* – “[a]s a
11 general rule, any firm, even a monopolist . . . [,] may bring its products to market whenever and
12 however it chooses,” *id.* – comes from a Ninth Circuit opinion *Foremost*. *Foremost*, in turn, took
13 this language from another Ninth Circuit case, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d
14 263 (2d Cir. 1979). In *Berkey*, the court immediately followed the statement above with the
15 following footnote:

16 This is not to say, of course, that new product introductions are *Ipso*
17 *facto* immune from antitrust scrutiny, and we do not agree with
18 Kodak’s argument that they are, *See, e. g., Sargent-Welch Scientific*
19 *Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *Cert. denied*,
439 U.S. 822 (1978) (use of power over old product to promote sale
of new); in all such cases, however, *it is not the product introduction*
itself, but some associated conduct, that supplies the violation.

20 *Id.* at 286 n.30 (emphasis added).

21 That statement in *Berkey* is consistent with later Ninth Circuit law, including *Allied*
22 *Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991 (9th Cir. 2010). In
23 *Allied*, the Ninth Circuit noted that § 2 law does not condemn the success of a monopolist where it
24 is based on invention and innovation. *See id.* at 998. Thus, “[a]s a general rule, courts are
25 properly very skeptical about claims that competition has been harmed by a dominant firm’s
26 product design changes.” *Id.* But, the court added, “changes in product design are not immune
27 from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a
28 monopoly under Section 2.” *Id.* Thus, for example, when Microsoft integrated its web browser

1 into its operating system, an antitrust violation was found, particularly as Microsoft gave no
 2 procompetitive justification for that conduct. *See id.* The *Allied Orthopedic* court added that,
 3 where a design change does “improve[] a product by providing a new benefit to consumers,” it
 4 “does not violate Section 2 *absent* some associated anticompetitive conduct.” *Id.* at 998-99
 5 (emphasis added); *see also id.* at 999-1000 (noting that “*CalComp* and *Foremost* . . . stand for the
 6 uncontroversial proposition that product improvement *by itself* does not violate Section 2, even if
 7 it is performed by a monopolist and harms competitors as a result”) (emphasis added).

8 With respect to the instant case, Plaintiffs are not contesting per se Gilead’s introduction of
 9 the TAF-based FDCs – *i.e.*, the product introduction, improvement, and/or innovation. Rather,
 10 Plaintiffs are challenging Gilead’s purposeful conduct – namely, moving consumers over to the
 11 TAF-based FDC (instead of letting the superiority of the products drive that change). For this
 12 conduct, Plaintiffs have a plausible argument that there is no procompetitive justification for the
 13 action. For instance, what purpose is served by Gilead degrading Stribild and/or standalone TAF?
 14 What purpose is served by Gilead not putting a HIV indication on TAF? Whether this was an
 15 unlawful restraint cannot be determined on this motion to dismiss.

16 The Court therefore denies Gilead’s motion to dismiss the antitrust claims based on the
 17 commercialization of TAF.

18 **VIII. ALL ANTITRUST CLAIMS – RELEVANT MARKET AND MARKET POWER**

19 Generally speaking, all of Plaintiffs’ antitrust claims (whether based on an unreasonable
 20 restraint of trade under § 1 or monopolization under § 2, and whether based on federal or state
 21 law) require the definition of a product market. *See, e.g., Big Bear Lodging Ass’n v. Snow Summit,*
 22 *Inc.*, 182 F.3d 1096, 1104-05 (9th Cir. 1999) (“Except when alleging a *per se* antitrust violation,
 23 Plaintiffs must identify the relevant geographic and product markets in which Plaintiffs and
 24 Defendants compete and allege facts demonstrating that Defendants’ conduct has an
 25 anticompetitive effect on those markets. Market definition is also essential to establish a
 26 monopolization claim.”).³⁰

27 _____
 28 ³⁰ As indicated above, if the Court were to find per se illegality under § 1, then Plaintiffs would
 not need to worry about market definition. But at this juncture of the proceedings, the Court has

1 A product market “encompass[es] the product at issue as well as all economic substitutes
2 for the product.” *Newcal Indus. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008). “The
3 outer boundaries of a product market are determined by the reasonable interchangeability of use *or*
4 the cross-elasticity of demand between the product itself and substitutes for it.” *Id.* (emphasis
5 added). “Elasticity of demand is a concept used to signify the relationship between changes in
6 price and responsive changes in demand.” *United States v. LSL Biotechnologies*, 379 F.3d 672,
7 697 (9th Cir. 2004); *see also Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 469 (1992)
8 (indicating that cross-elasticity of demand refers to “the extent to which consumers will change
9 their consumption of one product in response to a price change in another.”). In the instant case,
10 Plaintiffs have pointed to two product markets: (1) the broader market for cART drugs generally
11 and (2) the narrower market for each brand drug (standalone or FDC) and its AB-rated generic
12 equivalent. *See* CAC ¶ 376.

13 To the extent Defendants suggest it is not permissible for Plaintiffs to base their antitrust
14 claims on two different product markets, the Court does not agree. As both Plaintiffs and the FTC
15 explain in their respective briefs, what the appropriate product market is depends on what
16 anticompetitive harm is being claimed. *Cf. U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d
17 589, 598 (1st Cir. 1993) (indicating that one must “remember[] to ask, in defining the market, *why*
18 we are doing so: that is, what is the antitrust question in this case that market definition aims to
19 answer?”; adding that “the nature of the claim can affect the proper market definition”) (emphasis
20 added). Defining a product market is simply a way to determine whether a defendant has market
21 power. *See, e.g., Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001) (stating that “[o]ne
22 traditional way to demonstrate market power is by defining the relevant product market and
23 showing defendants’ percentage share of that market”); *Bhan v. NME Hosps., Inc.*, 669 F. Supp.
24 998, 1018 (E.D. Cal. 1987) (noting that, “[s]ince market power can only be measured in
25 relationship to a particular product market, the market definition bears directly upon the degree of
26 market power a firm has[;] [t]hus, to prove that a defendant has market power, the first crucial step
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28 _____
not made any conclusion as to whether the per se illegal rule applies.

1 is to establish the bounds of the relevant market”). Market power, in turn, is simply a way to
 2 assess whether the defendant’s conduct has anticompetitive effects. *See, e.g., Geneva Pharm.*
 3 *Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (in discussing § 2 claim, stating
 4 that “[e]valuating market power begins with defining the relevant market[;] [t]his inquiry will also
 5 prove useful for analyzing the § 1 allegations because a market definition provides the context
 6 against which to measure the competitive effects of an agreement”); *In re Aggrenox Antitrust*
 7 *Litig.*, 199 F. Supp. 3d 662, 668 (D. Conn. 2016) (stating that “articulating a relevant market
 8 definition is not an end in itself, but is in the service of answering the question of market power,
 9 which in turn ‘is but a surrogate for detrimental effects’”).

10 In the instant case, it is not unreasonable for Plaintiffs to have identified two different
 11 product markets because they have claimed harm to competition in two different ways. More
 12 specifically, Plaintiffs allege that (1) one “purpose and effect of Defendants’ unlawful conduct was
 13 to impair competition among drugs used in the cART regimen,” Opp’n at 65, and (2) another
 14 “purpose and effect of Defendants’ . . . unlawful conduct was to impair competition from generic
 15 versions of each of the brand name drugs at issue.” Opp’n at 63.

16 Defendants contend still that there are insufficient factual allegations to support each
 17 asserted product market. For the narrower market, the Court disagrees. For example, it is
 18 plausible each brand drug and its AB-rated generic version is not reasonably interchangeable with
 19 other drugs because, as Plaintiffs allege, “once the physician and patient find that one of these
 20 drugs is well tolerated, at competitive prices the doctor and patient are very unlikely to switch to a
 21 different HIV drug based on variations of price of 10% or less.” CAC ¶ 364; *see also* CAC ¶ 181
 22 (alleging that “pharmaceuticals are ‘experience’ goods that consumers and physicians are hesitant
 23 to change if they are working”). Plaintiffs also suggest that there is not reasonable
 24 interchangeability because each brand drug (and its AB-rated generic version), compared to other
 25 drugs, has “varying ability to treat the conditions for which it is prescribed” and a different “side-
 26 effects profile.” CAC ¶ 363.

27 However, Defendants’ position has merit on the broader market. That is, it is not clear
 28 from the CAC what exactly the cART product market is. Although the Court understands from

1 the CAC that cART stands for combination antiretroviral therapy, that it is the modern means of
 2 treating HIV, and that it often consists of two NRTIs and a third agent, Plaintiffs have not
 3 explained, *e.g.*, how there is reasonable interchangeability of use with respect to different cART
 4 drugs.³¹

5 Because the Court concludes that Plaintiffs have not adequately alleged a cART market, it
 6 does not address Defendants' contention that the broader and narrower product markets contradict
 7 one another. However, the Court does note that, under Ninth Circuit law, "it is legally permissible
 8 to premise antitrust allegations on a submarket." *Newcal*, 513 F.3d at 1045.

9 In sum, because Plaintiffs have not adequately alleged a cART market, its antitrust claims
 10 based on that market (as opposed to the narrower market for each brand drug) are dismissed but
 11 with leave to amend.

12 **IX. STATE LAW CLAIMS – ANTITRUST AND CONSUMER PROTECTION –**
 13 **COUNTS TWO, FOUR, SIX, SEVEN, NINE, ELEVEN, AND THIRTEEN**

14 As noted above, Plaintiffs bring two kinds of state law claims: state antitrust claims and
 15 state consumer protection claims. With respect to the state antitrust claims, Defendants argue that
 16 their arguments on the federal antitrust claims are also applicable. Defendants also make several
 17 other independent arguments in favor of dismissal of the state law claims, whether based on
 18 antitrust law or consumer protection law. Because most of these independent arguments are
 19 expressly made by Gilead, the Court largely refers to Gilead hereinafter.

20 A. Antitrust and Consumer Protection Claims: Application of California Law to Nationwide
 21 Purchases

22 For the most part, Plaintiffs claim violation of a particular state's law (whether antitrust or
 23 consumer protection) based on a purchase made in that state. The one exception is with respect to
 24 California law. Plaintiffs maintain that California law can apply to purchases made anywhere in
 25 the nation because Gilead is based in California. In its motion to dismiss, Gilead argues that it is a
 26 violation of due process to apply California law (antitrust or consumer protection) nationwide.

27 _____
 28 ³¹ For instance, which cART drugs are included and which are not? Is that market limited to those
 which contain a Gilead product or does it extend to all cART drugs?

1 As an initial matter, Plaintiffs suggest that the Court should not rule on this issue in the
 2 context of a 12(b)(6) motion; rather, Plaintiffs assert, the issue should be reserved for class
 3 certification. *See, e.g., Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 928 (N.D. Cal. 2013)
 4 (Gonzalez-Rogers, J.) (“find[ing] that the choice of law determination in this case is better suited
 5 for the class certification stage because the record with respect to balancing the competing states’
 6 interests is not sufficiently developed”); *Khoa Nguyen v. Barnes & Noble, Inc.*, No. SACV 12-
 7 812-JLS (RNBx), 2015 U.S. Dist. LEXIS 187099, at *11 (C.D. Cal. Nov. 23, 2015) (noting that,
 8 “[a]lthough there is some disagreement, most courts in this circuit hold that a claim should not be
 9 dismissed on a conflict of law analysis at the pleading stage, especially ‘when dealing with a
 10 potential nationwide class action’”; therefore, “declin[ing] to engage in a choice of law analysis
 11 based solely on the pleadings”); *Andriesian v. Cosmetic Dermatology, Inc.*, No. 3:14-cv-01600-
 12 ST, 2015 U.S. Dist. LEXIS 50502, at *28 (D. Or. Mar. 3, 2015) (citing cases in support of the
 13 proposition that “a case should not be dismissed based on a conflict of law analysis prior to class
 14 certification” – *i.e.*, a choice-of-law analysis at the pleading phase is “‘premature’”). But
 15 Plaintiffs’ position seems problematic, especially as the cases on which they rely hold that it is
 16 premature to make a choice-of-law decision prior to class certification. Here, Gilead is not really
 17 asking the Court to make a choice-of-law decision per se. Rather, Gilead is asking the Court to
 18 make a due process determination – *i.e.*, even though Plaintiffs claim that California law can be
 19 applied to purchases made outside the state (“extraterritorial” purchases), would application of
 20 California law violate Gilead’s due process rights?³²

21 The Court therefore addresses the due process argument now, leaving for another day the
 22 issue of whether California law is the correct choice of law. As to the due process argument, the
 23 parties essentially agree that the governing authority is *Phillips Petroleum Co. v. Shutts*, 472 U.S.
 24 797 (1985). There, the defendant was an oil company that produced or purchased natural gas from
 25 leased land located in eleven different states, and that sold most of the gas in interstate commerce.
 26 The plaintiffs were the royalty owners possessing rights to the leases from which the defendant

27
 28 ³² To be sure, it may be argued that Gilead is asserting choice of law dressed up as a due process
 claim. But as noted herein, case law has established a distinct due process analytical framework.

1 produced gas. *See id.* at 799. The plaintiffs brought a class action against the defendant in Kansas
2 state court, “seeking to recover interest on royalty payments which had been delayed by [the
3 defendant.” *Id.* The trial court certified a class action under Kansas law. *See id.* at 801. The final
4 certified class “contained 28,100 members” of which “[l]ess than 1,000 . . . resided in Kansas. [In
5 addition,] [o]nly a miniscule amount, approximately one quarter of one percent, of the gas leases
6 involved in the lawsuit were on Kansas land.” *Id.* at 801.

7 One of the issues before the Supreme Court was whether it was appropriate to apply
8 Kansas law to all of the class members’ claims. *See id.* at 802 (noting argument that “Kansas
9 courts could not apply Kansas law to every claim in the dispute”); *see also id.* at 814-15 (noting
10 that “[t]he Kansas courts applied Kansas contract law and Kansas equity law to every claim in this
11 case, notwithstanding that over 99% of the gas leases and some 97% of the plaintiffs in the case
12 had no apparent connection to the State of Kansas except for this lawsuit”). According to the
13 defendant, “total application of Kansas substantive law violated the constitutional limitations on
14 choice of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full
15 Faith and Credit Clause of Article IV, § 1.” *Id.* at 816.

16 The Supreme Court noted that it first had to “determine whether Kansas law conflicts in
17 any material way with any other law which could apply. There can be no injury in applying
18 Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.” *Id.*
19 Because there were at least some conflicts, the Court then asked whether Kansas had ““a
20 significant contact or significant aggregation of contacts’ to the claims asserted by each member of
21 the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of Kansas
22 law is not arbitrary or unfair.” *Id.* at 821-22. It concluded that, “[g]iven Kansas’ lack of ‘interest’
23 in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we
24 conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and
25 unfair as to exceed constitutional limits.” *Id.* at 822.

26 Accordingly, under *Phillips*,

27 the law of any particular state may not be applied to a nationwide
28 class unless (1) the chosen state’s law does not conflict with the law
of another jurisdiction that has an interest in the case, and (2) the

1 chosen state has a significant contact or significant aggregation of
 2 contacts to claims asserted by each member of the plaintiff class
 such that the choice of that state's law is not arbitrary or unfair.

3 *In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1073 (N.D. Cal. 2015) (Donato, J.).

4 1. Conflict Between California Law and Law of Other States

5 According to Gilead, there is, in fact, a conflict between California law and the laws of
 6 other states. More specifically, Gilead argues that, under California antitrust law, indirect
 7 purchasers may obtain damages but, under the laws of at least five states/jurisdictions whose laws
 8 have been implicated by the CAC, the opposite is true. *See* Gilead Mot. at 47-48 (citing Illinois,
 9 Puerto Rico, Rhode Island, Utah, and Maryland antitrust law³³); *see also* *Capacitors Antitrust*, 106
 10 F. Supp. 3d at 1073-74 (“find[ing] [a] potential conflict” because ““some states allow their citizens
 11 to sue for antitrust injuries as indirect purchasers (like California) and some do not””).³⁴

12 Whether the antitrust law of the five states/jurisdictions at issue bar indirect purchasers
 13 from getting damages is addressed below. *See* Part IX.D, *infra*.

14 For the time being, however, the Court notes that Gilead has pointed to a conflict in
 15 *antitrust* law only, and not to any conflict in *consumer protection* law. In its motion to dismiss,
 16 Gilead does suggest that Plaintiffs cannot avoid the rule of no damages for indirect purchasers by
 17 recasting their state antitrust claims as state consumer protection claims. *See* Gilead Mot. at 37.
 18 However, in making this argument, Gilead addresses the laws of nine states/jurisdictions – of
 19 which only four overlap with the states/jurisdictions identified above (*i.e.*, Illinois, Puerto Rico,
 20 Rhode Island, and Utah).

21 Accordingly, at most, Gilead has pointed to a conflict with the antitrust laws of five
 22 states/jurisdictions and a conflict with the consumer protection laws of four states/jurisdictions.

23 2. Significant Contacts with California

24 If there are no conflicts between California antitrust or consumer protection law and the
 25

26 ³³ Gilead also discusses Massachusetts law but based on a consumer protection statute, not
 27 antitrust law.

28 ³⁴ There is no dispute that, under federal antitrust law, indirect purchasers are not entitled to
 damages. *See generally* *Ill. Brick Co. v. Ill.*, 431 U.S. 720 (1977).

1 laws of other states/jurisdictions, then California law can be applied on a nationwide scale – *i.e.*, to
2 purchases made in other states – without there being a due process problem.

3 If, however, there are conflicts, that does not mean that California law cannot apply.
4 Rather, under *Phillips*, the question is whether California has a significant contact, or significant
5 aggregation of contacts, to the claims asserted by each member of the plaintiff class; if so, there is
6 no due process concern. In the instant case, Plaintiffs argue that there are significant contacts with
7 California because Gilead is “headquartered in-state and the challenged conduct occurred within
8 the state.” *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531, 538 (N.D. Cal. 2009) (Alsup,
9 J.). That is, at least a part of the challenged conduct (whether based on the No-Generics
10 Restraints, the Teva patent settlement agreements, or the commercialization of TAF) occurred
11 within the state because Gilead’s decisionmaking emanated from California.

12 Plaintiffs’ position has merit. And although Gilead does have arguments to the contrary,
13 they are not convincing. For example, Gilead argues that “the focus of the analysis is on the nexus
14 between plaintiffs’ claims and California, *not* defendants’ contacts.” Gilead Reply at 17
15 (emphasis in original). This is only partly true. It is correct that the Court must evaluate whether
16 Plaintiffs’ claims have a significant contact with California, but that does not mean that Gilead’s
17 contacts are thereby irrelevant. Plaintiffs’ claims are based on wrongdoing committed by Gilead.
18 Thus, where Gilead committed the wrongdoing is clearly significant. This case differs from
19 *Phillips*.

20 The Ninth Circuit confirmed as much in *AT&T Mobility LLC v. AU Optronics Corp.*, 707
21 F.3d 1106 (9th Cir. 2013). There, the court held that

22 anticompétitive conduct by a defendant within a state that is related
23 to a plaintiff’s alleged injuries and is not “slight and casual”
24 establishes a “significant aggregation of contacts, creating state
25 interests, such that choice of its law is neither arbitrary nor
26 fundamentally unfair.” Specifically, we hold in this case that
27 [California’s] Cartwright Act can be lawfully applied without
28 violating a defendant’s due process rights when more than a *de*
minimis amount of that defendant’s alleged conspiratorial activity
leading to the sale of price-fixed goods to plaintiffs took place in
California. Such a defendant cannot reasonably complain that the
application of California law is arbitrary or unfair when its alleged
conspiracy took place, at least in part, in California.

1 *Id.* at 1113; *see also id.* at 1111-12 (criticizing the district court for “mak[ing] a single contact –
2 the location of Plaintiffs’ injury – dispositive”; “the relevant ‘occurrence or transaction’ in this
3 case includes not only the sale of price-fixed goods, but Defendants’ alleged agreements and
4 conspiracies to fix LCD prices”).

5 Admittedly, Gilead has cited some authority in support of its position, but that authority
6 was issued before *AT&T*, is not binding, and is not persuasive. For instance, in *In re Relafen*
7 *Antitrust Litigation*, 221 F.R.D. 260 (D. Mass. 2004), the district court declined to apply
8 Pennsylvania law to a nationwide class even though the company producing the drug was
9 headquartered in the state and the product was sold and distributed from the state. Its rationale
10 was that

11 the primary aim of antitrust and consumer protection laws generally
12 – and those of indirect purchaser states particularly – is
13 compensating consumers, not policing corporate conduct.
14 Accordingly, the Court considers the more significant contact in this
15 context to be the location of the injury – that is, the location of the
16 sales to the end payor plaintiffs.

17 *Id.* at 277. But even if the district court was correct in elevating injury to the end payor over the
18 policing of corporate conduct, that does not mean that the policing of corporate conduct is not an
19 important part of antitrust and consumer protection law – such that the location of the corporate
20 conduct could not be a significant contact for purposes of due process analysis.

21 Gilead also relies on *In re Graphics Processing Units Antitrust Litigation*, 527 F. Supp. 2d
22 1011 (N.D. Cal. 2007) (hereinafter “*GPU*”), another decision that pre-dates *AT&T*. There, Judge
23 Alsup held that there was no significant contact with California based on the specific allegations in
24 the complaint. The plaintiffs in *GPU* had alleged that “secret meetings between defendants’
25 representatives took place in California,” that one defendant is “headquartered in California,” and
26 that another defendant had “at least some business operations . . . in California.” *Id.* at 1028.
27 According to Judge Alsup, these allegations were insufficient to establish significant contacts
28 because “plaintiffs have never alleged the specific locations of any of the meetings between
defendants” and one of the defendants “is organized in Canada and has its headquarters there.” *Id.*
Arguably, Judge Alsup’s conclusion is problematic; it seems a fair inference that at least a fair

1 amount of the alleged conspiracy between the defendants (*e.g.*, to fix prices) took place in
 2 California given that one defendant was based in the state and thus decisionmaking emanated from
 3 there. But, in any event, *GPU* is distinguishable from the instant case because, even if two of
 4 Plaintiffs’ theories turn on Gilead’s actions with other companies (*i.e.*, the claims based on the No-
 5 Generics Restraints and the Teva patent settlement agreements), one theory (*i.e.*, the claims based
 6 on the commercialization of TAF) does not.

7 Accordingly, the Court holds that it would not be a due process violation for California law
 8 to apply nationwide, *i.e.*, to purchases made outside the state. This ruling, however, is not
 9 dispositive of whether California law should in fact be the choice of law. The Court leaves that
 10 decision for another day, *see AT&T*, 707 F.3d at 1113 (noting that “the Due Process Clause does
 11 nothing but circumscribe the universe of state laws that can be constitutionally applied to a given
 12 case, [and so] we ‘need not . . . balance the competing interests of California and [other states]’[;]
 13 [o]bjections based on the interests of other states are more properly raised under a choice of law
 14 analysis”) – especially since the main authority on which Plaintiffs rely, *In re Qualcomm Antitrust*
 15 *Litig.*, 328 F.R.D. 280 (N.D. Cal. 2018) (Koh, J.), is currently on appeal. *See id.* at 312
 16 (conducting a choice-of-law analysis and concluding that California law – which permits damages
 17 for indirect purchasers – could apply to a nationwide class of consumers “because other states do
 18 not have an interest in barring their own citizens from recovering damages for a California-based
 19 corporation’s anticompetitive conduct that took place almost entirely in California”).

20 B. Antitrust and Consumer Protection Claims: Standing for 25 States/Jurisdictions

21 According to Gilead, Plaintiffs’ state law claims implicate the laws of 36 different states;
 22 however, they have alleged that purchases were made in only 11 of those 36 states. “No purchase
 23 by any Plaintiff is alleged in the other 25 states.” Gilead Mot. at 35. Gilead contends that,
 24 because Plaintiffs have not alleged purchases made in those 25 states, they lack standing to bring
 25 state law claims based on the laws of those 25 states. In response, Plaintiffs argue that any
 26 standing issue is, in effect, more appropriately addressed at the class certification stage, rather than
 27 the 12(b)(6) stage.

28 Plaintiffs have the better argument. This Court recently addressed the same basic issue in

1 *In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Products Liability Litigation*, 295
 2 F. Supp. 3d 927 (N.D. Cal. 2018) (hereinafter, “FCA”). In *FCA*, the Court explained that, in 2015,
 3 it held in a different case (*In re Carrier IQ, Inc. Consumer Privacy Litigation*, 78 F. Supp. 3d 1051
 4 (N.D. Cal. 2015)), that it had discretion as to whether to defer questions of standing until class
 5 certification; however, just a few months later, the Ninth Circuit decided *Melendres v. Arpaio*, 784
 6 F.3d 1254 (9th Cir. 2015), holding that, once a named plaintiff demonstrates individual standing
 7 for a claim, the standing inquiry is satisfied and any issue regarding the relationship between the
 8 named plaintiff and the members of the putative class is relevant only to class certification, not
 9 standing. *See FCA*, 295 F. Supp. 3d at 954-55. This Court expressly found that *Melendres* was
 10 controlling, establishing a per se rule.

11 Gilead points out that the Court made an alternative holding in *FCA* – *i.e.*, “[e]ven if
 12 *Melendres* does not sweep so broadly as to impose a per se rule,” a court should exercise its
 13 discretion to address standing *before* class certification where the named plaintiffs have ties to
 14 only a limited number of states on whose laws they have sued. *Id.* at 956 (noting that, in *Carrier*
 15 *IQ*, “[t]he named plaintiffs came from 13 states, and there were no named plaintiffs from 35 other
 16 states,” whereas, in *FCA*, “the named Plaintiffs reside in or purchased or leased Class Vehicles in
 17 43 states, and there are no named Plaintiffs for only seven states and the District of Columbia”).
 18 However, this Court still found as an initial matter that *Melendres* was dispositive.

19 C. Antitrust and Consumer Protection Claims: Pre-Filing Requirement

20 Gilead argues that (1) the antitrust laws of Arizona, Hawaii, Nevada, and Utah and (2) the
 21 consumer protection laws of Alabama, Massachusetts, and West Virginia have pre-filing notice
 22 requirements that have not been met. *See* Gilead Mot. at 40.

- 23 • Ariz. Rev. Stat. § 44-1415(A): “A person filing a complaint . . . for any violation of
 24 the provisions of this article [the Antitrust Act] shall simultaneously with the filing
 25 of the pleading in the superior court or, in the case of pendent state law claims in
 26 the federal court, serve a copy of the complaint . . . on the attorney general.”
- 27 • Haw. Rev. Stat. § 480-13.3(a)(1): “A class action for claims for a violation of this
 28 chapter [monopolies and restraint of trade] other than claims for unfair or deceptive

1 acts or practices may be filed, and may be prosecuted on behalf of indirect
 2 purchasers by a person other than the attorney general as follows: (1) A filed copy
 3 of the complaint . . . shall be served on the attorney general not later than seven
 4 days after filing of the complaint.” *See also id.* § 480.13.3(a)(5)(B) (“If the State
 5 files its own action involving the same or similar claim or claims set forth in the
 6 complaint filed by the proposed class representative, then the complaint filed by the
 7 proposed class representative shall be dismissed.”).

- 8 • Nev. Rev. Stat. § 598A.210(3): “Any person commencing an action for any
 9 violation of the provisions of this chapter shall, simultaneously with the filing of
 10 the complaint with the court, mail a copy of the complaint to the Attorney
 11 General.”
- 12 • Utah Code Ann. § 76-10-3109(9): “The attorney general shall be notified by the
 13 plaintiff about the filing of any class action involving antitrust violations that
 14 includes plaintiffs from this state.”
- 15 • Ala. Code § 8-19-10(e): “At least 15 days prior to the filing of any action under this
 16 section [deceptive trade practices], a written demand for relief, identifying the
 17 claimant and reasonably describing the unfair or deceptive act or practice relied
 18 upon and the injury suffered, shall be communicated to any prospective respondent
 19 by placing in the United States mail or otherwise. Any person receiving such a
 20 demand for relief who, within 15 days of the delivering of the demand for relief,
 21 makes a written tender of settlement which is rejected by the claimant may, in any
 22 subsequent action, file the written tender and an affidavit concerning this rejection.
 23 If the court finds that the relief tendered was sufficient to compensate the petitioner
 24 for his or her actual damages, the court shall not award any additional damages or
 25 attorney’s fees or costs to the petitioner.”
- 26 • Mass. G.L. ch. 93A, § 9(3): “At least thirty days prior to the filing of any such
 27 action, a written demand for relief, identifying the claimant and reasonably
 28 describing the unfair or deceptive act or practice relied upon and the injury

1 suffered, shall be mailed or delivered to any prospective respondent. Any person
2 receiving such a demand for relief who, within thirty days of the mailing or
3 delivery of the demand for relief, makes a written tender of settlement which is
4 rejected by the claimant may, in any subsequent action, file the written tender and
5 an affidavit concerning its rejection and thereby limit any recovery to the relief
6 tendered if the court finds that the relief tendered was reasonable in relation to the
7 injury actually suffered by the petitioner.”

- 8 • W. Va. Code § 46A-6-106(c): “[N]o action . . . may be brought pursuant to the
9 provisions of this section [consumer protection] until the person has informed the
10 seller or lessor in writing and by certified mail, return receipt requested, of the
11 alleged violation and provided the seller or lessor twenty days from receipt of the
12 notice of violation but ten days in the case a cause of action has already been filed
13 to make a cure offer: Provided, That the person shall have ten days from receipt of
14 the cure offer to accept the cure offer or it is deemed refused and withdrawn.”

15 In response, Plaintiffs maintain that they “are not required to plead compliance with [the
16 notice] requirements to state a claim under the relevant statutes.” Opp’n at 80. Plaintiffs add that,
17 in any event, “on May 14, 2019, Plaintiffs notified the attorneys general of Arizona, Hawaii,
18 Nevada, and Utah regarding the Complaint and the claims pursuant to the respective state antitrust
19 statutes.” Opp’n at 80; *see also* Goldstein Decl., Exs. P, Q, U, and W (letters to attorneys general
20 of Nevada, Hawaii, Arizona, and Utah). In addition, on May 14, 2019, “Plaintiffs notified
21 Defendants that the filed Complaint contained claims brought pursuant to the Massachusetts
22 Consumer Protection Act and the West Virginia Consumer Credit and Protection Act.” Opp’n at
23 80; Goldstein Decl., Exs. A-O (letters to Defendants). As for the only remaining state, Alabama,
24 Plaintiffs assert that no demand letter on Defendants was necessary because “that provision ‘shall
25 not apply if the prospective respondent does not maintain a place of business or does not keep
26 assets within the state.’” Opp’n at 80 (quoting Ala. Code § 8-19-10(e)).

27 Gilead does not challenge the above in its reply brief. Accordingly, the Court rejects
28 Gilead’s argument for dismissal based on the pre-filing notice requirements.

1 D. Antitrust and Consumer Protection Claims: *Illinois Brick* Rule

2 As indicated above, there is no dispute that, under federal antitrust law, indirect purchasers
3 are not entitled to damages. *See generally Ill. Brick Co.*, 431 U.S. at 720 (decided in 1977).
4 According to Gilead, several states/jurisdictions have the same or similar *Illinois Brick* rule,
5 barring indirect purchasers from getting damages.

6 1. Illinois Antitrust Act

7 Illinois’s Antitrust Act contains the following provision:

8 No provision of this Act shall deny any person who is an indirect
9 purchaser the right to sue for damages. Provided, however, that in
10 any case in which claims are asserted against a defendant by both
11 direct and indirect purchasers, the court shall take all steps necessary
12 to avoid duplicate liability for the same injury including transfer and
13 consolidation of all actions. *Provided further* that no person shall be
14 authorized to maintain a class action in any court of this State for
15 indirect purchasers asserting claims under this Act, with the sole
16 exception of this State’s Attorney General, who may maintain an
17 action *parens patriae* as provided in this subsection.

18 740 Ill. Comp. Stat. § 10/7 (emphasis added).

19 As reflected the language of the statute, an indirect purchaser *may* sue for damages for a
20 violation of the Illinois Antitrust Act – thus making Illinois an “*Illinois Brick* repealer state” for
21 purposes of state antitrust law – *except* that “no person shall be authorized to maintain a class
22 action in any court of this State for indirect purchasers asserting claims under this Act.” *Id.* Here,
23 Plaintiffs have brought a class action. Thus, Gilead argues that Plaintiffs – as indirect purchasers
24 – cannot assert any claim for damages.

25 “District courts are divided on whether the Illinois Antitrust Act precludes indirect
26 purchasers from filing class actions [in federal court].” *In re Effexor Antitrust Litig.*, 357 F. Supp.
27 3d 363, 391 (D.N.J. 2018). *Compare, e.g., In re Opana Er Antritrust Litigation*, 162 F. Supp. 3d
28 704, 723 (N.D. Ill. 2016) (“dismiss[ing] with prejudice [the] indirect purchaser antitrust claim
brought under Illinois law”), *with In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 817-
18 (N.D. Ill. 2017) (refusing to dismiss “the Illinois antitrust claim on the basis of the Illinois[]
class action bar”).

It appears that the majority of cases are in line with *Opana*. *See Effexor*, 357 F. Supp. 3d

1 at 391. Representative of these cases is a decision issued by Judge Orrick in 2014.

2 The EPPs [end purchaser plaintiffs] contend that the Supreme Court
 3 decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*
 4 *Co.*, 559 U.S. 393, 396 (2010), holding that a New York law
 5 prohibiting class actions in suits seeking penalties or statutory
 6 minimum damages did not prevent a federal district court sitting in
 7 diversity from entertaining a class action under Rule 23, allows the
 8 Illinois claim here. Oppo. 31-32. The *In re Wellbutrin XL Antitrust*
 9 *Litig.* Court [from the Eastern District of Pennsylvania], in a very
 10 detailed analysis, rejected that very argument explaining "The
 11 Illinois restrictions on indirect purchaser actions are intertwined
 12 with Illinois substantive rights and remedies because (1) the
 13 restrictions apply only to the IAA [Illinois Antitrust Act], (2) they
 14 are incorporated in the same statutory provision as the underlying
 15 right, not a separate procedural rule, and (3) the restrictions appear
 16 to reflect a policy judgment about managing the danger of
 17 duplicative recoveries. Because the indirect purchaser restrictions of
 18 the IAA are 'intertwined' with the underlying substantive right,
 19 application of Rule 23 would 'abridge, enlarge or modify' Illinois'
 20 substantive rights, and therefore Illinois' restrictions on indirect
 21 purchaser actions must be applied in federal court." *In re Wellbutrin*
 22 *XL Antitrust Litig.*, 756 F. Supp. 2d at 677. I agree with Judge
 23 McLaughlin's analysis, *especially as the no indirect purchaser class*
 24 *action rule was expressly adopted as an integral part of the Illinois*
 25 *Antitrust Act's repeal of Illinois Brick.* As such, I conclude that the
 26 Illinois antitrust claims must be DISMISSED with prejudice.

27 *United Food & Commer. Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v.*
 28 *Teikoku Pharma USA, Inc.*, 74 F. Supp. 3d 1052, 1084 (N.D. Cal. 2014) (emphasis added).

The rationale provided by courts who have reached the opposite conclusion is typically as follows:

The Court finds that *Shady Grove's* reasoning with respect to New York's class action ban is equally applicable to Illinois's requirement that class actions be brought by the Attorney General. It is true that the Seventh Circuit has noted that Illinois's decision to repeal *Illinois Brick* and allow indirect purchaser lawsuits "reflects different judgments about the feasibility of trying such claims and the potential danger of duplicative recoveries." *Ill., ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1480 (7th Cir.1991). And some district courts have identified this statement as an indication that the Seventh Circuit considers decisions about the "feasibility" of indirect purchaser suits to be a substantive, not procedural, issue. See *In re Opana ER Antritrust Litig.*, 162 F. Supp. 3d at 723 (citing *In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 677 (E.D. Pa. 2010)). Moreover, the *Illinois Brick* issue – whether indirect purchasers can bring suit at all, even individually – is certainly substantive in that it affects the "rights and remedies" of indirect purchasers. But whether such plaintiffs may bring a class action does not affect their substantive rights. The availability of the class action procedure does not change the

United States District Court
Northern District of California

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substantive rights or remedies available to them under Illinois law. See *In re Lithium Ion Batteries Antitrust Litig.*, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *21 (N.D. Cal. Oct. 2, 2014) [Gonzalez-Rogers, J.]; *In re Aggrenox Antitrust Litig.*, 2016 U.S. Dist. LEXIS 104647, 2016 WL 4204478, at *6 (D. Conn. Aug. 9, 2016).

Broiler Chicken Antitrust, 290 F. Supp. 3d at 817-18.

The Court finds Judge Orrick’s analysis in *United Food* more persuasive than the analysis in *Broiled Chicken Antitrust*. This is especially true given this Court’s take on *Shady Grove* as articulated in *In re MyFord Touch Consumer Litigation*, No. 13-cv-03072-EMC, 2016 U.S. Dist. LEXIS 179487 (N.D. Cal. Sep. 14, 2016). The Court noted as follows:

While the Ninth Circuit has not expressly recognized this, it has relied on Justice Stevens's concurrence for the proposition that "there are some state procedural rules that federal courts must apply in diversity cases because they function as part of the State's definition of the substantive rights and remedies." *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013). Under Justice Stevens's analysis, Rule 23 will not govern here if the Colorado and Virginia statutes are "procedural in the ordinary use of the term but [are] so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring)."

Id. at *77-78. Here, the Illinois prohibition on class actions is deeply intertwined with the rights under the *Illinois Brick* repealer.

Accordingly, the Court grants Gilead’s motion to dismiss on the Illinois Antitrust Act – more specifically, to the extent Plaintiffs seek damages as indirect purchasers for a violation of the state statute, such is not permissible.

2. Puerto Rico Antitrust Act

Title 10 of the Puerto Rico code deals with commerce, and Chapter 13 within that title deals with monopolies and restraint of trade. See generally 10 L.P.R.A. §§ 251-276. Unlike Illinois, Puerto Rico does not have an *Illinois Brick* repealer statute. Section 268 of the code simply provides: “Any person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, except § 259 and 261 of this title, may sue therefor” *Id.* § 268.

Similar to above, there is conflicting authority as to whether Puerto Rico allows for damages for indirect purchasers under Puerto Rico law.

1 For example, in *United Food*, Judge Orrick took note that, in *Rivera-Muniz v. Horizon*
 2 *Lines Inc.*, 737 F. Supp. 2d 57, 61 (D.P.R. 2010), a district court from Puerto Rico held that,
 3 “[b]ecause Puerto Rico liberally construes its standing requirements in private antitrust cases . . .
 4 it is immaterial whether Plaintiffs are direct or indirect purchasers of cabotage services.” *United*
 5 *Food*, 74 F. Supp. 3d at 1086 (quoting *Rivera-Muniz*). On the other hand, there were two
 6 decisions from the Northern District of California that favored the antitrust defendants.

7 In the first, *In re TFT-LCD Antitrust Litig.*, Case No. 07-mdl-1827
 8 SI, 599 F. Supp. 2d 1179 (N.D. Cal. 2009) the court dismissed the
 9 claims under Puerto Rico law because it was “reluctant to find
 10 standing in the absence of an explicit *Illinois Brick* repealer, either
 11 by statute or case law.” *Id.* at 1188. . . . In the second, *In re Static*
 12 *Random Access Memory (SRAM) Antitrust Litig.*, Case No. 07-mdl-
 13 01819 CW, 2010 U.S. Dist. LEXIS 131002, (N.D. Cal. Dec. 8,
 2010), the court dismissed the indirect purchaser claims because “IP
 Plaintiffs point to no authority that suggests that *Illinois Brick*'s
 interpretation of federal antitrust law would not be applied to Puerto
 Rico law” and because of the ruling in *In re TFT-LCD Antitrust*
Litig., 2010 U.S. Dist. LEXIS 131002.

14 *United Food*, 74 F. Supp. 3d at 1086-87. Finally, Judge Orrick acknowledged that, in a district
 15 court case from Massachusetts, the court considered each of the three cases identified above and
 16 held that “in light of the fact that Puerto Rico antitrust law has been interpreted in accordance
 17 with federal antitrust law, which does not allow claims from indirect purchasers following *Illinois*
 18 *Brick* – this Court dismisses the claims arising under the Puerto Rico law.” *Id.* at 1087 (quoting
 19 *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 410 (D. Mass. 2013)).

20 After surveying this authority, Judge Orrick ultimately came down on the side of the
 21 antitrust defendant, particularly because he did not find *Rivera-Muniz* persuasive.

22 I realize that the court in *Rivera-Muniz* first noted that the “[Puerto
 23 Rico Antitrust Act] is modeled after federal antitrust statutes” and
 24 then relied solely on *Pressure Vessels of P.R., Inc. v. Empire Gas de*
 25 *P.R.*, 137 P.R. Dec. 497, 509-18, 1994 Juris P.R. 144 (1994) as
 26 authority that Puerto Rico nevertheless “explicitly rejects” the
 27 indirect purchaser standing limitations imposed under the federal
 28 statutes. *Id.* at 737 F. Supp. 2d at 61. However, the *Pressure*
Vehicles court did not address the standing of indirect purchasers
 under the PRAA and did not discuss *Illinois Brick* or whether it had
 been repealed by Puerto Rico. Instead, the *Pressure Vehicles* court
 relied on cases recognizing the “liberal standing theory under
 Clayton Act sec. 4” and concluded that “plaintiff need not establish
 anything beyond a factual causal relation between the injury and the

1 violation to meet the" pleading requirements under the PRAA; "it
 2 suffices that the plaintiff has been injured as a result of the statutory
 violation." *Pressure Vessels of Puerto v. Empire Gas P.R.*, 137
 D.P.R. 497, 1994 Juris P.R. No. 144, 1994 WL 909547 (P.R. 1994).

3 Because neither *Rivera-Muniz* nor *Pressure Vehicles* addressed
 4 *Illinois Brick*, I agree with the weight of authority and find that the
 claims under Puerto Rico's statute must be DISMISSED with
 5 prejudice.

6 *Id.* at 1087; *see also In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-MD-2472-WES-PAS, 2019
 7 WL 5406077, at *7 (D.R.I. Oct. 17, 2019) (“join[ing] the majority of courts in concluding that the
 8 EPPs do not have standing to bring antitrust claims under Puerto Rico law”); *Opana*, 162 F. Supp.
 9 3d at 723 (finding *Rivera-Muniz* unpersuasive for similar reasons; stating that “[a]bsent an
 10 interpretation by the courts of Puerto Rico allowing antitrust recovery by indirect purchasers or an
 11 express *Illinois Brick* repealer statute enacted by the legislature, the Court concludes that EPPs’
 12 indirect purchaser antitrust claim is barred in Puerto Rico and must be dismissed with prejudice”);
 13 *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 251 (D. Conn. 2015) (noting that “*Pressure*
 14 *Vessels* did not address indirect-purchaser standing or the rule of *Illinois Brick*[,] [a]nd though I
 15 agree with the indirect purchasers’ contention that the courts of a particular jurisdiction can
 16 authoritatively interpret their laws as allowing antitrust recovery by indirect purchasers even in the
 17 absence of an express *Illinois Brick* repealer by the legislature, I cannot conclude that *Pressure*
 18 *Vessels* is such an authoritative statement”).

19 In contrast, a New York district court has found in favor of the antitrust plaintiff.

20 The Court recognizes that many district courts in the continental
 21 United States have dismissed indirect purchaser claims under the
 PRAA for lack of standing, based on the idea that the PRAA is
 22 modeled on federal statutes that do not extend standing to indirect
 purchasers. *See, e.g., Opana ER*, 162 F.Supp.3d at 723 (collecting
 23 cases); *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 413
 (S.D.N.Y. 2011).

24 Nonetheless, this Court finds that the U.S. District Court for the
 District of Puerto Rico has more faithfully interpreted the standing
 25 requirements of the PRAA, in light of how the Supreme Court of
 Puerto Rico reads that statute. *Rivera-Muniz*, 737 F. Supp. 2d at 61
 26 (citing *Pressure Vessels P.R. v. Empire Gas P.R.*, 137 D.P.R. 497,
 520 (P.R. 1994)).

27
 28 In *Pressure Vessels*, the Supreme Court of Puerto Rico interpreted
 the private damages section of the PRAA to hold that private

1 remedies were available to any plaintiff who met the following
 2 conditions: (1) the person was harmed in his business or property (2)
 3 by reason of (3) actions prohibited by law. 137 D.P.R. at 518. The
 4 Supreme Court of Puerto Rico reasoned that, in order to satisfy this
 5 second prong, a plaintiff need only allege that “as a consequence of
 6 the legal violation, he has been injured.” *Id.* at 520. Based on this
 7 interpretation of the PRAA in *Pressure Vessels*, the Court in *Rivera-*
Muniz held, “Because Puerto Rico liberally construes its standing
 8 requirements in private antitrust cases, it is immaterial whether
 9 Plaintiffs are direct or indirect purchasers.” *Rivera-Muniz*, 737 F.
 10 Supp. 2d at 61 (internal citation omitted).

11 Defendants’ motion to dismiss this claim is, therefore, DENIED.

12 *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, plc*, No. 15 CIV. 6549 (CM), 2018
 13 WL 7197233, at *23 (S.D.N.Y. Dec. 26, 2018).

14 As above, the Court finds Judge Orrick’s *United Food* decision more persuasive. The
 15 Court therefore grants Gilead’s motion to dismiss on the Puerto Rico Act, in particular, to the
 16 extent Plaintiffs seek damages as indirect purchasers.

17 3. Rhode Island Antitrust Act

18 For the Rhode Island Antitrust Act, Gilead argues that Rhode Island did not adopt an
 19 *Illinois Brick* repealer statute until July 15, 2013, *see* R.I. Gen. Laws § 6-36-7(d) (providing that,
 20 “[i]n any action under this chapter, the fact that a person or public body has not dealt directly with
 21 the defendant shall not bar or otherwise limit recovery[,] [p]rovided, however, that courts shall
 22 exclude from the amount of monetary relief awarded in the action any amount of monetary relief
 23 which duplicates amounts which have been awarded for the same injury”); 2013 R.I. SB 840 (July
 24 15, 2013) (adding § 6-36-7(d)); “[t]hus, any Rhode Island Antitrust Act claim for damages based
 25 on conduct prior to July 15, 2013 must be dismissed.” Gilead Mot. at 36.

26 In response, Plaintiffs argue that “[t]he repealer provision should be applied retroactively.”
 27 Opp’n at 72. But the cases on which Plaintiffs rely are not persuasive. For example, in *Landgraf*
 28 *v. Usi Film Products*, 511 U.S. 244 (1994), the Supreme Court stated that there is a “traditional
 presumption against truly ‘retrospective’ application of a statute.” *Id.* at 279. And with respect to
Pion v. Bess Eaton Donuts Flour Co., 637 A.2d 367 (R.I. 1994), Plaintiffs have taken a select
 quotation. The full context for the quotation is as follows:

Generally, it is presumed that statutes and their amendments are "to

operate prospectively unless it appears by clear, strong language or by necessary implication that the Legislature intended to give the statute retroactive effect." *VanMarter v. Royal Indemnity Co.*, 556 A.2d 41, 44 (R.I. 1989). If a statute lacks clear direction or necessary implication concerning its retroactive application, the difference between a substantive statute and a remedial or procedural statute becomes relevant. *See Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 869 (R.I. 1987). Substantive statutes, which create, define, or regulate substantive legal rights, must be applied prospectively. *See id.* In contrast, remedial and procedural statutes, which do not impair or increase substantive rights but rather prescribe methods for enforcing such rights, may be construed to operate retroactively. *See id.*

Id. at 371.

There is no clear and strong language directing that the Rhode Island repealer statute be given retroactive effect. Accordingly, the Court concludes that there is no retroactive application for the Rhode Island *Illinois Brick* repealer statute and, to that extent, Gilead's motion to dismiss is granted.

4. Utah Antitrust Act

The Utah code provides in relevant part that "[a] person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant." Utah Code Ann. § 76-10-3109(1)(a). Gilead underscores that "[t]he Utah Antitrust Act permits damages claims by indirect purchasers only if they are citizens or residents of the state," but here "[n]o Plaintiffs are alleged to meet this description." Gilead Mot. at 36. Gilead adds that "Plaintiffs cannot rely on absent class members to meet the . . . citizenship/residence requirement." Gilead Reply at 18.

The Court rejects Gilead's argument. This is essentially the *Melendres* issue discussed above. *See also In re Generic Pharm. Pricing Antitrust Litig.*, 368 F. Supp. 3d 814, 838 (E.D. Pa. 2019) (noting that "[a]llegations that members of the putative class presumably include Utah . . . citizens and residents are sufficient to overcome a motion to dismiss"). Therefore, the motion to dismiss the damages claim under the Utah statute is denied without prejudice. The remedy is, however, restricted to citizens and residents of Utah.

1 5. Maryland Antitrust Act

2 In 1993, the Maryland code was amended to include the following provision: “A person
3 whose business or property has been injured or threatened with injury by a violation of § 11-204
4 may maintain an action for damages or for an injunction or both against any person who has
5 committed the violation.” Md. Code Ann. § 11-209(b)(2)(i) (1993); *see also* 1993 MD. SB 196
6 (May 27, 1993). In 2002, a state appellate court held that § 11-209(b)(2)(i) follows the *Illinois*
7 *Brick* rule, particularly because “section 11-202(a)(1)[] states the purpose of [the Maryland
8 Antitrust Act] is ‘to complement the body of federal law governing restraints of trade, unfair
9 competition, and unfair, deceptive, and fraudulent acts or practices.’” *Davidson v. Microsoft*
10 *Corp.*, 143 Md. App. 43, 50 (2002). The appellate court also cited legislative history in support.
11 *See id.* at 51 (noting, *inter alia*, that a bill from 2001 which “would have amended 11-209(b) to
12 permit suits by private parties who dealt indirectly with the violator . . . was defeated in
13 committee”).

14 In 2017, however, § 11-209(b)(b)(i) was amended and now reads as follows: “A person
15 whose business or property has been injured or threatened with injury by a violation of Section 11-
16 204 of this subtitle may maintain an action for damages or for an injunction or both against any
17 person who has committed the violation *regardless of whether the person maintaining the action*
18 *dealt directly or indirectly with the person who has committed the violation.*” Md. Code Ann. §
19 11-209(b)(2)(i) (2017) (emphasis added); *see also* 2017 Md. HB 1415 (May 27, 2017); 2017 Md.
20 SB 858 (May 27, 2017).

21 Based on the above, Gilead argues that, up until the 2017 *Illinois Brick* repealer statute,
22 indirect purchasers could not get damages under Maryland law. *See* Gilead Reply at 18.
23 (“Maryland’s 2017 *Illinois Brick* repealer does not apply retroactively.”). Plaintiffs do not appear
24 to substantively dispute such – they do not, *e.g.*, argue for retroactive application. Hence, the
25 antitrust claim based on Maryland law is dismissed to the extent damages to indirect purchasers
26 are claimed prior to May 27, 2017.

27 6. Massachusetts Consumer Protection Act

28 Title XV of the Massachusetts code concerns the regulation of trade. The antitrust

1 provisions in the Massachusetts code can be found in chapter 93. In turn, the regulation of
2 business practices for the protection of consumers can be found in chapter 93A.

3 In chapter 93A, governing consumer protection, there are two different provisions giving
4 rise to a private right of action for unfair methods of competition or deceptive acts or practices.

- 5 • Section 9 of chapter 93A provides: “Any person, other than a person entitled to
6 bring action under section 11 of this chapter, who has been injured by another
7 person’s use or employment of any method, act or practice declared to be unlawful
8 by section two or any rule or regulation issued thereunder . . . may bring an action
9 in the superior court . . . for damages and such equitable relief, including an
10 injunction, as the court deems to be necessary and proper.” Mass. G.L. ch. 93A, §
11 9.
- 12 • Section 11 of chapter 93 in turn provides: “Any person who engages in the conduct
13 of any trade or commerce and who suffers any loss of money or property, real or
14 personal, as a result of the use or employment by another person who engaged in
15 any trade or commerce of any unfair method of competition or an unfair or
16 deceptive act or practice declared unlawful by section two or by any rule or
17 regulation issued under paragraph (c) of section two may, as hereinafter provided,
18 bring an action in the superior court . . . for damages and such equitable relief,
19 including an injunction, as the court deems to be proper and necessary.” Mass.
20 G.L. ch. 93A, § 11.

21 Massachusetts courts have indicated that the difference between § 9 and § 11 is that § 9
22 makes “consumer claims” actionable while § 11 makes “business claims” actionable. *See Lantner*
23 *v. Carson*, 374 Mass. 606, 610 (1978) (noting that, “where § 9 affords a private remedy to the
24 individual consumer . . . , an entirely different section, § 11, extends the same remedy to ‘any
25 person who engages in the conduct of any trade or commerce’”); *Fruzzo v. Landenberger*, 61 Mass.
26 App. Ct. 814, 821 (2004) (stating that “General Laws c. 93A distinguishes between ‘consumer’
27 and ‘business’ claims, the former actionable under § 9, the latter actionable under § 11”); *see also*
28 *Cont’l Ins. Co. v. Bahnan*, 216 F.3d 150, 156 (1st Cir. 2000) (noting that “section 11 affords no

1 relief to consumers and, conversely, section 9 affords no relief to persons engaged in trade or
 2 commerce”). Although “[t]he dividing line between a consumer claim and a business claim for
 3 purposes of G.L. c. 93, §§ 9 and 11[] is not always clear,” “the choice appears to turn on whether a
 4 given party has undertaken the transaction in question for business reasons, or has engaged in it
 5 for purely personal reasons (such as the purchase of an item for personal use.)” *Id.* “[A]ny
 6 transaction in which the plaintiff is motivated by business considerations gives rise to claims
 7 under the statute’s business section,” and the fact “[t]hat a transaction may be an isolated one not
 8 in the normal course of business does not insulate it from the reach of . . . § 11.” *Id.*

9 In the instant case, Gilead contends that “five of the Plaintiffs . . . are union insurers, not
 10 consumers,” Gilead Mot. at 36, and thus they can only bring § 11 claims. The Massachusetts
 11 Supreme Court has held that, under § 11, claims by indirect purchasers are not permissible – in
 12 contrast to § 9 consumer claims which do allow for claims by indirect purchasers. This issue was
 13 addressed by the Massachusetts Supreme Court in *Ciardi v. F. Hoffman La Roche, Ltd.*, 436 Mass.
 14 53 (2002).

15 There, the state Supreme Court began by noting that the Massachusetts Antitrust Act –
 16 covered by chapter 93 of the code as opposed to chapter 93A – was to be construed in harmony
 17 with federal antitrust law. “Because the [Massachusetts] Antitrust Act is to be construed in
 18 harmony with judicial interpretations of comparable Federal antitrust statutes, the rule of law
 19 established in *Illinois Brick* . . . would apply with equal force to preclude claims brought under
 20 G.L. c. 93 by indirect purchasers in Massachusetts. *Id.* at 57-58. The plaintiff in *Ciardi*, however,
 21 was not bringing a claim under chapter 93 but rather under chapter 93A. “In analyzing what
 22 constitutes unfair methods of competition and unfair or deceptive acts or practices, which are not
 23 defined in G. L. c. 93A, this court looks to interpretations by the Federal Trade Commission and
 24 Federal courts of § 45(a)(1) of the Federal Trade Commission Act (FTC Act).” *Id.* at 59. The
 25 FTC “may . . . enforce the antitrust laws.” *Id.* Moreover,

26 [t]he plain and unambiguous language of G.L. c. 93A reveals no
 27 legislative intent to limit lawsuits for price-fixing to direct
 28 purchasers. To the contrary, because the language of G.L. c 93A, §§
 1, 9(1), allows *any* person who has been injured by trade or
 commerce *indirectly* affecting the people of this Commonwealth to

bring a cause of action, the plaintiff is the type of consumer the Legislature intended to protect.

Id. (emphasis in original). Finally, the state Supreme Court pointed out that “the language of the [Massachusetts] Antitrust Act unambiguously states that ‘it shall have no effect upon the provisions of [c. 9A], except as *explicitly provided in said* [c. 93A].” *Id.* at 62 (emphasis in original). In contrast to § 9, § 11 – *i.e.*, the provision giving rise to business claims instead of consumer claims – “*includes a specific provision that in any action brought under that section, the court shall be guided in its interpretation of unfair methods of competition by the provisions of the [Massachusetts] Antitrust Act. [Section] 9[] contains no such explicit provision.*” *Id.* at 62-63 (emphasis added); *see also United Food*, 74 F. Supp. 3d at 1086 (noting that “indirect purchaser claims cannot be asserted under Section 11”); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C 07-5944 SC, 2014 U.S. Dist. LEXIS 35387, at *66 (N.D. Cal. Mar. 13, 2014) (stating that, “while corporations engaged in commerce can bring suits under Section 11 and potentially win them, a corporation engaged in commerce whose suit is based on indirect purchases will not have standing under Section 11”). Accordingly, as a general matter, § 9 consumer claims may be brought by indirect purchasers, but not § 11 business claims.

In the instant case, Gilead asserts that the union plaintiffs can bring only § 11 claims. As Gilead points out, two district courts have held that health and welfare funds have only § 11 claims when they purchase products not for their own personal use but rather for the use of their members. *See United Food*, 74 F. Supp. 3d at 1085 (noting that, “according to their own complaint, the EPPs did not purchase the products (and/or provide reimbursement for those products) for their personal use, but for the use of their members[;] [t]he Plan and the City appear to be engaged in the ‘trade or commerce’ of providing health and welfare benefits”); *In re Asacol Antitrust Litig.*, No. 15-cv-12730-DJC, 2016 U.S. Dist. LEXIS 94605, at *43-44 (D. Mass. July 20, 2016) (stating that health fund plaintiffs – *i.e.*, organizations – “cannot bring a claim under § 9 as they cannot show that they undertook the relevant transactions ‘for purely personal reasons (such as the purchase of an item for personal use)’”).

On the other hand, as Plaintiffs note, the union insurers are nonprofit entities, and there is case law indicating that “a party’s status as a non-profit influences [the] analysis”; “[i]n most

1 circumstances, a charitable institution will not be engaged in trade or commerce *when it*
 2 *undertakes activities in furtherance of its core mission.*” *In re Pharm. Indus. Avg. Wholesale*
 3 *Price Litig.*, 491 F. Supp. 2d 20, 81 (D. Mass. 2007) (emphasis added; quoting *Linkage Corp. v.*
 4 *Trs. of Bos. Univ.*, 425 Mass. 1, 26 (1997)). For example, in *In re Lorazepam & Clorazepate*
 5 *Antitrust Litigation*, 295 F. Supp. 2d 30 (D.D.C. 2003), the plaintiff was Blue Cross Blue Shield of
 6 Massachusetts (“BCBS”). It brought an unfair competition claim against several pharmaceutical
 7 companies on its own behalf as a third-party payor of prescription drugs for its insureds. The
 8 court held that BCBS’s claim fell under § 9 (instead of § 11), explaining as follows:

9 BCBS Massachusetts's charitable mission is set forth in its enabling
 10 statute, Mass. Gen Laws ch. 176B ("ch. 176B"). Further, BCBS
 11 Massachusetts has alleged that it is a medical service corporation
 12 under ch. 176B, and operates as a "nonprofit medical service plan"
 13 pursuant to which it provides "health services," including
 14 prescription drug benefits, to its members. *See* Complaint ¶ 14; *see*
 15 *also* generally ch. 176B. BCBS Massachusetts's core mission has
 16 been recognized by the First Circuit as well:

17 Blue Shield of Massachusetts, Inc. and Blue Cross of
 18 Massachusetts, Inc. are nonprofit, tax exempt medical
 19 service and hospital service corporations, organized
 20 to provide "for the preservation of the public health
 21 by furnishing medical services at low cost to
 22 members of the public who become subscribers. . . ."
 23 1941 Mass. Acts c. 306, preamble. Mass. G.L. c.
 24 176B (Blue Shield); c. 176A (Blue Cross).

25 *Kartell v. Blue Shield of Massachusetts, Inc.*, 592 F.2d 1191, 1191
 26 (1st Cir. 1979). The transactions identified by Plaintiff here –
 27 payment for members' prescription drug claims, *see, e.g.*, Complaint
 28 ¶¶ 1-8 – are clearly at the core of BCBS Massachusetts's charitable
 mission. Further, while the Court has not found cause to review any
 of Plaintiff's financial statements, the Court must construe the
 complaint in the light most favorable to the Plaintiff and accepts as
 true for purposes of the instant motion BCBS Massachusetts's
 allegation that it does not "profit" under the specific transactions at
 issue (i.e., payment for its members' prescription drug claims).

29 *Id.* at 45-46. The court added that “an absence of legislative mandate tend[s] to indicate the
 30 presence of Section 11 ‘trade or commerce,’” but here “BCBS Massachusetts is a creation of
 31 statutory law that [is] subject to both legislative mandate and constraint. For example, pursuant to
 32 Mass. Gen. Laws ch. 176, § 23 and ch. 176B, § 13, the state commissioner of the Division of
 33 Insurance is responsible for ascertaining, *inter alia*, that BCBS Massachusetts is ‘not being

1 operated for profit’ and is maintaining sufficient reserves.” *Id.* at 46. *Compare S. Shore Hellenic*
 2 *Church, Inc. v. Artech Church Interiors, Inc.*, 183 F. Supp. 3d 197, 202 (D. Mass. 2016) (noting
 3 that, *in Linkage* – where the plaintiff-company sued Boston University, a nonprofit entity, for
 4 unlawfully terminating an agreement under which the plaintiff provided educational, training, and
 5 other programs of a technical nature at a satellite facility owned by the university – the court held
 6 that the university had engaged in trade or commerce because “it [had] cut a private company out
 7 of a lucrative market”).

8 Because a party’s status as a nonprofit affects the analysis as to whether it has a § 9 or § 11
 9 claim, the Court shall allow the union insurers’ claims based on the Massachusetts Consumer
 10 Protection Act to proceed. The union insurers’ role arguably is akin to that of consumers; the
 11 factual record must be developed in order for the Court or the trier of fact to make an informed
 12 determination as to whether the union insurers profit from paying its insureds’ prescription drug
 13 claims.

14 7. Summary

15 Gilead’s motion to dismiss the indirect purchaser claims for damages is granted as to the
 16 Illinois Antitrust Act and the Puerto Rico Antitrust Act. On the Rhode Island Antitrust Act and
 17 the Maryland Antitrust Act, Rhode Island and Maryland each has an *Illinois Brick* repealer statute
 18 but indirect purchaser claims for damages prior to the effective date of that statute are not viable.
 19 The motion to dismiss the indirect purchaser claims for damages under the Utah Antitrust Act and
 20 the Massachusetts Consumer Protection Act is denied without prejudice.

21 E. Consumer Protection Claims: Circumvention of the *Illinois Brick* Rule

22 Gilead notes that Plaintiffs have brought not only antitrust claims under state law but also
 23 state law consumer protection claims. According to Gilead, certain states have an *Illinois Brick*
 24 rule for their antitrust laws; to the extent they do, Plaintiffs cannot try to “end run” the *Illinois*
 25 *Brick* rule by recasting the antitrust claims as consumer protection claims. *See* Gilead Mot. at 37
 26 (arguing that the “consumer-protection claims under the laws of Arkansas, Connecticut, Illinois,
 27 Idaho, Missouri, Montana, Puerto Rico, Rhode Island, and Utah must fail”).

28 Gilead’s argument is problematic. In support, Gilead cites *In re DDAVP Indirect*

1 *Purchaser Antitrust Litig. v. Ferring Pharms. Inc.*, 903 F. Supp. 2d 198 (S.D.N.Y. 2012). But
 2 there the court simply agreed with other courts holding that, ““where the applicable state law bars
 3 antitrust actions for damages by indirect purchasers . . . a plaintiff cannot circumvent the statutory
 4 framework by recasting an antitrust claim as *one for unjust enrichment.*” *Id.* at 232. Here,
 5 Plaintiffs are not bringing a claim for unjust enrichment but rather a statutory claim for consumer
 6 protection. Furthermore, as Plaintiffs note in their papers, “[m]any of the [the] statutes . . . contain
 7 ‘harmonization’ provisions providing a legislative mandate that the statutes be interpreted in
 8 accordance with the Federal Trade Commission (‘FTC’) Act.” *Opp’n* at 75. Finally, the
 9 consumer protection statutes cover more than just anticompetitive conduct – typically covering
 10 unfair, unconscionable, or deceptive conduct. *See Opp’n* at 75.

11 Accordingly, the Court denies Gilead’s motion to dismiss based on the “end run” argument
 12 (as applied to state consumer protection laws).

13 F. Consumer Protection Claims: Conclusorily Pled

14 Gilead argues, in effect, that the consumer protection claims have been conclusorily pled –
 15 “providing no information on how the claims at issue satisfy the particular requirements of each
 16 state’s individual consumer-protection statutes.” *Gilead Mot.* at 37; *see also* *Gilead Reply* at 19
 17 (arguing that Plaintiffs “ignore the differences among state consumer-protection laws”).

18 This argument has no merit. Plaintiffs have been clear about what wrongdoing has
 19 allegedly been committed by Gilead. If Gilead believes that specific elements of consumer
 20 protection claims have not been met, that is their obligation to identify those specific elements.

21 G. Consumer Protection Claims: Deceptive Conduct

22 According to Gilead, fifteen states require deceptive conduct, or at least conduct directed
 23 to and relied upon by a consumer, in order to state a consumer protection claim, but, here, “the
 24 Complaint alleges no such conduct.” *Gilead Mot.* at 15. Gilead cites to the laws of Arizona,
 25 California, District of Columbia, Idaho, Illinois, Kansas, Maine, Michigan, New York, Nevada,
 26 New Mexico, Rhode Island, Tennessee, Utah, and West Virginia. Following are the specific state
 27 laws identified by Gilead:

- 28 • Arizona. “The act, use or employment by any person of any deception, deceptive

1 or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or
 2 concealment, suppression or omission of any material fact with intent that others
 3 rely on such concealment, suppression or omission, in connection with the sale or
 4 advertisement of any merchandise whether or not any person has in fact been
 5 misled, deceived or damaged thereby, is declared to be an unlawful practice.” Ariz.
 6 Rev. Stat. § 44-1522(A); *see also id.* § 44-1522(C) (providing that “[i]t is the intent
 7 of the legislature, in construing subsection A, that the courts may use as a guide
 8 interpretations given by the federal trade commission and the federal courts to 15
 9 United States Code sections 45, 52 and 55(a)(1)”).

- 10 • California. “[U]nfair competition shall mean and include any unlawful, unfair or
 11 fraudulent business act or practice and unfair, deceptive, untrue or misleading
 12 advertising and any act prohibited by Chapter 1 (commencing with Section 17500)
 13 of Part 3 of Division 7 of the Business and Professions Code.” Cal. Bus. & Prof.
 14 Code § 17200.
- 15 • District of Columbia. “It shall be a violation of this chapter for any person to
 16 engage in an unfair or deceptive trade practice, whether or not any consumer is in
 17 fact misled, deceived, or damaged thereby, including to: [*inter alia*] (f) fail to state
 18 a material fact is such failure tends to mislead.” D.C. Code § 28-3904(f); *see also*
 19 *id.* § 28-3901(d) (providing that, “[i]n construing the term ‘unfair or deceptive trade
 20 practice’ due consideration and weight shall be given to the interpretation by the
 21 Federal Trade Commission and the federal courts of the term ‘unfair or deceptive
 22 act or practice,’ as employed in section 5(a) of An Act to create a Federal Trade
 23 Commission, to define its powers and duties, and for other purposes, approved
 24 September 26, 1914”).
- 25 • Idaho. “The following unfair methods of competition and unfair or deceptive acts
 26 or practices in the conduct of any trade or commerce are hereby declared to be
 27 unlawful, whether a person knows, or in the exercise of due care should know, that
 28 he has in the past, or is: [*inter alia*] (17) Engaging in any act or practice which is

1 otherwise misleading, false, or deceptive to the consumer.” Idaho Code § 48-
2 603(17).

- 3 • Illinois. “Unfair methods of competition and unfair or deceptive acts or practices,
4 including but not limited to the use or employment of any deception, fraud, false
5 pretense, false promise, misrepresentation or the concealment, suppression or
6 omission of any material fact, with intent that others rely upon the concealment,
7 suppression or omission of such material fact, or the use or employment of any
8 practice described in Section 2 of the ‘Uniform Deceptive Trade Practices Act’
9 [815 ILCS 510/2], approved August 5, 1965, in the conduct of any trade or
10 commerce are hereby declared unlawful whether any person has in fact been
11 misled, deceived or damaged thereby.” 815 Ill. Comp. Stat. § 505/2.³⁵
- 12 • Kansas. “No supplier shall engage in any deceptive act or practice in connection
13 with a consumer transaction.” Kan. Ann. Stat. § 50-626(a). “Deceptive acts and
14 practices include, but are not limited to the following, each of which is hereby
15 declared to be a violation of this act, whether or not any consumer has in fact been
16 misled: [*inter alia*] (3) the willful failure to state a material fact, or the willful
17 concealment, suppression or omission of a material fact.” *Id.* § 50-626(b)(3).
- 18 • Maine. “Unfair methods of competition and unfair or deceptive acts or practices in
19 the conduct of any trade or commerce are declared unlawful.” 5 Me. Rev. Stat. §
20 207; *see also id.* § 207(1) (providing that “[i]t is the intent of the Legislature that in
21 construing this section the courts will be guided by the interpretations given by the
22 Federal Trade Commission and the Federal Courts to Section 45(a)(1) of the
23 Federal Trade Commission Act (15 United States Code 45(a)(1)), as from time to
24 time amended”).

25
26
27
28 ³⁵ Regarding a claim of deception based on concealment or suppression, an Illinois state court has noted that “sellers have a duty not to conceal or suppress known material facts regarding products from potential buyers” and that, for liability to attach, “a plaintiff must establish that defendants intended that [the consumers] rely on the suppression in making their choice to buy.” *Jensen v. Bayer AG*, 371 Ill. App. 3d 682, 689 (2007).

- 1 • Michigan. “Unfair, unconscionable, or deceptive methods, acts, or practices in the
2 conduct of trade or commerce are unlawful and are defined as follows: [*inter alia*]
3 (s) Failing to reveal a material fact, the omission of which tends to mislead or
4 deceive the consumer, and which fact could not reasonably be known by the
5 consumer.” Mich. Comp. Laws § 445.903(1)(s).
- 6 • New York. “Deceptive acts or practices in the conduct of any business, trade or
7 commerce or in the furnishing of any service in this state are hereby declared
8 unlawful.” N.Y. Gen. Bus. Law § 349(a).
- 9 • Nevada. “A person engages in a ‘deceptive trade practice’ if, in the course of his or
10 her business or occupation, he or she: [*inter alia*] (15) Knowingly makes any other
11 false representation in a transaction.” Nev. Rev. Stat. § 598.0915(15).
- 12 • New Mexico. “Unfair or deceptive trade practices and unconscionable trade
13 practices in the conduct of any trade or commerce are unlawful.” N.M. Stat. Ann. §
14 57-12-3. “[U]nfair or deceptive trade practice’ means an act specifically declared
15 unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written
16 statement, visual description or other representation of any kind knowingly made in
17 connection with the sale, lease, rental or loan of goods or services . . . that may,
18 tends to or does deceive or mislead any person . . .” *Id.* § 57-12-2(D).
- 19 • Rhode Island. “Unfair methods of competition and unfair or deceptive acts or
20 practices in the conduct of any trade or commerce are declared unlawful.” R.I.
21 Gen. Laws § 6-13.1-2. “[U]nfair methods of competition and unfair or deceptive
22 acts or practices’ means any one or more of the following: [*inter alia*] (xiii)
23 Engaging in any act or practice that is unfair or deceptive to the consumer.” *Id.* §
24 6-13.1-1(6)(xiii):
- 25 • Tennessee. “Unfair or deceptive acts or practices affecting the conduct of any trade
26 or commerce constitute unlawful acts or practices . . .” Tenn. Code § 47-18-
27 104(a). “The following unfair or deceptive acts or practices affecting the conduct
28 of any trade or commerce are declared to be unlawful and in violation of this part . .

1 . . .” *Id.* at 47-18-104(b); *see also id.* § 47-18-115 (providing that “[i]t is the intent
2 of the general assembly that this part shall be interpreted and construed consistently
3 with the interpretations given by the federal trade commission and the federal
4 courts pursuant to § 5(A)(1) of the Federal Trade Commission Act, codified in 15
5 U.S.C. § 45(a)(1)”³⁶).

- 6 • Utah. “A deceptive act or practice by a supplier in connection with a consumer
7 transaction violates this chapter” Utah Code § 13-11-4(1). In addition, “[a]n
8 unconscionable act or practice by a supplier in connection with a consumer
9 transaction violates this act” *Id.* § 13-11-5(1).
- 10 • West Virginia. “Unfair methods of competition and unfair or deceptive acts or
11 practices in the conduct of any trade or commerce are hereby declared unlawful.”
12 W. Va. Code § 46A-6-104. ““Unfair methods of competition and unfair or
13 deceptive acts or practices’ means and includes, but is not limited to, any one or
14 more of the following: [*inter alia*] (M) The act, use or employment by any person
15 of any deception, fraud, false pretense, false promise or misrepresentation, or the
16 concealment, suppression or omission of any material fact with intent that others
17 rely upon such concealment, suppression or omission, in connection with the sale
18 or advertisement of any goods or services, whether or not any person has in fact
19 been misled, deceived or damaged thereby.” *Id.* § 46A-6-102(7)(M).³⁷

20 As an initial matter, Gilead’s position is questionable because it is not clear that all of the
21 states identified condemn deceptive conduct only – *e.g.*, on their face, some of the statutes seem to
22 implicate unfair conduct as well. *Compare In re Dynamic Random Access Memory (DRAM)*

23
24 ³⁶ *See also In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 203 (D.
25 Me. 2004) (acknowledging that the Tennessee statute directs a court to look to federal
26 interpretation of the FTC Act for guidance but nevertheless “follow[ing] the narrower
27 interpretation of the Tennessee courts” – *i.e.*, “deception is required for a TCPA claim”).

28 ³⁷ Regarding a claim of deception based on concealment or suppression, a West Virginia state
court has noted as follows: “Where concealment, suppression or omission is alleged, and proving
reliance is an impossibility, the causal connection between the deceptive act and the ascertainable
loss is established by presentation of facts showing that the deceptive conduct was the proximate
cause of the loss.” *White v. Wyeth*, 227 W. Va. 131, 140 (2010).

1 *Antitrust Litig.*, 516 F. Supp. 2d 1072, 1117 (N.D. Cal. 2007) (Hamilton, J.) (noting that the Utah
2 statute – unlike the FTC Act – does *not* refer to unfair competition, and therefore “the FTCA’s
3 prohibition on antitrust price-fixing should not be read into the CSPA here”) (emphasis omitted).

4 But putting aside that point, Plaintiffs fairly point out that they have claimed deception,
5 more specifically in the form of concealment: “Plaintiffs have . . . alleg[ed] a conspiracy between
6 Gilead and its coconspirators to monopolize the cART market and maintain artificially high prices,
7 a fact that Defendants *concealed* from Plaintiffs.” Opp’n at 77 (emphasis added). At least some
8 courts have found this a plausible claim of deception. *See, e.g., GPU*, 527 F. Supp. 2d at 1030
9 (Alsup, J.) (concluding that plaintiffs made sufficient allegations to state a claim under state
10 consumer protection law because plaintiffs “contend that defendants have engaged in deceptive
11 acts to conceal the alleged agreement to fix prices” – *i.e.*, “[d]efendants hid the alleged conspiracy
12 from plaintiffs, resulting in plaintiffs paying higher prices”); *see also In re Lamictal Indirect*
13 *Purchaser & Antitrust Consumer Litig.*, 172 F. Supp. 3d 724, 752-53 (D.N.J. 2016) (stating that
14 “anticompetitive conduct can violate § 349 [of New York law] if it is deceptive in nature” – *e.g.*, if
15 defendants made efforts to conceal an anticompetitive agreement, if defendants secretly agreed to
16 raise prices, or if defendants entered into secret anticompetitive agreements). *Compare Leider v.*
17 *Ralfe*, 387 F. Supp. 2d 283, 295-97 (S.D.N.Y. 2005) (noting that § 349 refers to deceptive, but not
18 unfair, practices; manipulation of a market is a generic antitrust scheme and not deception).

19 However, if the claim is based on such deception, it is not clear what relief Plaintiffs seek
20 as a result of Defendants’ deception. Arguably, Plaintiffs’ cannot conflate harm from Defendants’
21 deception with harm from Defendants’ anticompetitive conduct. *Cf. Motor Vehicles Canadian*,
22 350 F. Supp. 2d at 176-77, 189 (rejecting argument that there was actionable deception under,
23 *inter alia*, Michigan law, because defendants failed to inform consumers about conspiracy to keep
24 out Canadian cars, which inflated new car prices in the United States; price differential was not
25 hidden from or unknown to consumers – thus, “if United States consumers failed to acquire the
26 cheaper Canadian vehicles, it was because they did not care to, or because the alleged conspiracy
27 prevented Canadian dealers from selling to them . . . , not because the conspiracy was unknown”).
28 The Court therefore orders Plaintiffs to provide a more definite statement as to what relief is

1 sought for any deceptive conduct.

2 H. Consumer Protection Claims: Consumer Requirement

3 Gilead argues that ten states/jurisdictions “allow a plaintiff to sue only in its capacity’ as a
4 consumer,” and, here, five of the plaintiffs are union insurers – who are not consumers but rather
5 third-party payors. Gilead Mot. at 38 (citing to the laws of the District of Columbia, Hawaii,
6 Kansas, Maine, Missouri, Montana, North Carolina, Rhode Island, Utah, and Vermont).

7 In response, Plaintiffs argue that the union insurers do constitute “consumers” because
8 “third-party payor Plaintiffs participate in consumer transactions by paying some or all of the
9 prices charged to individual consumers and, as a result, pay a portion of any overcharges. These
10 purchases are made for the personal purposes of the patient.” Opp’n at 77. Plaintiffs admit that
11 the union insurers “do not personally use the products, [but] they nonetheless purchase them for
12 others’ personal use.” Opp’n at 78.

13 The states at issue are addressed below.

14 1. District of Columbia

15 Under D.C. law, “[i]t shall be a violation of this chapter for any person to engage in an
16 unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived or
17 damaged thereby” D.C. Code § 28-3904. “A consumer may bring an action seeking relief
18 from the use of a trade practice in violation of a law of the District.” *Id.* § 28-3905(k)(1). When
19 used as a noun, “consumer” means “a person who, other than for purposes of resale, does or would
20 purchase, lease (as lessee), or receive consumer goods or services, including as a co-obligor or
21 surety, or does or would otherwise provide the economic demand for a trade practice.” *Id.* § 28-
22 3901(a)(2)(A). When used as an adjective, “consumer” “describes anything, without exception,
23 that: (i) A person does or would purchase, lease (as lessee), or receive and normally use for
24 personal, household, or family purposes.”

25 In *Lidoderm*, Judge Orrick evaluated the above statutes and found in favor of the
26 defendants. *See Lidoderm*, 103 F. Supp. 3d at 1155 (Orrick, J.). His reasoning was as follows:

27 As explained by the District of Columbia Court of Appeals, “the
28 relevant distinction is one between retail and wholesale transactions.
Transactions along the distribution chain that do not involve the

1 ultimate retail consumer are not ‘consumer transactions’ that the Act
 2 seeks to reach. Rather, it is the ultimate retail transaction between
 3 the final distributor and the individual member of the consuming
 4 public that the Act covers. Accordingly, it is not the use to which
 5 the purchaser ultimately puts the goods or services, but rather the
 6 nature of the purchaser that determines the nature of the
 7 transaction.”

8 Here the purchase at issue – the one trying to secure a recovery for
 9 its indirect purchase – is GEHA [Government Employees Health
 10 Organization]. It is true that GEHA has pled it is a joint “end payor”
 11 for the Lidoderm patches, and that it has paid retail and mail order
 12 pharmacies in the District of Columbia \$13,432.85 for Lidoderm
 13 patches during the relevant period. However, GEHA was not part of
 14 the “retail” transaction, in terms of deciding to purchase the product
 15 or actually purchasing it. It, instead, was required to pay the
 16 pharmacies for a portion of the expenses for the patches because its
 17 members filled personal prescriptions for Lidoderm patches.
 18 Although GEHA played a role in the retail transaction, its own
 19 transactions with the pharmacies were more akin to “wholesale”
 20 than retail transactions.

21 *Id.*

22 Respectfully, the Court disagrees with Judge Orrick’s analysis. Although an insurer who
 23 purchases a pharmaceutical product does not make that purchase for its own use, its role is located
 24 on the retail side of the transaction given that it is essentially acting as a proxy for its insured.
 25 Absent legislative history indicating that “consumer” as used in the statutes means an individual or
 26 business purchasing for his, her, or its use only, the Court does not limit application of the statutes
 27 as argued by Gilead.

28 2. Hawaii

Under Hawaii law, “[u]nfair methods of competition and unfair or deceptive acts or
 practices in the conduct of any trade or commerce are unlawful.” Haw. Rev. Stat. § 480-2(a).
 “No person other than a consumer, the attorney general or the director of the office of consumer
 protection may bring an action based upon unfair or deceptive acts or practices declared unlawful
 by this section.” *Id.* § 480-2(d). “‘Consumer’ means a natural person who, primarily for personal,
 family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods
 or services or who commits money, property, or services in a personal investment.” *Id.* § 480-
 1(d).

Because the Hawaii code refers specifically to a suit being brought by a consumer and then

1 defines consumer as a “natural person,” Gilead has the better position. *See also Sergeants*
 2 *Benevolent Ass'n Health & Welfare Fund v. Actavis, PLC*, No. 15 Civ. 6549, 2018 U.S. Dist.
 3 LEXIS 220574, at *109-10 (S.D.N.Y. Dec. 26, 2018) (holding in favor of defendants on Hawaii
 4 code).

5 3. Kansas

6 Under Kansas law, “[n]o supplier shall engage in any deceptive act or practice in
 7 connection with a consumer transaction.” Kan. Stat. Ann. § 50-626(a). “‘Consumer transaction’
 8 means a sale, lease, assignment or other disposition for value of property or services within this
 9 state . . . to a consumer.” *Id.* § 50-624(c). “‘Consumer’ means an individual, husband and wife,
 10 sole proprietor, or family partnership who seeks or acquires property or services for personal,
 11 family, household, business or agricultural purposes.” *Id.* § 50-624(b). “Whether a consumer
 12 seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a
 13 consumer aggrieved by an alleged violation of this act may bring an action” *Id.* § 50-634(a).

14 Because the Kansas code specifically refers to a consumer bringing suit and defines
 15 “consumer” as it does above (excluding, *e.g.*, entities such as insurers), Gilead has the better
 16 position.

17 4. Maine

18 Under Maine law, “[u]nfair methods of competition and unfair or deceptive acts or
 19 practices in the conduct of any trade or commerce are declared unlawful.” 5 Me. Rev. Stat. § 207.

20 Any person who purchases or leases goods, services or property,
 21 real or personal, primarily for personal, family, or household
 22 purposes and thereby suffers any loss of money or property, real or
 23 personal, as a result of the use or employment by another person of a
 method, act or practice declared unlawful by section 207 . . . may
 bring an action

24 *Id.* § 213(1).

25 Although arguably a close call, the Court finds in Plaintiffs’ favor. Defendants have not
 26 cited any legislative history or case law indicating that a person must purchase a good for his, her,
 27 or its *own* personal, family, or household purpose. As discussed above in conjunction with D.C.
 28 law, an insurer who purchases a pharmaceutical product essentially acts as a proxy for its insured,

1 who clearly falls within the common understanding of a “consumer.”

2 5. Missouri

3 Under Missouri law,

4 [t]he act, use or employment by any person of any deception, fraud,
5 false pretense, false promise, misrepresentation, unfair practice or
6 the concealment, suppression, or omission of any material fact in
7 connection with the sale or advertisement of any merchandise in
trade or commerce or the solicitation of any funds for any charitable
purpose, as defined in section 407.453, in or from the state of
Missouri, is declared to be an unlawful practice.

8 Mo. Rev. Stat. § 407.020(1). Furthermore,

9 [a]ny person who purchases or leases merchandise primarily for
10 personal, family or household purposes and thereby suffers an
ascertainable loss of money or property, real or personal, as a result
11 of the use or employment by another person of a method, act or
practice declared unlawful by section 407.020, may bring a private
civil action

12
13 *Id.* § 407.025(1).

14 As above, although arguably a close call, Plaintiffs have the better position, particularly in
15 the absence of legislative history indicating that a consumer is restricted to one who purchases for
16 his, her, or its own use. *But see In re Actimmune Mktg. Litig.*, No. C 08-02376 MHP, 2010 U.S.
17 Dist. LEXIS 90480, at *37 (N.D. Cal. Aug. 31, 2010) (in discussing Missouri law, stating that,
18 “[a]lthough the term ‘person’ explicitly includes corporations like GEHA, the statute has been
19 interpreted as requiring that a person purchase the property for his, her or its own ‘personal, family
20 or household purposes’” and, “[a]ccordingly, the claims of health care plans and third-party payors
21 have been dismissed for lack of standing”).

22 6. Montana

23 Under Montana law, “[u]nfair methods of competition and unfair or deceptive acts or
24 practices in the conduct of any trade or commerce are unlawful.” Mont. Code § 30-14-103. “A
25 consumer who suffers any ascertainable loss of money or property, real or personal, as a result of
26 the use or employment by another person of a method, act, or practice declared unlawful by 30-14-
27 103 may bring an individual but not a class action.” *Id.* § 30-14-133(1). “‘Consumer’ means a
28 person who purchases or leases goods, services, real property, or information primarily for

1 personal, family, or household purposes.” *Id.* § 30-14-102(1).

2 As above, although arguably a close call, Plaintiffs have the better position, particularly in
3 the absence of legislative history indicating otherwise. *But see Lidoderm*, 103 F. Supp. 3d at 1165
4 (Orrick, J.) (dismissing the Montana claim because the statute “defines a ‘consumer’ as ‘a person
5 who purchases or leases goods, services, real property, or information primarily for personal,
6 family, or household purposes” and “[t]he statute excludes persons who buy goods for resale”).

7 7. North Carolina

8 Under North Carolina law, “[u]nfair methods of competition in or affecting commerce, and
9 unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” N.C. Gen.
10 Stat. § 75-1.1(a).

11 If any person shall be injured or the business of any person, firm or
12 corporation shall be broken up, destroyed, or injured by reason of
13 any act or thing done by any other person, firm or corporation in
14 violation of the provisions of this Chapter, such person, firm or
15 corporation so injured shall have a right of action on account of such
16 injury done

15 *Id.* § 75-16. Given the broad language used in the statutes, the Court finds in favor of Plaintiffs.
16 Gilead relies on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999),
17 presumably because, there, the court noted that North Carolina “gives a private cause of action to
18 consumers aggrieved by unfair or deceptive business practices.” *Id.* at 519; *see also id.* at 519-20
19 (adding that “businesses are sometimes allowed to assert UTPA claims against other businesses
20 because ‘unfair trade practices involving only businesses’ can ‘affect the consumer as well’”;
21 however, “one business is permitted to assert an UTPA claim against another business only when
22 the businesses are competitors (or potential competitors) or are engaged in commercial dealings
23 with each other”). But the Fourth Circuit did not foreclose the possibility that a party involved in
24 a consumer transaction, other than the consumer him/herself – such as a union insurer – could
25 bring suit under the state consumer protection law.

26 8. Rhode Island

27 Under Rhode Island law, “[u]nfair methods of competition and unfair or deceptive acts or
28 practices in the conduct of any trade or commerce are declared unlawful.” R.I. Gen. Laws § 6-

1 13.1-2.

2 Any person who purchases or leases goods or services primarily for
3 personal, family, or household purposes and thereby suffers any
4 ascertainable loss of money or property, real or personal, as a result
5 of the use or employment by another person of a method, act, or
6 practice declared unlawful by Section 6-13.1-2, may bring an action
7

8 *Id.* § 6-13.1-5.2(a). As above, although arguably a close call, Plaintiffs have the stronger position,
9 particularly in the absence of any legislative history to the contrary.

10 9. Utah

11 Under Utah law, “[a] deceptive act or practice by a supplier in connection with a consumer
12 transaction violates this chapter whether it occurs before, during, or after the transaction.” Utah
13 Code Ann. § 13-11-4(1). “‘Consumer transaction’ means a sale, lease, assignment, award by
14 chance, or other written or oral transfer or disposition of goods, services, or other property, both
15 tangible and intangible (except securities and insurance) to, or apparently to, a person for: (i)
16 primarily personal, family, or household purposes.” *Id.* § 13-11-3(2)(a). “Whether he seeks or is
17 entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action”
18 for certain relief. *Id.* § 13-11-19(1).

19 Whether a union insurer could be a “consumer” under Utah law is a close call. In
20 *Sergeants Benevolent*, 2018 U.S. Dist. LEXIS 220574, at *135-38, the court found in favor of the
21 plaintiffs and against the defendants. The court noted first that the Utah code does not define
22 “consumer” but does define “consumer transaction” – covering not just a sale to a person for, *e.g.*,
23 personal purposes but also *apparently to* a person for personal purposes. The court found that
24 “apparently to” language critical. *See id.* at *137 (“[U]nlike other consumer protection statutes
25 reviewed by this Court, the UCSPA contemplates sales made both ‘to’ and ‘apparently to’ a
26 person for personal, family, or household purposes.”). “Construing the allegations in the
27 Complaint in the light most favorable to the IPP [indirect purchaser plaintiff], . . . the Court finds
28 that sales of Namenda were made either to or ‘apparently to’ consumers primarily for their
personal, family, or household purposes. Therefore, the Complaint states a claim.” *Id.* at *138.
Because of the unique language in the Utah statute, the Court denies the motion to dismiss the

1 union insurers’ claims based on Utah law.

2 10. Vermont

3 Under Vermont law, “[u]nfair methods of competition in commerce and unfair or
4 deceptive acts or practices in commerce are hereby declared unlawful.” 9 Vt. Stat. Ann. §
5 2453(a).

6 Any consumer who contracts for goods or services in reliance upon
7 false or fraudulent representations or practices prohibited by section
8 2453 of this title, or who sustains damages or injury as a result of
9 any false or fraudulent representations or practices prohibited by
10 section 2453 of this title, or prohibited by any rule or regulation
11 made pursuant to section 2453 of this title may sue

12 *Id.* § 2461(b)1.

13 “Consumer” means any person who purchases, leases, contracts for,
14 or otherwise agrees to pay consideration for goods or services not
15 for resale in the ordinary course of his or her trade or business but
16 for his or her use or benefit or the use or benefit of a member of his
17 or her household . . . or a person who purchases, leases, contracts
18 for, or otherwise agrees to pay consideration for goods or services
19 not for resale in the ordinary course of his or her trade or business
20 but for the use or benefit of his or her business or in connection with
21 the operation of his or her business.

22 *Id.* § 2451a(a). Given that the Vermont code specifies that it is only a consumer who may bring
23 suit and the specific definition of “consumer” above, Gilead has the better position.

24 11. Summary

25 In summary, the Court grants the motion to dismiss the union insurers’ claims based on the
26 consumer protection laws of the following states/jurisdictions: Hawaii, Kansas, and Vermont.

27 I. Antitrust Claims: Concerted Action Requirement

28 Counts 4 and 6 of the CAC are the state law causes of action for monopolization and
attempted monopolization (as opposed to, *e.g.*, conspiracy to monopolize or conspiracy to restrain
trade). These claims are pled against Gilead only. Gilead argues that certain states – namely,
Kansas, New York, and Tennessee – only allow for antitrust claims where there is concerted
action, *see* Gilead Mot. at 37 (arguing that “[t]he antitrust laws of Kansas, New York, and
Tennessee apply only to agreements between two or more parties”),³⁸ and therefore Counts 4 and

³⁸ *See also* Kan. Stat. § 50-101 (providing that “a trust is a combination of capital, skill, or acts, by

6 based on these states' laws must be dismissed. In response, Plaintiffs do not dispute that the above states' laws require concerted action. They point out, however, that Counts 4 and 6 are still based – at least in part – on concerted action, namely, the No-Generics Restraints and the Teva patent settlement agreements. In reply, Gilead asserts: “Counts 4 and 6 should be dismissed *to the extent* they claim unilateral conduct.” Gilead Reply at 19 (emphasis omitted). Implicitly, Gilead is referring to the antitrust claims based on its commercialization of TAF. Because this appears to be unilateral action on the part of Gilead, the Court dismisses the above state law claims to this extent.

X. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are granted in part and denied in part.

- The overarching conspiracy claims are dismissed with leave to amend.
- The motions to dismiss the antitrust claims based on the No-Generics Restraints are granted in part and denied in part. The claims based on the No-Generics Restraints in the Gilead/Japan Tobacco agreement are dismissed with prejudice. The claims based on the No-Generics Restraints in the Gilead/BMS agreements and the Gilead/Janssen agreements are allowed to proceed. Plaintiffs have leave to provide a more definite statement regarding their antitrust injury theory that untainted competitors in BMS, Japan Tobacco, and Janssen's positions would actually have challenged Gilead's patents prior to their expiration dates (*e.g.*, instead of waiting for the TDF patents to expire in December 2017).
- The motion to dismiss the antitrust claims based on the Teva settlement agreements is denied.
- The motion to dismiss the antitrust claims based on Gilead's commercialization of

two or more persons” for the purpose of, *e.g.*, creating or carrying out restrictions in trade or commerce); N.Y. Gen. Bus. Law § 340(1) (declaring as illegal and void contracts, agreements, arrangements, or combinations for monopoly or in restraint of trade); Tenn. Code §§ 47-25-101 to -112 (addressing arrangements, contracts, agreements, trusts, or combinations between persons or corporations).

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TAF is denied.

- The motion to dismiss based on a failure to adequately plead the relevant market is granted in part and denied in part. The motion is granted to the extent Plaintiffs have not adequately alleged a cART market. Plaintiffs have leave to amend.
- The motion to dismiss the state law claims (antitrust and consumer) is granted in part and denied in part.
 - Applying California law to nationwide purchases is not a due process violation.
 - The Court shall address at the class certification stage Gilead’s argument that Plaintiffs cannot proceed with their state law claims for 25 states (*i.e.*, because “[n]o purchase by any Plaintiff is alleged in the . . . 25 states”). Gilead Mot. at 35.
 - The motion to dismiss based on failure to satisfy pre-filing requirements is denied.
 - The motion to dismiss the indirect purchaser claims for damages is granted as to the Illinois Antitrust Act and the Puerto Rico Antitrust Act. On the Rhode Island Antitrust Act and the Maryland Antitrust Act, Rhode Island and Maryland each has an *Illinois Brick* repealer statute but indirect purchaser claims for damages prior to the effective date of that statute are not viable. The motion to dismiss the indirect purchaser claims for damages under the Utah Antitrust Act and the Massachusetts Consumer Protection Act is denied without prejudice.
 - The motion to dismiss certain consumer protection claims based on an “end run” argument (*i.e.*, around *Illinois Brick*) is denied.
 - The motion to dismiss the consumer protection claims as conclusorily pled is denied.
 - The motion to dismiss the consumer protection claims to the extent based on deceptive conduct is denied. However, the Court orders Plaintiffs to

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provide a more definite statement as to what relief is sought for any deceptive conduct.

- The motion to dismiss is granted with respect to the union insurers’ claims based on the consumer protection laws of the following states/jurisdictions: Hawaii, Kansas, and Vermont.
- The motion to dismiss the monopolization and attempted monopolization claims under Kansas, New York, and Tennessee law is granted in part – *i.e.*, to the extent the claims are based on the unilateral conduct of Gilead in commercializing TAF.

To the extent the Court has allows Plaintiffs leave to amend, Plaintiffs’ amended complaint shall be filed within 30 days from the date of this order. Thereafter, Defendants shall have 30 days to respond. If Defendants respond with another motion to dismiss, the Court strongly encourages Defendants (as before) to coordinate. Ideally, Defendants would be able to file a joint motion to dismiss, and the Court would extend page limitations to reflect the joint nature of the motion.

This order disposes of Docket Nos. 143, 149, 158, and 159.

IT IS SO ORDERED.

Dated: March 3, 2020


EDWARD M. CHEN
United States District Judge