No. 21-3005

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

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

SANOFI-AVENTIS U.S., LLC,

Plaintiff, Counterclaim-Defendant, and Appellant,

v.

MYLAN, INC.,

Defendant and Appellee,

MYLAN SPECIALTY, LP,

Defendant-Counterclaimant and Appellee.

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

BRIEF OF AMICUS CURIAE J. GREGORY SIDAK IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

Amicus curiae, J. Gregory Sidak, is an economist and antitrust scholar who has written extensively on the economic principles underlying antitrust law, innovation, and regulation for 40 years. He has a strong interest in ensuring that antitrust law develops in a manner consistent with sound economics.

Mr. Sidak is founder and chairman of Criterion Economics, Inc., the founding U.S. editor of the *Journal of Competition Law & Economics*, the preeminent international journal on antitrust law and economics, published quarterly by the Oxford University Press since 2005, and the publisher and editor of the *Criterion Journal on Innovation*, which he launched in 2016. He was Judge Richard Posner's first law clerk, a staff member of the President's Council of Economic Advisers, and Deputy General Counsel of the Federal Communications Commission. Mr. Sidak has held academic appointments at Yale, Georgetown, Tilburg University in The Netherlands, and the American Enterprise Institute.

Since 1984, courts across the country, including the Supreme Court, have cited Mr. Sidak's work approvingly. *E.g.*, *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 514 (2002); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 n.23

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[1] No party's counsel authored this brief in whole or part. No party, party's counsel, or person other than *amicus curiae* and his counsel contributed money to fund the brief's preparation or submission. The parties have stated that they consent to the filing of this brief.

(1984); *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, No. 19-40566, 2021 WL 3877749, at *5 (5th Cir. Aug. 31, 2021); *SprintCom, Inc. v. Comm'rs of Ill. Com. Comm'n*, 790 F.3d 751, 756 (7th Cir. 2015); *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (en banc) (per curiam); *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 927 (6th Cir. 2000). Mr. Sidak has twice served as Judge Posner's court-appointed neutral economic expert when Judge Posner sat as a district judge by designation.

PRELIMINARY STATEMENT

Justice Holmes said that "the law" is merely a "prophec[y] of what the court[] will do" in the next case to come before it. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897). Economists would call Holmes' definition of the law a "rational expectation." An antitrust economist examining Sanofi's appeal in this case would ask: Would we rationally expect five members of the current Supreme Court to displace the well-established "equally efficient competitor" principle and replace it instead with the novel "effective entrant burden" heuristic, which the district court rejected below? Surely not. There is no serious prospect that the Supreme Court is about to strip the law of monopolization down to the studs and give it an entirely different façade. Nor is there any sound reason why the Court should want to do so.

To the extent that any factual premise is necessary to frame *amicus curiae*'s economic arguments, it can be concisely summarized. Sanofi accused Mylan of monopolizing the market for epinephrine auto injectors, like Mylan's EpiPen and Sanofi's Auvi-Q. EpiPen had a high market share going back many years before Sanofi entered in 2013. Mylan had always paid small rebates to the pharmaceutical benefit managers ("PBMs"). After Auvi-Q entered, Mylan paid larger rebates, often in exchange for preferential or sometimes exclusive positions on PBM formularies. After a year or more of being disinclined to compete on price, Sanofi began to respond to PBM requests for competitive rebates and did much better in formulary coverage and market share. Some PBMs gave Auvi-Q exclusive coverage, and there Mylan's share of EpiPen shrank close to zero. In mid-2015, however, Auvi-Q was withdrawn for unreliable dosing, and Sanofi gave up the product.

Sanofi's expert economic witness, Professor Fiona Scott Morton, opined that Mylan had monopoly power, as evidenced by its share, and that its exclusionary rebates anticompetitively foreclosed the market, making competition impossible. Scott Morton relied on Mylan's documents expressing its intent to win. She also relied on her 2017 law review article arguing that discounts can be foreclosing where much demand is non-contestable. Scott Morton opined that the rebates in essence taxed Auvi-Qs so they could not compete.

The district court found undisputed proof that Sanofi and Mylan could compete vigorously over rebates for preferential positions on PBM formularies and eventually did so (once Sanofi decided to compete on net price); that net prices consequently fell; that there was little foreclosure of entry under any economic definition; that there was little non-contestability of demand for EpiPens; and that Sanofi ultimately exited the market following problems maintaining its own product's quality.

This brief is a rifle shot addressing solely the economic merits of Sanofi's last-gasp argument. Sanofi cannot win on the facts under existing law. Its only recourse is to ask this Court to replace the equally efficient competitor principle as the controlling law with Scott Morton's novel theory and then decide the case in Sanofi's favor—not based on whether the challenged conduct harmed competition and consumer welfare, but rather on the presence or absence of an "effective entrant burden."

That novel theory would flout Supreme Court antitrust jurisprudence by incorrectly elevating ***competitor*** welfare over ***consumer*** welfare. It finds no support in current antitrust law or economic principles, and it could not plausibly become the law of monopolization in the Holmesian sense. This Court should affirm.

ARGUMENT

I. THE EQUALLY EFFICIENT COMPETITOR PRINCIPLE PROMOTES COMPETITION

"Anticompetitive behavior is illegal under federal antitrust law. Hyper-competitive behavior is not." *FTC v. Qualcomm Inc.*, 969 F.3d 974, 1005 (9th Cir. 2020). The equally efficient competitor principle of American antitrust jurisprudence has long embodied this economic distinction and thereby differentiated U.S. antitrust law from competition law in Europe and other foreign jurisdictions.

A. Prevailing Antitrust Law Protects Competition and Consumer Welfare

U.S. antitrust law promotes "'the protection of ***competition***, not ***competitors***.'" *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *see Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013) (Gorsuch, J.). Antitrust law thus stays true to its design "as a 'consumer welfare prescription.'" *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 66 (1978))); *see Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986).

Conduct that harms competitors is not necessarily anticompetitive: All firms, including monopolists, can ***promote*** competition by charging low prices, including

discounts off higher prices. *See, e.g.*, *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986); *Brooke Grp.*, 509 U.S. at 223 ("[l]ow prices benefit consumers," even if they harm competitors, and "'do not threaten competition'" if they are set "'above predatory levels'" (*i.e.*, above the appropriate measure of the defendant's cost) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990))).[2]

The Supreme Court has cautioned against "impos[ing] antitrust liability for prices that are too low." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 451 (2009). "[M]istaken inferences" are too costly: "'[T]hey chill the very conduct the antitrust laws are designed to protect.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); *see* J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. Competition L. & Econ. 279, 282, 297, 306 (2008). Thus, the Supreme Court has refused to "protect competitors from the loss of profits due to [above-cost] price competition." *Brooke Grp.*, 509 U.S. at 222. "It would be absurd to require the firm to hold a price umbrella over less efficient entrants." Richard A. Posner, *Antitrust Law* 196 (2d ed. 2001). Such a rule would produce the "perverse result" of condemning "any

[2] *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007); *Cargill*, 479 U.S. at 116; *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 274 n.11 (3d Cir. 2012) (Fisher, J.).

decision by a firm to cut prices in order to increase market share." *Brooke Grp.*, 509 U.S. at 223.

B. The Equally Efficient Competitor Principle Protects Competition and Consumer Welfare

Consistent with those principles, Mylan's expert and the district court below embraced the "equally efficient competitor principle," which asks whether the "challenged practice is likely in the circumstances to exclude from defendant's market an equally or more efficient competitor." Posner, *supra*, at 196. That standard protects procompetitive pricing behavior, competition, and, ultimately, consumer welfare. It respects the Supreme Court's admonitions against imposing liability for charging consumers too little.

Part of the principle's appeal is its straightforward application: If the defendant's price exceeds the appropriate measure of the defendant's cost, the pricing conduct is presumptively lawful. Mylan's expert, Professor Robert D. Willig of Princeton University, applied the principle to the facts of this case, as did the district court. Both concluded that Mylan's conduct would not have excluded an equally efficient competitor. *See* J.A. Vol. 18 at 4018, 4020-4023; J.A. Vol. 13 at 2703-2704.

This Court embraced the principles of equally efficient competitor analysis when it explained that antitrust law and sound economic policy do not force a firm "to subsidize a less efficient rival." *Novell*, 731 F.3d at 1077. "Forcing monopolists

to hold an umbrella over inefficient competitors might make rivals happy," the Court observed, "but it usually leaves consumers paying more for less." *Id.* at 1072 (quotation and brackets omitted). Holding "firms liable for making moves that enhance their overall efficiency . . . would risk retarding consumer welfare by deterring vigorous competition." *Id.* at 1077-78.

Other federal courts of appeals have embraced the same principles. *See ZF Meritor*, 696 F.3d at 275; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000); *Int'l Air Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714, 721-26 (5th Cir. 1975). Still others have expressly adopted the equally efficient competitor test. *See Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 270 (6th Cir. 2015); *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 906 (9th Cir. 2008). So have leading antitrust scholars. *See, e.g.*, Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 705, 711 (1975); Posner, *supra*, at 196; Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 300 (1981); Sidak, *Price Squeeze*, *supra*, at 282, 297, 306; Br. of Amici Curiae Professors and Scholars in L. and Econ. in Supp. of Pet'rs, 2008 WL 4125499, at *7, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (No. 07-512) (filed Sept. 3, 2008) (drafted and filed by Hon. Robert H. Bork and J. Gregory Sidak) ("Bork-Sidak *linkLine* Br.").

II. SCOTT MORTON'S "EFFECTIVE ENTRANT BURDEN" "TEST" WOULD HARM COMPETITION

In the court below, Sanofi's expert—Professor Fiona Scott Morton of the Yale School of Management and the Charles River Associates consultancy[3]—did not dispute that Sanofi's case fails under the "equally efficient competitor" test. Instead, she advocated an "effective entrant burden" "test" as an alternative. J.A. Vol. 14 at 2938-2940; *see* J.A. Vol. 14 at 3080-3094. She said her "test," which originated in a 2017 law review article, measures the "competitive effects of loyalty rebates" to "sift anticompetitive from procompetitive loyalty discounts." Fiona M. Scott Morton & Zachary Abrahamson, *A Unifying Analytical Framework for Loyalty Rebates*, 81 Antitrust L.J. 777, 777, 816 (2017). That "test," however, would elevate competitor welfare over consumer welfare and would prohibit competitive conduct that benefits consumers.

A. Scott Morton's "Test" Contravenes Basic Economic Theory

According to Scott Morton, a "dominant" firm's loyalty discounts impose a "burden" on new market entrants by forcing them to offer a discount "to compete [with the 'dominant' firm] for contestable market share." Scott Morton & Abrahamson, *supra*, at 819. If, she argues, the "burden" of a given loyalty discount

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[3] *See* J.A. Vol. 14 at 2844 ¶7.

is high enough—how high is unclear—relative to the rival's overhead, her "test" would find the discount anticompetitive. *See id.* at 823.

In fact, Scott Morton's "test" would penalize procompetitive conduct and only ***hurt*** consumers. Scott Morton compares the so-called "burden" on an entrant to its "long-run average incremental cost" ("LRAIC"), *i.e.*, the cost the entrant incurs when competing with an established firm. Scott Morton & Abrahamson, *supra*, at 797-99, 822-23. "Th[e] difference," according to Scott Morton, "is the financial penalty imposed by the incumbent on the entrant." *Id.* at 798. LRAIC, however, includes "set-up costs," "R&D expenditures," and other expenses unrelated to the cost of competing for a given sale. *Id.* at 797-98; *see* William J. Baumol & J. Gregory Sidak, *Toward Competition in Local Telephony* 57-58 (1994). Because Scott Morton's "test" credits market entrants for all those costs, it effectively credits a hypothetical rival for ***its overhead***.

Scott Morton's "test" thus abandons a key insight of American antitrust law: Nearly all market entrants must bear initial losses. *See* Richard A. Posner, *Antitrust Law: An Economic Perspective* 59 (1976) ("A barrier to entry is commonly used in a quite literal sense to mean anything which a new entrant must overcome in order to gain a foothold in the market, such as the capital costs of entering the market on an efficient scale. This is a meaningless usage, since it is obvious that a new entrant must incur costs to enter the market, just as his predecessors, the firms now

occupying the market, did previously."); *id.* at 92 ("The amount of capital required for entry is not a barrier to entry . . . ; presumably it is no greater for the new entrant than for the firms in the market."); Benjamin Klein & Andres V. Lerner, *Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts*, 80 Antitrust L.J. 631, 666 n.73 (2016).

Scott Morton's "test" also flouts a central insight of Nobel laureate George Stigler, who famously defined a barrier to entry as "a cost of producing . . . which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry." George J. Stigler, *The Organization of Industry* 67 (1968). Established firms that have already sunk costs are entitled to benefit from their investments. Scott Morton's "test," however, would recast the initial costs that every entrant bears into a "burden" supposedly inflicted by a firm's loyalty discounts that ***benefit*** consumers.

B. Scott Morton's "Test" Is a Normative Policy Prescription

A common error of economists who testify or consult in litigation is failure to distinguish normative propositions about what they think the law ***should be*** from positive statements about what the law ***is***. In presenting her "test," Scott Morton evidently assumes that controlling law—which defines the question on which the expert's opinion might be helpful and relevant according to the law of evidence—coincides with the normative rule she would prefer courts to adopt. *See* Scott Morton

& Abrahamson, *supra*, at 796 ("[W]hile marginal-cost tests may be helpful in the antitrust review of predatory pricing, they should yield to alternative analyses in the context of loyalty rebates.").

The controlling principle for identifying relevant and helpful expert economic testimony—and excluding unhelpful, unreliable, and confusing testimony—is the positive rule that courts ***actually use*** to decide cases. *See* Fed. R. Evid. 702; *see also Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003) ("Rule 702 embodies a trilogy of restrictions on expert testimony: qualification, reliability and fit."); *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122 (10th Cir. 2006) (similar). Courts lack discretion to create new rules from whole cloth, much less rules that flout Supreme Court precedent—which Scott Morton's "test" would do.

C. Erroneous Economic Assumptions Underlie the Scott Morton "Test"

Expert economic testimony that assumes a false state of affairs cannot help—and will confuse—juries. Scott Morton's theoretical model departs from the real world.

1. *The Assumption That Price Discrimination Is Absent from the Pricing of Pharmaceuticals Is Contrary to Fact*

In economics, the traditional way of viewing businesses and products has been to consider the ***multi***product firm. Such a firm produces *n* different products and

earns a different price-cost margin on each, depending on the firm's own-price elasticity of demand for each. Scott Morton assumes the absence of price discrimination in pharmaceutical pricing. *See* J.A. Vol. 13 at 2848-2851. (As defined by Stigler, price discrimination occurs when consumer *A* pays a firm a different price for a particular good than consumer *B*, even though the marginal cost of producing the good is the same for both consumers, George J. Stigler, *The Theory of Price* 210-11 (Macmillan 4th ed. 1987)). Casual observation reveals pervasive price discrimination in pharmaceutical pricing, and economists have powerfully shown the contrary assumption unsound.

William Baumol, one of the great economists of his generation, and Daniel Swanson, a senior antitrust partner at Gibson Dunn (who also holds a Ph.D. in economics from Harvard), observed in an influential article that price discrimination is ubiquitous—even in competitive markets. *See* William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous* Competitive *Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 Antitrust L.J. 661, 678-81 (2003). Baumol and Swanson showed that competing firms are compelled to engage in price discrimination because "scale economies in general, and repeated sunk costs in particular, force firms in the affected industries, if they operate in competitive

markets, to adopt prices that are discriminatory and exceed marginal costs." *Id.* at 662.[4]

For Scott Morton to propose what is supposed to be a legal test to assess loyalty discounts under antitrust law, and then to apply that "test" to pharmaceuticals while assuming no price discrimination, is contrary to fact. The test is so disconnected from reality that it offers nothing that would help a trier of fact determine whether certain pricing practices are anticompetitive.

2. *The Conjecture That Mylan's Conduct Caused a Substantial Portion of Demand To Be Non-Contestable Is Unrealistic*

Scott Morton's conjecture that Mylan's conduct caused a substantial portion of demand in the relevant market to be non-contestable is unrealistic. *See* J.A. Vol. 14 at 2922-2933. Why is demand non-contestable? Why is the phenomenon Scott Morton observes—the alleged "increase [in] the entrenched share for EpiPen market-wide" over time, *id.* at 2922—not simply the innocuous case where two different demand curves of different slope exist for distinct sets of consumers, which are then horizontally summed to produce a familiar "kinked" overall demand curve? If price were to be increased substantially rather than marginally, would demand

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[4] Although Baumol's and Swanson's point addresses separate classes of consumers for a ***single*** product, that situation is analytically similar to the multiproduct scenario, with the exception that economies of scope do not figure in the analysis. *See* Baumol & Swanson, *supra*, at 678-81; pp. 17-19, *infra* (explaining economies of scope).

truly remain non-contestable for the less price-sensitive subset of consumers? And over what time horizon would customers supposedly outright refuse to switch to a rival product? Scott Morton's "test" does not answer these questions and thus does not inform whether, in fact, any pricing conduct increased non-contestable demand.

3. *Scott Morton's Use of Long-Run Average Incremental Cost Is Incorrect*

Scott Morton suggests using the ***incumbent's price*** as a proxy for the ***entrant's*** LRAIC. Scott Morton & Abrahamson, *supra*, at 798 ("If a court is concerned about the entrant's efficiency, the court can use the incumbent's price as a proxy for LRAIC."). Her use of LRAIC raises the question of the magnitude of the denominator (number of units when calculating cost-per-unit). Are we guessing at the hypothetical entrant's unit sales ***at the time of its entry***? Why should that level of sales be related to, for example, R&D expenditure?

That simplifying assumption has at least two other obvious flaws. First, it includes the incumbent's ***profit*** (as profits would be a part of its price) in a proxy for measuring ***costs***. Second, it compares the ***incumbent's discount*** to the potential ***entrant's costs***. The test thus requires an incumbent seeking to avoid liability to price according to what it ***thinks*** a hypothetical entrant's costs might be, instead of according to the incumbent's own costs.

Scott Morton would also require that "any price-cost test"—including the equally efficient competitor principle—incorporate overhead costs. Scott Morton &

Abrahamson, *supra*, at 797. However, using the incumbent's price, which would cover the incumbent's overhead costs, as a proxy for an entrant's LRAIC would depart from reality in yet another way: It would assume that entrants would confront ***all of the R&D costs that the incumbent faced***. That totality of costs might include blind alleys, failed designs, and the larger costs of introducing a new product. There is no sound economic basis for assuming that an entrant would need to bear all those costs. To the contrary, an (equally efficient) entrant would effectively be copying an already successful product and would consequently face much lower up-front costs. The imitator, therefore, enjoys a valuable "second mover" advantage, for it can piggyback on the results of the incumbent's risky sunk investment in discovering and commercializing a new technology. *See* J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. Competition L. & Econ. 349, 357 (2006); Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 Yale L.J. 417, 464-66 (1999). Scott Morton's "test" incorrectly assumes that the "entrant" would start from scratch—like the incumbent did—rather than confine entry to products already revealed, by dint of the incumbent's investment in innovation, to be technologically feasible and commercially valuable.

4. *Scott Morton's Characterization of an Entrant's Efficiency or "Burden" Is Ambiguous, Incomplete, and Incorrect*

Scott Morton's "test" necessarily makes a critical but implicit assumption about the breadth of product offerings across which a multiproduct entrant can exploit economies of scope. A firm's technology exhibits economies of scope if a single firm can produce two products at a lower cost than if each product were produced by a different firm. *See, e.g.*, J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States* 55-60 (1997); Daniel F. Spulber, *Regulation and Markets* 114-17 (1989); William J. Baumol, John C. Panzar & Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* 71 (Harcourt Brace Jovanovich rev. ed. 1988).[5] The cost of producing one of the firm's products alone is called the product's "stand-alone cost." *See, e.g.*, Baumol & Sidak, *supra*, at 58-59. Economies of scope are said to exist if the sum of the stand-alone costs of the two products exceeds the cost of jointly producing the two products within a single firm.

A major issue for Scott Morton's "test" arises when the "entrant"—which in her schema might actually be a well-established multiproduct rival like Sanofi—

[5] The seminal exposition of economies of scope is John C. Panzar & Robert D. Willig, *Economies of Scale in Multi-Output Production*, 91 Q.J. Econ. 481 (1977).

offers only $n - 1$ products and thus fails to avail itself of the same economies of scope that the incumbent has attained by providing n products. Scott Morton's "test" for analyzing the feasibility of entry by a hypothetical firm producing a single product on a stand-alone basis cannot be informative if, in the real world, no firm would ever choose to compete on a stand-alone basis. The stand-alone cost of entry must, therefore, be recast as the cost of entering the market with a simultaneous offering of the minimally viable vector of products. The entrant must achieve not only minimum efficient scale, but also minimum efficient scope. *See generally* J. Gregory Sidak, *The Law of* n + *1*, 7 Criterion J. on Innovation 1 (2021).

Here, traditional antitrust jurisprudence is admittedly underdeveloped: Until recently, it likewise has been preoccupied with assessing competition as though it occurred among single-product firms. Once demand complementarities are introduced—and, thus, once ancillary revenue streams are introduced in what is really nothing more than a modified Ramsey pricing framework—a new clarity emerges.[6] Particularly in a technologically dynamic market such as

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[6] Under "Ramsey pricing" a multiproduct firm maximizes profits (and recovers sunk costs) by setting higher price-cost margins for goods with relatively inelastic demand and lower price-cost margins for goods with relatively elastic demand. Sidak, *A Consumer-Welfare Approach*, *supra*, at 358. The seminal contributions are Frank P. Ramsey, *A Contribution to the Theory of Taxation*, 37 Econ. J. 47 (1927), and William J. Baumol & David F. Bradford, *Optimal Departures from Marginal Cost Pricing*, 60 Am. Econ. Rev. 265 (1970).

pharmaceuticals, the imperative to compete across the dimension of n rather than $n - 1$ products will generate enormous gains to consumer welfare. Mylan should not be penalized for Sanofi's strategic decision not to compete across n products. The district court surely did not abuse its discretion in refusing to credit Scott Morton's test where it fails to justify ignoring the reality that the market is occupied by multiproduct firms.

5. *Adopting Scott Morton's "Test" Would Flout* Grinnell

In *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), the Supreme Court articulated its now well-known requirement that "[t]he offense of monopoly under [§] 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 570-71. A generation before Justice William O. Douglas penned this famous phrase for the Court, Judge Learned Hand had coined a similar phrase in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"): "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry." *Id.* at 430.

Two sentences later in *Alcoa*, Judge Hand remarked even more enduringly: "The successful competitor, having been urged to compete, must not be turned upon

when he wins." 148 F.2d at 430. This observation framed what Robert Bork later famously called the antitrust paradox. *See* J. Gregory Sidak, *Monopoly, Innovation, and Due Process:* FTC v. Qualcomm *and the Imperative To Destroy*, 6 Criterion J. on Innovation 1, 98 (2020). To adopt Scott Morton's "test" would be to repudiate *Grinnell*'s requirement that the plaintiff prove as part of its *prima facie* case that business acumen, among other benign factors or virtuous attributes, was ***not*** the lawful proximate cause of the alleged harm to a competitor. *See id.* at 699.

6. *Scott Morton's "Test" Ignores That "Exit" Is Not a Sufficient Condition for Proving Harm to Competition*

Antitrust law is concerned about exit only when it harms competition, which has a precise economic meaning regarding the attainment of competitive pricing. Judge Posner wrote for the Seventh Circuit in 1982: "Now there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated." *Prods. Liab. Ins. Agency v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982). He anchored that statement in *Reiter v. Sonotone*, 442 U.S. at 343, and the various accounts of the primacy of consumer welfare "told by the Supreme Court repeatedly in recent years." *Products Liab.*, 682 F.2d at 663. "That 'there's a special providence in the fall of a sparrow' is not the contemporary philosophy of antitrust." *Univ. Life Ins. Co. of Am. v. Unimarc Ltd.*, 699 F.2d 846, 853 (7th Cir. 1983) (Posner, J.) (citation omitted) (quoting William Shakespeare, *Hamlet* act 5, sc. 2, l. 232).

Instead, the relevant analysis is whether "either the exclusion of an individual [competitor] . . . or the possible effect of that exclusion on the competitive behavior of other aspirants . . . could result in a higher price or lower quality of [service]" in the relevant market. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 706 F.2d 1488, 1497 (7th Cir. 1983). Put differently, exit is not a sufficient condition for an antitrust plaintiff to establish cognizable harm to competition.

What if the "exit" takes the form of the business unit in question being sold to a formidable firm (hardly the stylized upstart "entrant")? When Intel sold its baseband processor modem business to Apple in 2019, and thus "exited" the mobile device chipset market, did that development harm competition in that market? *See* Press Release, Apple Inc., *Apple To Acquire the Majority of Intel's Smartphone Modem Business* (July 25, 2019), https://www.apple.com/newsroom/2019/07/apple-to-acquire-the-majority-of-intels-smartphone-modem-business. Surely not, for there was no causal nexus whatsoever between Intel's exit and a diminution in competition. So, too, in regard to Sanofi's exit in this case.

Economics textbooks say a good deal about "entry," but precious little about "exit." The word "exit" can connote two distinct economic phenomena. *See* Sidak, FTC v. Qualcomm, *supra*, at 682-83. When a firm "exits" an industry in the existential sense, its productive assets vanish. The opposite of ***existential*** "exit," which can be termed ***transcendent*** "exit," implies salvaging a thing still possessing

value—exit is the path to preserving or delivering valuable assets from ruin. So, as the word is used in an antitrust case, does "exit" connote death or deliverance? It cannot be both simultaneously in a given case. *See id.* at 682-84.

Here, the district court observed that, after recalling Auvi-Q due to its "potential for inaccurate dosage delivery of epinephrine," "Sanofi never re-launched Auvi-Q." J.A. Vol. 12 at 2597-2598. "Instead, in the fall of 2015, Sanofi elected to return its rights to Auvi-Q to Intelliject." *Id.* at 2598. In turn, Intelliject—under the new name Kaléo—began selling Auvi-Q itself. *See Auvi-Q: Meet the Family*, https://www.auvi-q.com/about-auvi-q#meet-the-family (last visited Sept. 22, 2021). Sanofi thus did not ***burn down*** its Auvi-Q business. The word "exit" as used by Scott Morton incorrectly confuses a firm's departure from the industry with the disposition of its dynamic capabilities and productive assets (including intellectual property) to another firm.

Even if a firm were to choose to stop development and production within a business unit, that firm would seek to salvage or redeploy capital to reduce its costs of exit. Even if all of the firm's assets were liquidated instead, the underlying technologies that those assets practiced would remain. Knowledge would not be lost. Unless the dynamic capabilities enabled by the creation of specialized human capital and intellectual property were somehow destroyed, they would remain available for use by a subsequent market entrant. That was the lesson from Intel's

sale of its mobile chipset business to its largest customer, Apple. And that is what happened here.

Exit happens all the time, including when one multiproduct firm sells a business unit to another firm. Exit need not be a reason for consumers to grieve and competitors to sue. To the contrary, exit is a necessary incident to—and market signal of—the efficient redeployment of assets to their highest-valued user.

D. Economists and Courts Have Properly Declined To Accept Scott Morton's "Test"

Other economists have not embraced Scott Morton's "test," perhaps because of the erroneous assumptions on which it rests, or perhaps because of the failure of the "test" to offer any way to quantify the "burdens" on which its analysis turns. Scott Morton admitted that her "test" offers no "cutoff" for determining "whether or not [the effective entrant burden calculation] reflects an anticompetitive situation." J.A. Vol. 19 at 4074.

Does Scott Morton's line of reasoning even amount to a "test" that a court could feasibly apply? A test is necessarily a conditional proposition: If factual conditions *A*, *B*, and *C* are proven to be true (according to the requisite burden of persuasion), then it follows that proposition *X* may be accepted as true. Scott Morton has not formulated any if-then relationship. It is not a conditional relationship—it is not a "test"—merely to say that it is bad to "burden" an entrant. To the contrary, that sentiment is at most a desideratum.

Economists understand that every action has a cost—that is, an opportunity cost of the sort that Armen Alchian famously articulated: "In economics, the cost of an event is the highest-valued opportunity ***necessarily*** forsaken." Armen A. Alchian, *Cost*, *in* 3 *International Encyclopedia of the Social Sciences* 404, 404 (David L. Sills ed. 1968) (emphasis added). So, the desideratum of not "burdening" an entrant implies an opportunity cost of some action that an incumbent would be denied the freedom to undertake as a result—in this case, offering consumers greater discounts. It is not clear *a priori* whether the "burden" on the rival that Scott Morton's "test" supposedly avoids exceeds the opportunity cost that is borne by the incumbent and its customers when the incumbent must forbear from more aggressive forms of rivalry—what the Ninth Circuit in *FTC v. Qualcomm* called entirely lawful "[h]ypercompetitive behavior." 969 F.3d at 1005. It is doubtful that economic welfare would, on balance, increase under Scott Morton's novel "test" relative to the level of economic welfare that would be attained under the prevailing equally efficient competitor principle.

E. Scott Morton's "Test" Condemns Procompetitive Pricing

Even if it could be understood as a genuine legal "test," Scott Morton's heuristic would still be incompatible with American antitrust law because it would condemn even procompetitive pricing. Four points deserve emphasis.

1. It is well recognized that potential competition—*i.e.*, the threat of new entry in the market—helps discipline pricing, improve quality, and spur innovation. *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 27 (2001); David J. Teece & J. Gregory Sidak, *Dynamic Competition in Antitrust Law*, 5 J. Competition L. & Econ. 581, 611-12 (2009); Sidak, FTC v. Qualcomm, *supra*, at 586-600. By condemning ***any*** "burden" placed on a rival, Scott Morton's "test" would tell incumbents they cannot respond to the potential for new entry by offering loyalty discounts that lower the effective price of their goods to consumers' benefit. The "test" purports to measure "the penalty that a rebate contract imposes on a prospective entrant." Scott Morton & Abrahamson, *supra*, at 777. That objective presumes that every rebate contract (*i.e.*, loyalty discount) imposes an anticompetitive burden on new market entrants, even if the ultimate price offered exceeds the incumbent's cost.

2. Although Scott Morton's "test" is framed in terms of its effect on "entrants," rarely in practice would the "test" apply to an entrant. Case in point: With revenues exceeding €35 billion in 2017, the year in which it sued Mylan, Sanofi—the largest pharmaceutical company headquartered in France—was neither a neophyte nor a minnow. Press Release, Sanofi, *Sanofi Delivers 2017 Business EPS(1) in Line with Guidance* (Feb. 7, 2018), https://www.sanofi.com/en/media-room/press-releases/2018/2018-02-07-07-30-00.

In practice, cases arise when an ***incumbent*** (like Sanofi) ***leaves*** the market. That is precisely what Sanofi did: In October 2015, after it "discovered Auvi-Q's potential for inaccurate dosage delivery of epinephrine—a defect that could include failure to deliver the drug," Sanofi "voluntarily recalled all Auvi-Q devices." J.A. Vol. 12 at 2597-2598. Rather than promote "new entry," Scott Morton's "test" instead enhances the litigation position of a market behemoth whose exit the defendant did not cause.

3. Scott Morton's "test" would attribute a burden to ***any*** price decrease or any quality increase. The lesser danger of this "test" would be its application to loyalty discounts, which produce the salutary effect of lowering quality-adjusted prices (typically by contract). *See* p. 9, *supra*. The greater danger of the "test" would be its proclivity to identify ***any*** behavior by an incumbent that lowers quality-adjusted prices—by contract or in a market—as a "burden."

Because Scott Morton admits that she offers no "cutoff" for distinguishing anticompetitive behavior from vigorous competition, her "test" would fail to offer courts a reliable way of punishing anticompetitive behavior without also punishing procompetitive behavior. J.A. Vol. 19 at 4074. The "test" thus could be invoked in virtually any setting and produce the same outcome: higher prices, lower product quality, or some combination of the two. Under Scott Morton's "test," antitrust

plaintiffs could portray ***every contract and every market action*** as a *de facto* or constructive loyalty discount in disguise.

4. Scott Morton's "test" would offer a windfall to inefficient competitors by treating the price of entering a market as a "burden" imposed by those already in it. Scott Morton admits that her "test" would force "dominant" firms to forgo conduct that "reduces the entrant's profits." J.A. Vol. 14 at 3099; *see id.* at 3082; Scott Morton & Abrahamson, *supra*, at 784. It thus would force competitors "to subsidize a less efficient rival," *Novell*, 731 F.3d at 1077, and would discourage cost reduction and price cutting—which ultimately would harm consumers, who would pay higher prices.

Ultimately, the primary concern of Scott Morton's "test" would be the protection not of consumer welfare, but of ***competitors***. Yet, consumer welfare animates American antitrust law. *See Reiter*, 442 U.S. at 343. Scott Morton's "test" mistakenly draws its theoretical inspiration from Europe's "abuse-of-dominance" model, *see* Scott Morton & Abrahamson, *supra*, at 802-06, which treats market dominance—regardless of its effect on consumer welfare—as inherently anticompetitive, *see* Sidak, *Price Squeeze*, *supra*, at 295-97; *see generally* Bork-Sidak *linkLine* Br., *supra*.

CONCLUSION

Sanofi attempted to prevail by persuading the district court to water down the proof needed for a *prima facie* case of monopolization. It unsuccessfully tried to convince the district court to impose a new "test"—one that would elevate the interests of competitors over the protection of competition—in place of the established law. Considering that Sanofi recalled and ceased selling its competing drug in 2015 owing to its defective product quality, the dispositive question is whether anything Mylan did or failed to do plausibly caused Sanofi's exit from the relevant product market and consequently harmed competition. Scott Morton's "test" is a distraction incapable of answering that question.

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a) because this brief contains 6,342 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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