CASE NO. 00-2483

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE CARDIZEM CD ANTITRUST LITIGATION
MDL NO. 1278

LOUISIANA WHOLESALE DRUG CO., INC.; BETNOR INC.; AETNA
US HEALTHCARE; ALBERT EIRICH; PEARL BENCE LOWY;
DUANE READE, INC.; STATE LAW PLAINTIFFS; SHERMAN
CLASS ACT PLAINTIFFS; SIXTEENTH STREET
COMMUNITY HEALTH CENTER,
Plaintiffs-Appellees,

v.

HOECHST MARION ROUSSEL, INC., now known as Aventis
Pharmaceuticals Inc.; ANDRX PHARMACEUTICALS, INC.,
Defendants-Appellants,

HOECHST AG; ANDRX CORPORATION,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[PROPOSED] BRIEF OF *AMICUS CURIAE* AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE OF THE GRANT OF PARTIAL SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, the American Antitrust Institute ("AAI") makes the following disclosure:

1. Is said party a subsidiary of a publicly owned corporation? No.
   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

   N/A

____________________________ ____________________
Paul E. Slater Date

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MISCELLANEOUS

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ANTITRUST INSTITUTE

The American Antitrust Institute ("AAI") respectfully submits this brief *amicus curiae* in support of the district court's holding that the agreement between Andrx Pharmaceuticals, Inc. ("Andrx") and Hoechst Marion Roussel, Inc. ("HMR") constitutes a per se violation of §1 of the Sherman Act.[1] The AAI believes that the holding below is correct and that the departure from the per se rule requested by the defendants would threaten competition and expose consumers to higher prices.

Identity and Interest of *Amicus Curiae* and Source of Authority to File

The AAI is an independent, not-for-profit organization dedicated to economic research, study of the antitrust laws and public education. The directors of the AAI are Jonathan Cuneo, attorney, Albert H. Foer, attorney, and Professor Robert Lande of the University of Baltimore Law School. The Advisory Board of the AAI consists of forty-nine prominent lawyers, law professors, economists and business leaders (The members of the Advisory Board are listed on Exhibit A attached hereto). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by the AAI. The AAI's mission is to increase the role of competition and challenge the undue concentration of economic power. No director or member of the Advisory Board of the AAI represents any party in this litigation.

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[1] AAI expresses no opinion with regard to the antitrust injury issue pending before this Court.

The agreement here in question provided that HMR, the holder of a patent for the prescription drug Cardizem® CD, would pay Andrx, a generic drug manufacturer, $40,000,000 per year to refrain from entering the market with its FDA approved, but allegedly infringing generic verison of Cardizem® CD. The district court held that the agreement allocated the entire Cardizem® CD market to HMR and constituted a horizontal market allocation which is one of the types of agreement which has long been held to be per se unlawful.

In its proposed brief, the AAI argues that the district court correctly analyzed the intersection between the antitrust and patent laws. Its ruling grants proper deference to the patent system without allowing a patentee to preclude market entry by simply paying a generic manufacturer to withhold his lower-priced product from consumers.

The AAI believes that if the decision below is reversed, the agreement in question will become a template which pharmaceutical manufacturers will use to withhold lower-priced generic drugs from the market while they share the resulting monopoly profits. In order to protect the public's interest in lower pharmaceutical prices and the sound application of the antitrust laws, the AAI, pursuant to F.R.App.P. 29(b), seeks leave of Court to file its *Amicus Curiae* brief urging affirmance of the ruling below and is contemporaneously its Motion for Leave to File *Amicus Curiae* Brief In Support of the Plaintiffs-Appellees.

I. The Antitrust Rule Structure

A. The Per Se Rule

Section 1 of the Sherman Act proscribes "every contract ... or conspiracy ... in restraint of trade." Since 1911, however, only agreements that unreasonably restrain competition have been held to be unlawful. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343 (1982).

There are two tests to determine whether an agreement unreasonably restrains competition. Most restraints are judged under the rule of reason, which requires a detailed analysis of the effect on competition within a defined market. *National Society of Professional Engineers v. United States*, 433 U.S. 679, 692 (1978). Certain types of agreements, however, which "always or almost always tend to restrict competition," are deemed "per se illegal" without further analysis. *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 19-20 (1979). Under this approach one need only determine whether the agreement in question falls within one of the per se categories. If it does, illegality automatically follows because such agreements are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958); *Maricopa County*, 457 U.S. at 344. Indeed, if an agreement falls within a per se category, evidence of its pro-competitive effect or economic justification is not even

admissible. *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 472 (10th Cir. 1990) ("evidence of reasonableness and/or economic justification for the alleged activities" held inadmissible where defendant is charged with horizontal market allocation which is a per se offense); *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186 (5th Cir. 1972).

B. The Rationale For The Per Se Rule

In *Maricopa County*, the Supreme Court explained the rationale for the per se rule. The Court pointed out that inquiry into the reasonableness of a particular business practice "often is extensive and complex" and "entails significant costs." 457 U.S. at 343. The Supreme Court further noted that judges often lack the economic expertise needed to "determine with any confidence a practice's effect on competition;" and, that the complexity of the required analysis provided very "little certainty or guidance about the legality of a practice." *Id.* at 343; *see also Balmoral America, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 314 (6th Cir. 1989) (holding that agreements which fall into the per se categories are "so unlikely to produce any procompetitive effects that courts deem it unnecessary and a waste of resources to engage in complicated rule of reason analysis").

The Supreme Court has acknowledged that its hard and fast rule might catch some harmless or even pro-competitive agreements, but has held this to be an

acceptable cost in order to obtain predictability, avoid complex economic analysis and reduce the expense of litigation. As stated in *Maricopa County*:

> For the sake of business certainty and litigation efficiency, we have tolerated the [per se] invalidation of some agreements that a full blown inquiry might have proved to be reasonable.
>
> * * *
>
> Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices . . . . Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.

457 U.S. at 344 and n. 16. *Accord*, *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n. 16 (1977); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 n. 25 (1984).

C. Types Of Agreements Which Are Per Se Unlawful

Despite the shared label, not all per se violations are treated alike. Group boycotts and tying arrangements are per se unlawful only when defendants have market power. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 296 (1985); *Jefferson Parish*, 466 U.S. at 12-15. Vertical minimum price fixing is per se unlawful only when there is an agreement "on the price or price levels to be charged." *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S.Ct. 1515, 1521 (1988). Vertical maximum price fixing is no longer per se unlawful at all. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

This does not mean, however, that all per se violations require threshold proof of market power or specified prices. Quite the contrary, horizontal price fixing and horizontal market allocations are viewed as cartelizing behavior which constitutes a frontal assault on the free market and justifies application of the per se rule without any threshold showing. Only proof of the agreement is required. As stated in ABA, *Antitrust Law Developments (Fourth)*, Vol. I, p. 44:

> The extent of analysis necessary before a restraint can be deemed illegal per se has come to depend upon the nature of the restraint. Certain agreements are treated as illegal per se with virtually no factual inquiry. For example, naked price-fixing . . . and market-allocation agreements among competitors rarely have plausible procompetitive justifications, and all a plaintiff usually needs to prove to establish illegality is that such an agreement exists.

D. The Rationale For The Strict Per Se Rule Against Horizontal Price Fixing And Market Allocation Agreements

The reason for the strict per se rule against horizontal price fixing is that horizontal competition "is the primary concern of antitrust law" (*Continental TV*, 433 U.S. at 51 n. 19) and price/output decisions are "the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26 n. 59 (1940). As a result, the Supreme Court has held agreements which "raised, lowered, or stabilized prices" to be per se unlawful even if the conspirators lack the power to accomplish their price fixing scheme (*id.* at 221, 225, n. 59), and regardless of the means employed. As explained below, horizontal market allocations have the same

economic effect on price and output as horizontal price fixing agreements, and as a result are analyzed with the same unforgiving per se rule.

In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), an association of independent grocers developed a private brand label in order to allow its members to better compete against national supermarket chains. Each association member agreed that it would not sell Topco goods in competition with other association members. The lower court applied the rule of reason and held that the injury to competition between Topco members was more than outweighed by the benefit to competition between Topco members and national chains. *Id.* at 605-06. The Supreme Court reversed. It held that after considerable experience with horizontal market allocations, it had determined that they were "classic examples of a per se violation" and subject to a "rigid rule" of per se illegality. *Id.* at 608, 609-10. As a result, the Court held that whether the agreement was "well intended . . . or developed to increase competition" or whether it would pass muster under the rule of reason "is irrelevant to the issue before us." *Id.* at 609-10.

More recently, in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 47 (1990), the Supreme Court addressed an agreement between HBJ and BRG, two providers of bar review services. HBJ agreed that it would not compete against BRG in the Georgia market. In consideration, BRG agreed to share the revenue from the Georgia market

by paying HBJ $100 per Georgia student. As a result of this horizontal allocation, the price paid by Georgia students went up. *Id*. at 47-48.

As in *Topco*, the lower court analyzed the agreement under the rule of reason and held it to be lawful. *Id*. Again, the Supreme Court reversed. It pointed out that the revenue sharing feature of the horizontal agreement coupled with the impact on price indicated an anticompetitive purpose. Relying on *Topco*, the Court held that such horizontal market allocations are "unlawful on [their] face" and a "classic example of a per se violation." *Id.* at 49-50.

In *General Leaseways, Inc. v. National Truck Leasing Assoc.*, 744 F.2d 588, 594-95 (7th Cir. 1984), Judge Posner explained that a horizontal market allocation -- like the agreement here in question -- is equivalent to an agreement to limit output and "also equates to a price fixing agreement." *Id.* at 594. Judge Posner pointed out that "one way the firm can free itself from competition is by agreeing with sellers of the same product that they will not enter each other's markets." Once the agreement is reached, the firm "is free from competition [and] will reduce output below the competitive level and . . . [c]onsumers will pay more when supply is scarcer." *Id.* As Judge Posner stated:

> An agreement on output also equates to a price fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too -- in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. *Thus, with exceptions not*

relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects.

744 F.2d at 594 (emphasis added). *Accord*, *California Dental Association v. FTC*, 526 U.S. 756, 777 (1999) (adopting the above passage from *General Leaseways* verbatim); *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) ("the analogy between price fixing and division of markets is compelling. It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide the markets, thus eliminating all competition among them.").

In keeping with the view that horizontal market allocations restrict output and raise price, the courts have repeatedly held that such agreements are subject to a strict rule of per se illegality. *United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367, 1370-71 (6th Cir. 1988); *United States v. Goodman*, 850 F.2d 1473, 1476 (11th Cir. 1988); *Suntar Roofing*, 897 F.2d at 472.

II. Application Of The Per Se Rule To The Current Case

It is undisputed that HMR's price for Cardizem© CD was higher than the price that Andrx would have charged for its generic alternative. *In Re Cardizem© CD Antitrust Litigation*, 105 F.Supp.2d 682, 705 (E.D. Mich. 2000). Indeed, when the HMR/Andrx agreement was abandoned in 1999, Andrx entered the market at a price

significantly below HMR's. *Id.* at 688. That is exactly what HMR and Andrx would have expected as generic drugs are always priced significantly below their brand name counterparts. *Id.* at 685.[2]

It is also undisputed that if Andrx had entered the market with its lower priced generic drug, it would have taken substantial sales from HMR's $700 million per year market for Cardizem© CD. Def. Br. at 12. Indeed, HMR predicted that if Andrx entered the market it would capture 40% of HMR's sales within the first year. FTC Analysis at 2.

The agreement to pay Andrx $40 million per year to stay out of HMR's market therefore had the following effects: (1) it excluded Andrx's lower priced generic drug from the market; (2) allowed HMR to maintain its higher prices without losing sales to

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[2] *See also* FTC Analysis to Aid Public Comment Concerning HMR/Andrx Consent Orders at 1 ("FTC Analysis") (attached to Amicus Brief of Generic Pharmaceutical Ass'n) ("generic drugs typically are sold at substantial discounts from the price of branded drugs"). Indeed, brand name manufacturers have profit margins which are "orders of magnitude larger than the generic company's." Amicus Brief of Pharmaceutical Ass'n at 4, n. 2. Since the brand name manufacturers have higher research and development costs, their higher profit margins can only result from much higher prices.

a lower priced alternative; and (3) as explained by Judge Posner, it necessarily restricted output. Just as in *BRG of Georgia*, actual or potential horizontal competitors agreed to allocate the entire market to one of two competitors and that competitor agreed to share some of the revenue attributable to the resulting higher (*i.e.*, supracompetitive) prices with the excluded seller. The detrimental effects which justify the use of the "rigid" per se rule are all present. A more perfect example of a per se unlawful price fixing or market allocation agreement is hard to imagine.

Defendants, of course, assert that they lacked anticompetitive intent and argue that their agreement was really pro-competitive or justified because HMR had filed a patent infringement claim against Andrx. *Topco* and *Maricopa County*, however, teach that even if these contentions had merit, the expense and economic complexity of addressing them and the resulting lack of certainty makes the analysis not worth the cost. As held in *Topco*, the question of whether a market allocation agreement is on balance pro-competitive or whether it would pass muster under the rule of reason is simply irrelevant. Indeed, evidence of such procompetitive effects which defendants would like to offer is not even admissible. *Suntar Roofing*, 897 F.2d at 472.

III. Objections To The Use Of The Per Se Rule

Defendants make four objections to the use of the per se rule: (1) that the courts have had insufficient experience with this type of agreement; (2) that the agreement is pro-competitive; (3) that the agreement settled a patent dispute; and (4)

that the agreement caused no harm because Andrx would not have entered the Cardizem© market in any event. (Def. Br. 3-4, 8, 12, 45, 50). The last objection presents no great difficulty. It raises the question of whether defendants' conduct injured the plaintiffs by depriving them of access to less expensive generic drugs. The issue of causation of injury is not before the Court and has no bearing on whether the agreement is per se unlawful. Defendants' remaining objections are addressed below.

A. The Courts Have Had Sufficient Experience With Market Allocation Agreements

It is claimed that the judiciary has had insufficient antitrust experience with the pharmaceutical industry and the Hatch-Waxman Act to allow for the use of the per se rule. The reference to the Hatch-Waxman Act, however, is a red herring as that Act does not alter the antitrust analysis. Rather, it established new guidelines for FDA approval of generic drugs and, as the court below held, was intended to facilitate the early "entry of relatively inexpensive generic drugs into the market place." 105 F.Supp.2d at 685. The Act is in no way inconsistent with the purposes of the Sherman Act and there is no basis to assert that it modifies the operative antitrust rule structure. *See National Gerimedical Hospital v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981) (the antitrust laws are the fundamental national economic policy and are altered by another federal statute only in cases of clear repugnancy).

The contention that courts have had too little antitrust experience with brand name and generic drug manufacturers is similarly wide of the mark. The Supreme Court has decided that it has had enough experience with horizontal market allocations to declare them per se unlawful. The market allocation agreement here in question is therefore per se unlawful, regardless of the complexity of competition in the pharmaceutical industry.

For example, in *Maricopa County*, defendant argued that the per se rule was inapplicable because the judiciary had not had sufficient experience with the complex competition in the health care industry. The Supreme Court disagreed. It held that regardless of the competitive characteristics of a particular industry that the Sherman Act "establishes one uniform rule applicable to all industries alike." 457 U.S. at 349. Indeed, the Court held that the per se rule was specifically created to avoid the necessity of engaging in complex competitive analysis on an industry-by-industry basis:

> Finally, the argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for per se rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken."

457 U.S. at 350-51. *Accord*, *United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367, 1370-71 (6th Cir. 1988) (holding horizontal market allocations to be

per se illegal and rejecting attempt to recharacterize the scheme as a "no-solicitation agreement" with which the courts had insufficient experience).

B. HMR's Patent Does Not Avoid The Per Se Rule

It is argued that this case is not suitable for per se treatment because the agreement in question settled a patent dispute. The HMR/Andrx agreement, however, did not settle any patent claim. The patent infringement action continued. The agreement simply paid Andrx to stay out of the market during the pendency of the suit. Furthermore, the use of the per se rule here would not make it impossible to settle a patent dispute, as defendants contend. In the typical patent settlement the alleged infringer does not receive money from the patentee. Rather, the alleged infringer pays money to the patentee and either takes a patent license or agrees to respect the patent and leave the market. 105 F.Supp.2d at 704. Thus, in a typical patent settlement, it is the power of the patent that procures either the royalty or the infringer's departure from the market. No one contends that such agreements are per se unlawful.

The agreement in the current case, however, is fundamentally different. Here, it is not the power of the patent, but rather the payment of $40 million per year that procured Andrx's absence from the market. HMR's market exclusivity did not flow from the patent, but rather from the agreement and the payment of money to Andrx.

Finally, the contention that patent settlements must always be analyzed under the rule of reason is incorrect. No court has ever so held and the authority offered in support of this position does not sustain it.[3] Indeed, in *In Re Terazosin*

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[3] *Standard Oil Co. v. United States*, 283 U.S. 163 (1931), does not hold that agreements, otherwise per se unlawful, are permissible if they are part of a patent settlement. Indeed, *Standard Oil* holds that rights granted patentees "do not exempt them from the prohibitions of the Sherman Act." *Id.* at 168. Similarly, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997), is not a case which "looked like" or "could have been analogized" to a horizontal market allocation (Generic Ph. Ass'n Amicus Br. at 9, n. 3; Pharmaceutical Research & Mfg. of Am. Amicus Br. at 7). In *Clorox*, a settlement agreement precluded a competitor from using a trademark. It did not prevent the competitor from entering or competing in any market -- an essential feature of any market allocation. *Id.* at 51.

Nor does *B. Braun Medical, Inc. v. Abbott Labs, Inc.*, 124 F.3d 1419 (Fed. Cir. 1997), hold that horizontal agreements which protect patents must be evaluated under the rule of reason. (Def. Br. at 38, 56). Rather, in *Braun*, the

Hydrochloride, Case No. 99 MDL 1317 (S.D. Fla. 2000), on facts virtually identical to the current case, the court held that "the Supreme Court has reviewed patent settlements under the per se rule. *E.g.*, *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 377 (1952). The per se rule applies to the defendants' conduct" (Slip. Op. at 17). In *New Wrinkle*, the defendants settled cross-patent claims and agreed to prevent prices from going down. The Supreme Court had no trouble finding this "patent settlement" to be per se unlawful. 342 U.S. at 377, 380.

The law is quite clear that a patent settlement may violate the antitrust laws if it goes beyond what is necessary to protect the rights granted to the patentee. *Duplan Corp. v. Deering Milliken Inc.*, 444 F.Supp. 648, 684 (D.S.C. 1977), *aff'd*, 594 F.2d 979 (4th Cir. 1979); *United States v. Masonite Corp.*, 316 U.S. 265, 278-79 (1942). A patent settlement which not only protects the patentee, but also rewards an allegedly

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restraint was vertical, not horizontal, and therefore not per se unlawful: "simply put, the restriction imposed by Braun is not a per se illegal horizontal restraint because Braun and Abbott are not horizontal competitors." *Id.* at 1427, n. 4.

Noll v. O.M. Scott & Sons Co., 467 F.2d 295 (6th Cir. 1972), does not even involve an antitrust claim and *In Time Products, Inc. v. Toy Biz, Inc.*, 38 F.3d 660 (2d Cir. 1994), is not a patent case. It is a trademark case and like *Clorox*, there was no agreement that barred market entry or prevented any competition.

infringing competitor with the bounty of reduced competition, is unlawful. *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 193-95 (1963) (holding patent settlement unlawful because "[patentee] went far beyond its claimed purpose of merely protecting its own 401 machine -- it was protecting [competitors] Gegauf and Vigarelli . . . under the same umbrella").

Here, HMR paid Andrx to stay out of the market and then shared the resulting monopoly profits with Andrx. The agreement rewarded not only HMR, but also its competitor, Andrx, with the fruits of reduced competition. As the Supreme Court held in *Singer*, such an agreement is not protected by the patent laws because the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage." *Id.* at 196-97. Thus, even if the Andrx/HMR agreement had settled a patent dispute, it would still be per se unlawful.

C. Plaintiff Is Not Required To Prove That The HMR/Andrx Agreement Injured Competition

Defendants repeatedly argue that "a truncated analysis such as the per se rule" may not be used unless the court first makes "considerable inquiry into market conditions" and has evidence of "actual anticompetitive effects flowing from the agreement." (Def. Br. 1, 35-36, 50). It is true, of course, that a category of agreement is not deemed per se unlawful until the courts decide that such an agreement is "always or almost always" anticompetitive. *Broadcast Music*, 441 U.S.

at 19-20. Once that bridge is crossed, however, agreements of that type are prohibited without inquiry into the competitive harm they have caused or the purported pro-competitive justification for their use. *Northern Pacific Railway*, 356 U.S. at 5; *Maricopa County*, 457 U.S. at 344. Indeed, the very reason for creating the per se rule was to avoid the complex economic analysis which defendants now claim is a prerequisite to the invocation of the rule. The Supreme Court has repeatedly held that the time, expense and uncertainty of investigating the competitive effects of an agreement which falls within a per se category is not justified and that such an agreement is unlawful even if a full rule of reason analysis would prove it harmless or even pro-competitive. *Maricopa County*, 457 U.S. at 344; *Continental TV*, 433 U.S. at 50, n. 16. As a result, the evidence of anticompetitive effect which defendants say is required, is actually not even admissible. *Suntar Roofing*, 897 F.2d at 472; *E.A. McQuade*, 467 F.2d at 186.[4]

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[4] The cases on which defendants rely do not support their position. In two of those cases the Supreme Court found exceptions to the per se rule which have no application to the current case. Thus, in *Broadcast Music*, the Court created an exception to the per se rule if the product could not be produced at all but for the restraint in question. 441 U.S. at 19-22. Similarly, in *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100-101 (1984), the Court held that the per se rule would not be applied to sports league agreements because it is "an industry in which horizontal restraints on competition are essential if the product is to be available at all." There is, of course, no contention that the pharmaceutical products would not be available at all if horizontal market allocations are not allowed.

Defendants' remaining authorities are not even per se cases. *State Oil Co. v.*

Khan, 522 U.S. 3 (1997), and *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), are vertical cases governed by the rule of reason. Unlike per se cases, proof of an unreasonable effect on competition is required in a rule of reason case. *Continental TV* is another vertical, rule of reason case. In *Cooperative Theaters*, this Court held that *Continental TV* could not be applied to horizontal market allocations because vertical restraints have "numerous pro-competitive aspects" and are not generally classified as per se violations. 845 F.2d at 1372.

In support of their contention that "truncated analysis like the per se rule" is not allowed without proof of anticompetitive effects defendants cite to *NCAA* and *California Dental Association*. (Def. Br. 35-36, 50). In both of those cases, however, truncated analysis was not undertaken pursuant to the per se rule; it was undertaken pursuant to the "quick look" version of the rule of reason. Under that test, proof of anticompetitive effects is not even required in a rule of reason case if there is a naked restraint and defendant does not advance a plausible pro-competitive justification. *NCAA*, 468 U.S. at 109-110; *California Dental Ass'n.*, 526 U.S. at 769-771. Thus, the cited authority merely demonstrates that the proof of anticompetitive effects -- which defendants herein demand -- is not even required in some rule of reason cases, much less in a proper per se case like the one here at issue.

Conclusion

The agreement here in question is between horizontal competitors. It excludes one of only two competitors; allocates the entire market to the higher-priced seller; and shares the resulting overcharge between the competitors. Consumers are deprived of choice and price competition. It is respectfully submitted that for all the reasons set forth above the trial court's conclusion that the HMR/Andrx agreement is a classic per se violation is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 29(d)

Amicus Curiae American Antitrust Institute has complied with Fed.R.App.P. 29(d), which limits this brief to 7,000 words. Compliance was confirmed using the Word Count feature of WordPerfect 9.0, which indicates a total of 4,821 words.

CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the foregoing **[Proposed] Brief of *Amicus Curiae* American Antitrust Institute In Support Of Plaintiffs-Appellees Urging Affirmance Of The Grant Of Partial Summary Judgment In Favor Of The Plaintiffs** to be served by Federal Express upon each of the following on May 30, 2001:

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