No. 19-3640

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: SUBOXONE (BUPRENORPHINE HYDROCHLORIDE AND NALOXONE) ANTITRUST LITIGATION

BURLINGTON DRUG CO., INC.; MEIJER, INC.; MEIJER DISTRIBUTION, INC.; ROCHESTER DRUG CO-OPERATIVE, INC.,

Plaintiffs-Appellees

v.

INDIVIOR INC.,

Defendant-Appellant

On Permission to Appeal from the United States District Court for the Eastern District of Pennsylvania (Goldberg, D.J.; D. Ct. Case No. 2:13-md-02445)

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

RANDY M. STUTZ
Counsel of Record
LAURA ALEXANDER
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 905-5420

Counsel for Amicus Curiae

March 12, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Appellate Rule 26.1.1, *amicus* states as follows:

The American Antitrust Institute is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[2]

INTRODUCTION

This appeal involves a product hopping scheme in which Indivior Inc. (referred to here as "Reckitt") is alleged to have unlawfully coerced patients into switching formulations for the billion-dollar opioid addiction drug Suboxone, thereby thwarting generic competition, maintaining high prices, and injuring victims of an ongoing U.S. health epidemic.

---

[1] Plaintiffs-Appellees consent to the filing of this *amicus* brief; Defendant-Appellant does not consent. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than *amicus curiae* or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. One of AAI's directors was recused from this matter because his law firm is involved in the case. That director played no role in this brief.

The class plaintiffs allege, among other things, that Reckitt unlawfully maintained monopoly power through an overarching scheme to prevent or delay generic competition. They allege that the means to Reckitt's anticompetitive ends involved a combination of intertwined acts with a common purpose, including (1) falsely disparaging Suboxone tablets as dangerous to children, (2) falsely announcing the withdrawal of tablets due to fabricated safety concerns, (3) eliminating tablet rebate contracts in favor of film rebate contracts, (4) significantly raising tablet prices above film prices to manipulate the market, (5) eventually removing tablets from the market altogether, and (6) manipulating the FDA's REMS program. Pls. Br. at 4.

On its motion to dismiss, its motion to exclude plaintiffs' expert report, and its opposition to class certification, Reckitt's principal contention was that class plaintiffs improperly attributed injury and damages to lawful, pro-competitive pricing practices. *See, e.g.*, A66. Reckitt believes predatory pricing (or bidding) is the only cognizable price-based form of anticompetitive conduct, and also that unilateral above-cost pricing practices are *per se* lawful. *See* Reckitt Br. 16, 20.

In opposing plaintiffs' expert report and class certification, Reckitt also relied heavily on the Supreme Court's holding in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). A25. Reckitt reads *Comcast* to suggest that, where one of several intertwined acts alleged to be part of a monopolization scheme is not

independently actionable under antitrust law, injury and damages cannot be premised on the scheme. *See* A26.

The district court first rejected Reckitt's pricing argument on Reckitt's motion to dismiss. The court held that class plaintiffs pled multiple intertwined acts that, in combination, plausibly established exclusionary conduct. *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig*., 64 F. Supp. 3d 665, 672 (E.D. Pa. 2014) ("MTD Op."). And if the anticompetitive effect of the challenged conduct were proven, and it resulted in purchasers paying inflated prices, plaintiffs could establish harm to competition. *Id*. at 685. Hence plaintiffs plausibly pled antitrust injury. *Id*.

In subsequent proceedings, the court warned Reckitt that its continued efforts to characterize the case as premised solely on allegations of predatory pricing were improper. A67. It reminded Reckitt that, at the motion to dismiss stage, it had found that plaintiffs' claims, which alleged impact from Reckitt's combined acts rather than just its pricing acts, stated a plausible claim of exclusionary conduct. A26. Citing this Court's holding in *ZF Meritor, LLC v. Eaton Corp*., 696 F.3d 254 (3d Cir. 2012), the court acknowledged that above-cost pricing would not be actionable if the sole allegation in the case had been predatory pricing. A26, MTD Op. at 683–84 n.9. But here, the court held, plaintiffs' theory of liability is not that Reckitt's pricing of brand tablets independently caused harm. *Id*.

The plaintiffs' theory is that a combination of intertwined acts constituted exclusionary conduct. *Id*. And this Court in *ZF Meritor* rejected a rule of *per se* legality for above-cost pricing, holding instead that above-cost pricing can be part of an actionable monopolization scheme if price is not the clearly predominant mechanism of exclusion. *Id*. Moreover, the plaintiffs, under their theory of liability, do not have to prove with common evidence that each individual aspect of the scheme independently caused injury to establish antitrust impact, but rather that the plausibly alleged scheme itself caused antitrust impact. A68.

Notably, on the question of whether antitrust impact is provable with common evidence, Reckitt did *not* contest the expert's finding that all class members experienced injury-in-fact in the form of overcharges. A60–69. And Reckitt now concedes that injury-in-fact to all class members is provable with common evidence. Br. at 18–19 (common evidence that all purchasers paid more for branded tablets not disputed).

SUMMARY OF ARGUMENT

In this appeal, Reckitt continues to rest its legal arguments on a hypothetical counterfactual. It asks this Court to imagine the implications if the class plaintiffs had filed a different complaint alleging that patients switched from Suboxone tablets to Suboxone film based on the market's price-signaling mechanism, without coercion. *See, e.g.*, Br. at 11 (positing counterfactual whereby plaintiffs allege that

their injuries "result from … unilaterally pricing a new product lower than an older product, but still above cost[.]").

But Reckitt's counterfactual does not bear upon the plaintiffs' burden of establishing that common questions likely will predominate over individual questions in *this* case. Although the merits of class plaintiffs' claims are disputed, the class plaintiffs' allegations and which facts they allege to support them are not in doubt. They are spelled out in the plaintiffs' complaint, which plausibly pled that Reckitt engaged in monopolization through a combination of intertwined acts with a common purpose.

This amicus brief argues that two undisputed issues in this case should lead this Court to reject Reckitt's predominance challenge to class plaintiffs' proof of antitrust impact. First, all parties agree that plaintiffs rely on common evidence to prove that all class members suffered injury-in-fact by paying more for branded tablets. Second, all parties agree that the *plaintiffs*' *theory* of liability is that Reckitt engaged in a monopolization scheme in which price was not the predominant mechanism of exclusion.

1. Antitrust impact consists of two elements. Plaintiffs must prove an injury-in-fact, which is compensable harm causally linked to the challenged conduct, and "antitrust injury," which is an injury the antitrust laws were designed to prevent and that flows from that which makes the defendant's acts unlawful. Injury-

in-fact is a basic prerequisite for Article III standing; it addresses the policy risk that a plaintiff who lacks compensable injury nonetheless may seek to recover. Antitrust injury addresses the different policy risk that, when competition is diminished, a plaintiff may seek to recover for injuries that are not incurred by reason of the diminution.

Reckitt's "lawful pricing" argument implicates neither. Instead, Reckitt's argument implicates yet another policy risk—that a plaintiff may seek to recover when competition is not diminished. However, that risk is addressed by a substantive element of Section 2 of the Sherman Act, namely the requirement that dominant-firm behavior must be unreasonable to incur liability. *See United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

Reckitt's argument fails because it conflates injury-in-fact and antitrust injury and thereby elides what common evidence of antitrust impact is required to prove. In particular, Reckitt obscures that injury-in-fact requires a causal "nexus" between compensable injury and the challenged conduct, and antitrust injury requires that a plaintiff must claim injury "by reason of" practices forbidden by the antitrust laws. Here, there is no dispute over injury-in-fact; the only contested issue on class certification is antitrust injury. And Reckitt's argument fails because controlling law holds that the antitrust injury inquiry begins by assuming a completed

violation. The inquiry never requires a merits determination as to whether the antitrust laws were violated.

2. Reckitt's *Comcast* argument is incorrect. Because the class plaintiffs allege only one theory of liability, and Reckitt's countervailing theory is that its conduct is legal, this case presents no risk that damages will be premised on an invalid theory of injury. If Reckitt's argument prevails, it will not be found liable at all; if plaintiffs argument prevails, liability and impact are common questions. There is no risk of a partial liability finding, as in *Comcast*.

Reckitt's argument also fails because *Comcast* never concerned itself with whether a plaintiff's theory of impact matches a defendant's theory of non-liability. Rather, *Comcast* considered whether a plaintiff's theory of impact matches the plaintiff's theory of damages, consistent with the requirement that a violation must be assumed for purposes of assessing antitrust injury.

3. Although this Court should not reach Reckitt's merits argument, Reckitt is incorrect in supposing that this case should be treated analogously to a predatory pricing case. This Court has already held that the traditional *Microsoft* balancing test, instead of a more skeptical test, applies to product hopping.

Moreover, the policy risk that the Supreme Court's predatory pricing cases identify—a prudential concern that punishing low prices might chill procompetitive discounting—is absent here. Reckitt's own description of its conduct does not

involve any price cutting. And product hopping and related schemes to delay generic entry, unlike predatory pricing, are not said to be "rarely tried and even more rarely successful," *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 589-90 (1986); on the contrary, they are an endemic, billion-dollar problem in the healthcare sector. Furthermore, no court has ever applied the predatory pricing rationale to conduct that raised prices to consumers. And finally, it is easy to demonstrate that the ratio of price to cost has no bearing on the fundamentally anticompetitive nature of the challenged restraint.

ARGUMENT

I. RECKITT INVITES THE COURT INTO "THE TRAP OF THE IRRELEVANT HYPOTHETICAL"

A. The Antitrust Injury Test Assumes a Completed Antitrust Violation

Reckitt's predominance argument is built on a foundation of tautology and confusion. The tautology is that a plaintiff does not suffer antitrust injury if a defendant's conduct is not illegal. Reckitt Br. 15-19. This is true in every antitrust case and adds nothing to the "antitrust impact" inquiry that the Sherman Act requires. Indeed, the analytical error that Reckitt invites this court to commit is so well-worn, it has been given its own name: "The Trap of the Irrelevant Hypothetical." Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697, 725 n.103 (2003).

> The trap of the Irrelevant Hypothetical is the fallacious proposition that any time one can construct a counterfactual hypothetical in which (a) the facts are changed such that there is no antitrust violation, yet (b) the plaintiff still suffers damage similar to the injury it actually suffered as a result of the violation, there is no antitrust injury.
>
> The proposition is fallacious for two reasons. First, such a hypothetical can *always* be created. Therefore, conscientiously applied, the Irrelevant Hypothetical leads ineluctably to the conclusion that no plaintiff ever suffers antitrust injury. It wipes out all private antitrust litigation….
>
> Second, the Irrelevant Hypothetical leads a court away from the whole point of the antitrust injury exercise, as laid out in *Brunswick*, *Cargill*, and *ARCO*, which is to determine [whether the plaintiff's injury is within] the intended purpose of the statute or rule invoked by the plaintiff.

Id.

It is clear that Reckitt misunderstands and misapplies the antitrust injury requirement from the fact that courts regularly reject antitrust claims on the merits yet find the plaintiffs do adequately establish antitrust injury. *See, e.g., Eichorn v. AT&T Corp*., 248 F.3d 131, 142, 145–46 (3d Cir. 2001) (district court erred in holding plaintiffs did not suffer antitrust injury and lacked antitrust standing but defendant did not violate antitrust laws); *Willow Creek Fuels, Inc. v. Farm & Home Oil Co*., No. 08-5417, 2009 WL 3103738, at *4 (E.D. Pa. Sept. 18, 2009) (plaintiff adequately alleged antitrust injury but failed to adequately allege agreement element of conspiracy). The reverse is also true. Plaintiffs often fail the antitrust injury test even when a violation on the merits is confirmed as a matter of law. *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 346 (1990)

(competitor-plaintiff lacked antitrust injury despite *per se* illegality of alleged maximum price fixing).

Accordingly, resolving the merits question of whether there is an antitrust violation is *never* required to determine whether a plaintiff has suffered antitrust injury. On the contrary, "proof of a[n antitrust] violation and of antitrust injury are distinct matters that *must* be shown independently." *Id*. (quoting IIA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 334.2c, at 330 (1989 Supp.) (emphasis added)). The ultimate legality of Reckitt's challenged conduct therefore has no bearing on whether class plaintiffs suffered antitrust injury.

Reckitt's tautological argument would lead to absurd results. One telling example is that it would foreclose a plaintiff from seeking overcharge damages for naked price fixing—"the paradigm of an unreasonable restraint of trade," *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 100 (1984)—when the *defendant* argues the evidence implies only parallel pricing behavior. *See* Davis, *supra*, at 725 n.103; *In re Foreign Exch. Benchmark Rates Antitrust Litig. ("FOREX")*, 74 F. Supp. 3d 581, 597 (S.D.N.Y. 2015) ("[T]hat argument would doom almost every price-fixing claim at the pleading stage. Simply because conduct can be legal when undertaken individually, does not prevent it from becoming illegal if undertaken collusively[.]").

Such absurdity must be avoided here. Even if Reckitt *could* have raised prices of Suboxone tablets independent of an anticompetitive scheme with a common purpose, that is not the plaintiffs' theory of liability. The plaintiffs' theory is that the price increases were "part of" an illegal scheme, in which price was not the predominant mechanism of exclusion. That theory is necessarily where the inquiry into antitrust injury begins.

The confusion Reckitt stokes involves the difference between injury-in-fact and antitrust injury, and what a plaintiff's common evidence of antitrust impact must prove. Reckitt repeatedly makes ambiguous references to the umbrella term "injury," but "injury" in the antitrust context "incorporates two different issues. The first is whether the class members suffered harm, or injury-in-fact. The second is whether the conduct caused 'legal injury'; that is, whether the injury is 'of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 984 n.81 (2010) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 489 (1977)). Such "legal injury" is the independent concept of "antitrust injury," which courts sometimes analyze in tandem with "antitrust impact" or "antitrust standing."

While an antitrust plaintiff must prove that challenged conduct "caused" antitrust injury, Reckitt elides that the "nexus" required to prove antitrust impact applies to the plaintiff's showing of *injury-in-fact*, not its showing of antitrust injury. *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983) ("[F]act of damage or injury requires that plaintiff show a nexus between the violation and the injury."); *see Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 483 (3d Cir. 1998) (causation requirement applies to injury-in-fact).

Antitrust injury is "a concept requiring that the plaintiff's injury reflect the adverse effect of the defendant's conduct on competition." Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 Antitrust L.J. 273, 293–96 (1998). It "focuses on the *character* of the plaintiff's injury, as opposed to the existence of a causal connection *between* the injury and violation." Anne E. Hartnett, *Keep Calm and Causation On: Reframing Causation Analysis in Private Section 1 Antitrust Actions at Summary Judgment*, 102 Iowa L. Rev. 2291, 2315 (2017).

Accordingly, this Court recognizes that antitrust impact involves two separate issues, "consideration of 'the nexus between the antitrust violation and the plaintiff's harm' *and* 'whether the harm alleged is of the type for which Congress provides a remedy.'" *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 274 (3d Cir. 1999) (citation omitted; emphasis added); *In re Lower Lake Erie Iron Ore*

Antitrust Litig., 998 F.2d 1144, 1165 (3d Cir.1993) (identifying as separate factors "(1) the causal connection between the antitrust violation and the harm to the plaintiff" and "(2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress"). Reckitt conflates these two issues.

Reckitt concedes that plaintiffs rely on common evidence to prove that Reckitt's product hopping scheme caused injury-in-fact. *See, e.g.*, Reckitt Br. at 18–19 (common evidence of branded Tablet overcharges "not disputed"). Its argument is that plaintiffs have failed to identify common evidence that Reckitt's scheme "caused" *antitrust injury* in accordance with the Supreme Court's *Brunswick* line of cases, because Reckitt believes its conduct is lawful. *See, e.g.*, 23(f) Pet. at 13 ("[T]he problem with [plaintiffs'] theory is that is [sic] unilateral, above-cost pricing is *lawful*"); Reckitt Br. at 17 ("If Reckitt's pricing conduct was lawful, Plaintiffs cannot prove injury …" (argument heading)). But such causation is not part of the antitrust injury analysis; it is relevant only to the (undisputed) injury-in-fact analysis.

Reckitt's argument is defeated because the antitrust injury analysis *assumes* a completed violation. *See ZF Meritor*, 696 F.3d at 310 n.8 (Greenberg, J., dissenting) ("Although courts often conflate the antitrust injury requirement with the determination of whether the defendant's conduct violated the antitrust laws, this

approach is erroneous as the antitrust injury requirement assumes the defendant's conduct was unlawful (and thus anticompetitive) and asks whether the anticompetitive aspect of the unlawful conduct is the cause of plaintiff's injury." (citing *Angelico*, 184 F.3d at 275 n.2)); *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 n.9 (2d Cir. 2013) ("When assessing antitrust injury, we assume that the practice at issue is a violation of the antitrust laws …."); *JetAway Aviation, LLC v. Bd. of Cty. Comm'rs of Cty. of Montrose, Colo.*, 754 F.3d 824, 833 (10th Cir. 2014) (Holmes, J., concurring) (in "taking up the antitrust-injury question … I 'assume the existence of an antitrust violation.'" (quoting Areeda & Hovenkamp, *supra*, ¶ 335f, at 75 (3d ed. 2007)).

It is widely accepted that, for analytical clarity, a violation of the antitrust laws should be assumed for all aspects of the inquiry into antitrust standing that the Supreme Court articulated in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), including causal injury-in-fact and remoteness. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 770 (2d Cir. 2016) ("To avoid a quagmire, this Court (among others) assumes 'the existence of a violation in addressing the issue of antitrust standing.'") (quoting *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 437 (2d Cir. 2005) (alteration omitted)) ("[W]hile the issue of an antitrust violation in this case is by no means clear, for purposes of this appeal we assume the alleged violation and assess only

plaintiffs' standing to pursue their claim.")); *Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732, 738 (5th Cir. 2015) (same); *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.*, 123 F.3d 301, 306 (5th Cir. 1997) (same).[3]

In assessing antitrust injury, assuming a violation is not only advisable but required. The obligation follows from the Supreme Court's definition of antitrust injury as injury that "flows from that which makes defendants' acts unlawful," *Brunswick*, 429 U.S. at 489, and injury that is "the type of loss that the *claimed* violations … would be likely to cause." *Id.*, (emphasis added); *Atlantic Richfield*, 495 U.S. at 334 (injury must be "attributable to an anti-competitive aspect of the practice *under scrutiny*" (emphasis added)); *see Gelboim*, 823 F.3d at 777 (defendants' position that "harm to competition is necessary to show antitrust injury … cannot be reconciled with Supreme Court precedent").

Assuming a violation also follows from this Court's command that it is error to "confus[e] antitrust injury with an element of a claim." *Angelico*, 184 F.3d at 275 n.2; *ZF Meritor*, 696 F.3d at 310 n.8 (Greenberg, J., dissenting) ; *cf. FOREX*, 74 F. Supp. 3d at 597 ("Defendants' argument—that there can be no antitrust

[3] Assuming a violation to determine antitrust standing is necessary to avoid a "quagmire" because of cases like this one, where government and private suits overlap. *See* IIA Phillip E. Areeda & Herbert Hovenkamp et al., Antitrust Law ¶ 335f, at 90 (4th ed. 2013) ("[T]he absence of any threat to competition means that no violation has occurred and that even suit by the government—which enjoys automatic standing—must be dismissed").

injury where they could have accomplished unilaterally the same result that they allegedly achieved through collusion—does not even implicate the concept of antitrust injury…. [I]f accepted, [it] would impose an additional pleading requirement: that private antitrust plaintiffs must plead that the alleged antitrust violation could not have occurred through Defendants' unilateral action.").

While it is a tautology that the antitrust injury test cannot be met if the challenged conduct is not illegal, the overriding consideration is that the test cannot be meaningfully applied at all unless the plaintiff has stated a claim upon which antitrust relief may be granted. *See* Davis, *supra*, at 732 (to apply test in such circumstances is "to undertake a fool's errand"); Areeda & Hovenkamp, *supra*, ¶ 335f, at 90 (such applications are "unfortunate[]" and "erroneous" because they confuse the question of whether a violation has occurred for purposes of related suits by the government); *cf.* Pl.'s Opp'n Br. at 17–18 (arguing Reckitt should have sought interlocutory review of order denying dismissal).

To be sure, the trap Reckitt sets for this court is not always easily identified and avoided. *Gelboim*, 823 F.3d at 770 ("it is easy to blur the distinction between an antitrust violation and an antitrust injury"; "The interplay between these two concepts has engendered substantial confusion."); *SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 43 (1st Cir. 1995) ("[C]ourts sometimes have difficulty, well justified in certain cases, in separating standing or antitrust injury issues from two other

problems: whether there has been an antitrust violation at all, and whether the plaintiff has suffered any injury causally (in the 'but for' sense) related to the challenged conduct.").

Because antirust standing, of which antitrust injury forms a part, is a "threshold inquiry," *JetAway Aviation, LLC*, 754 F.3d at 833, some courts have come close to implying that they may rely on the *potential* absence of an antitrust violation in determining whether a plaintiff suffers antitrust injury. That proposition is incorrect, as Judge Holmes correctly reasoned in the Tenth Circuit *JetAway* case. In the course of reviewing precedent and authority on antitrust injury, Judge Holmes cited a confusing Eighth Circuit statement that, "'Unless it can establish that its alleged injury was caused by conduct that violates the antitrust laws, a plaintiff lacks standing … to bring an antitrust suit.'" *Id. (quoting Fischer v. NWA, Inc*., 883 F.2d 594, 599 (8th Cir. 1989)). Judge Holmes clarified that "[t]his threshold requirement [of antitrust injury] 'ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws,'" and he assumed a violation. *Id.* at 833, n.9 (citing Davis, *supra*, at 732; Areeda & Hovenkamp, *supra*, ¶ 335f, at 76 ("Of course, if the substantive doubt [regarding the existence of anticompetitive conduct] is great enough, the court should grant the defendants summary judgment on the merits, but not by denying standing to sue.") (alteration in original)).

Other courts may sometimes confuse the term "causal antitrust injury," which has appeared in several circuit court opinions, to suggest that the nexus required for antitrust impact is between the injury-in-fact and a *finding* of illegality, instead of the injury-in-fact and the *claimed* violation. *See* Davis, *supra*, at 727-28 (explaining that Ninth Circuit uses phrase to refer to both injury-in-fact and antitrust injury at the same time, but that it defined and applied the latter concept properly in *Rebel Oil Co. v. Atlantic Richfield Co*., 51 F.3d 1421 (9th Cir. 1995)).

Indeed, this Court narrowly avoided falling into the trap when it combined its inquiries into causation and "injury" in *City of Pittsburgh v. W. Penn Power Co*., 147 F.3d 256, 265 (3d Cir. 1998) ("rather than trying to separate these two factors of causation and injury, we will treat them together"); *see* Davis, *supra*, at 729 (case showed "regrettable tendency in the Third Circuit jurisprudence to confuse antitrust standing with issues going to the merits"), but the Court corrected for the resulting confusion in *In re Warfarin Sodium Antitrust Litig*., 214 F.3d 395, 401 (3d Cir. 2000) (explaining that *West Penn* turned on the absence of a nexus between injury-in-fact and alleged harm, and "No significant antitrust injury inquiry was required to reach this conclusion and none was undertaken."). *See also Rossi*, 156 F.3d at 483 (making confusing statement that plaintiff must prove "the antitrust violation caused the antitrust injury suffered by the plaintiff," but clarifying in

preceding sentence that "an antitrust plaintiff must prove causation, described in our jurisprudence as 'fact of damage or injury'").

Once the fog created by Reckitt's reliance on the umbrella term "injury" is lifted, and Reckitt can no longer conflate injury-in-fact and "legal injury," Reckitt's argument collapses under its own weight. Reckitt's argument begins from the premise that plaintiffs cannot prove an antitrust violation, *see* A26 ("the pricing practices allegations alone could not give rise to [a viable] claim"), and inquires whether Reckitt's price-based conduct would render otherwise lawful conduct illegal. This gets the antitrust injury analysis exactly backwards. Under the law, which requires that plaintiffs' injuries flow from what makes the defendant's acts *un*lawful, the inquiry assumes the conduct is a violation and then asks whether the claimed injury occurs by reason of the alleged harmful effect on competition.

Here, Reckitt's increased prices on Suboxone tablets are anticompetitive, according to plaintiff's theory, because they are part of an anticompetitive scheme. *Id*. ("[A]bsent allegations of predatory pricing, an antitrust plaintiff may rely on the exclusionary effect of prices together with other forms of anticompetitive conduct in order to state a plausible antitrust claim.") (citing *ZF Meritor, LLC v. Eaton Corp*., 696 F.3d 254, 277 (3d Cir. 2012)). And there is no dispute that the price increases included in the scheme are one material cause of the plaintiffs' claimed

overcharges. Thus, both prongs of the antitrust impact test are clearly common questions.

II. RECKITT'S *COMCAST* ARGUMENT IS INCORRECT AND INAPPOSITE

A. Trial Can Only Proceed on One of the Parties' Two Competing Theories of Liability and Non-Liability

Reckitt's *Comcas*t argument is yet another tautology: "If [Reckitt] is right on the merits … Plaintiffs would then have no common evidence that proves individual injury …." Br. 29–30. Of course, without a violation, no plaintiff can adequately prove any injury under any law. Reckitt's interpretation would require the federal courts to determine liability at class certification in every case.

Here, it is dispositive that Reckitt's argument and plaintiffs' argument are mutually exclusive. If Reckitt is correct that prices can only ever be a cognizable part of a monopolization scheme when they are below cost, Reckitt wins on the merits (and the district court erred in holding that plaintiffs stated a claim on which relief may be granted). If plaintiffs are correct that above-cost prices can be a cognizable part of a scheme where price is not the clearly predominant mechanism of exclusion, then both liability and impact are common questions. Thus, this case necessarily presents an either-or proposition, and there is no risk of a mismatch between the plaintiff's liability and damages theories, as in *Comcast.*

Reckitt maintains that this Court's opinion in *Avaya, RP v. Telecom Labs, Inc*., 838 F.3d 354 (3d. Cir. 2016), supports its *Comcast* argument, but *Avaya*, like *Comcast*, presented the risk that "'a general verdict may rest on either of two claims—one supported by the evidence and the other not.'" *Id*. at 409 (quoting *Albergo v. Reading Co*., 372 F.2d 83, 86 (3d Cir. 1966)); *see Comcast*, 569 U.S. at 37-38. Here, there is only one claim—the interconnected scheme, of which the elevated Suboxone tablet prices were a part.

And because Reckitt's countervailing interpretation of class plaintiffs' allegations is a theory that the scheme is not illegal, "there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis." *Butler v. Sears, Roebuck & Co*., 727 F.3d 796, 800 (7th Cir. 2013) (Posner, J.); *cf*. Davis & Cramer, *supra*, at 985 ("proof of the antitrust violation (e.g., an agreement to fix prices or unilateral efforts to monopolize markets) tends to be overwhelmingly common"); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625 (1997) (threshold predominance requirement "readily met in certain cases alleging … violations of the antitrust laws"). The risk that a court will find Reckitt's conduct *per se* legal, but that plaintiffs have nonetheless proven an antitrust violation, does not exist.

B. *Comcast* Does Not Require Plaintiffs to Overcome Defenses to Liability

Reckitt also misreads *Comcast*. Reckitt argues that *Comcast* requires that common evidence of injury and damages must "correspond to *a* legitimate theory of liability." Reckitt Br. at 30 (emphasis added). But that is not what *Comcast* says. *Comcast* says "any model supporting a 'plaintiff's damages case must be consistent with *its* liability case, particularly with respect to the *alleged* anticompetitive effect of the violation.'" *Comcast*, 569 U.S. at 35 (citation omitted; emphasis added)).

The Court could not have been clearer that the inquiry turns on the plaintiff's theory of liability. *See, e.g., id*. ("*If* respondents prevail on *their claims*, they would be entitled … to damages resulting from reduced overbuilder competition[.]") (emphasis added); *id*. at 36, 38. Indeed, when Reckitt is not parsing articles and pronouns as finely, it slips into conceding as much. *See, e.g*., 23(f) Pet. at 14 (*Comcast* supplies the answer that "A class cannot be certified unless the class's injury is 'attributable to [their] theory of liability.'") (alteration by Reckitt); *see In re Modafinil Antitrust Liti*g., 837 F.3d 238, 262 (3d Cir. 2016) (rejecting *Comcast* argument where "Plaintiff's theory of liability … may ultimately be proven wrong, but it does match Plaintiffs' damages theory."). That rule is consistent with the antitrust injury component of proving antitrust impact, which, as discussed *supra*, assumes a completed antitrust violation.

Reckitt's argument that *Comcast* creates an open-ended inquiry into the legitimacy of a plaintiff's claims by requiring a "viable theory of liability," Reckitt Br. at 30, would import the motion-to-dismiss standard into class certification. *See, e.g., City of Philadelphia v. Lead Indus. Ass'n, Inc*., 994 F.2d 112, 122 (3d Cir. 1993) ("None of their claims can survive a motion to dismiss, therefore, unless plaintiffs assert a viable theory of … liability."). But *Comcast* does not imply that antitrust defendants can use class certification as an appellate venue for unfavorable Rule 12(b)(6) rulings. *See* Pl.'s Opp'n Br. at 17–18.

III. Reckitt's Merits Argument Is Incorrect

Reckitt's merits argument, which the Court should not reach, is that this product hopping case should be analyzed under predatory pricing law. It urges the Court to apply the strict price-cost test applicable to predatory pricing claims rather than the traditional rule of reason. And since its prices are above cost, Reckitt argues it should win. However, Reckitt's argument is incorrect because this product-hopping case does not bear any resemblance to a predatory pricing case.

"[T]he standard for predatory pricing law is driven by prudential concerns." Sean P. Gates, *Antitrust By Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts*, 79 Antitrust L.J. 99, 122 (2013). "Uncontroversial, consensus economics demonstrates that above-cost pricing may be anticompetitive." *Id*. at 123, n.137 (citing Herbert Hovenkamp, The Antitrust Enterprise 173 (2005);

Aaron Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941, 955-60 (2002)). The Supreme Court, however, thought that a bright-line, cost-based rule was appropriate for predatory pricing claims because liability might discourage "the very conduct the antitrust laws are designed to protect" by "courting intolerable risks of chilling legitimate price cutting." *Brooke Group Ltd. v Brown & Williamson Tobacco Corp*., 509 U.S. 209, 223, 226 (1993).

"A fair question then is whether the relationship between single product, unconditional, below-cost pricing and competitive harm as governed by these prudential concerns allows for an inference of a similar relationship between competitive harm and [product hopping]." Gates, *supra*. at 123. The answer is plainly no. *Cf. id*. at 123–24 (rejecting predatory pricing analogy for multiproduct, conditional rebates because they do not depend on "unremunerative" prices to succeed, imposing liability would not interfere with firms separately pricing their products at cost, and withholding liability would diminish economic welfare by justifying anticompetitive conduct).

First, this Court has already held that the traditional *Microsoft* balancing test applies to product hopping, instead of a more skeptical test. *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co*., 838 F.3d 421, 438 (3d Cir. 2016) (product hopping reviewed under "'rule of reason' burden-shifting framework set forth by the D.C. Circuit in *United States v. Microsoft Corp*"); *see* Steven C. Salop, *Exclusionary*

Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard, 73 Antitrust L.J. 311, 333-34 (2006) (*Microsoft* approach results in a consumer-welfare-effect standard rather than more skeptical standard).

Second, it cannot be said that product hopping and related schemes to delay generic entry are "rarely tried and even more rarely successful." *Matsushita*, 475 U.S. at 589–90. On the contrary, product hopping poses a "particularly acute" risk of anticompetitive harm to consumers. Brief for Amicus Curiae Federal Trade Commission Supporting Plaintiff-Appellant 28, *Mylan Pharm., Inc. v. Warner Chilcott Pub. Co*. (No. 15-2236), 2015 WL 6157989 (filed Sept. 30, 2015). *See, e.g*., Steve Shadowen et al., *Anticompetitive Product Changes in the Pharmaceutical Industry*, 41 Rutgers L.J. 1, 3, 32 (2009) ($28.1 billion worth of drugs are subject to product hopping, including Advair, Allegra, Augmentin, Caduet, Clarinex, Kapidex, Lexapro, Nexium, Prozac, Risperdal); Robin Feldman, *May Your Drug Price Be Evergreen*, 5 J. L. & Biosci. 590, 597 (2018) (artificial extensions of patent or other exclusivity are "common and pervasive problem endemic to the pharmaceutical industry").

Third, to our knowledge, there has never been an antitrust case in which a court applied the predatory pricing framework to conduct that *raised* prices to consumers. Reckitt sometimes refers to its conduct as a "discount," Reckitt Br. at 22, but its own description of its conduct omits any reference to a price cut, *see* Reckitt

Br. at 15 ("Reckitt (1) introduced Film at the same list price as the older Tablet product [and] (2) subsequently raised prices only incrementally …"), and it does not dispute that its conduct caused overcharges to patients, Br. at 18; *see In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, 212 (S.D.N.Y. 2018) ("Monopolist overcharges are 'the classic antitrust injury.'") (citation omitted).

Finally, applying the predatory pricing framework makes no sense because Reckitt's conduct is anticompetitive regardless of whether film or tablets are priced above or below cost. The point is undeniable in prescription drug markets in particular, because of the well recognized "price disconnect." *See, e.g.*, Michael A. Carrier & Steve D. Shadowen, *Product Hopping: A New Framework*, 92 Notre Dame L. Rev. 167, 179–180 (2016) (describing market failure whereby "the doctor who prescribes the product does not pay for it, and the consumer (or her insurer) who pays for it does not choose it," such that "[n]o one makes the price/quality decision or trade-off that ensures that manufacturers sell products at competitive prices."). The price disconnect makes competition dependent on generic substitution laws, but the laws allow substitution only for generics of the same formulation, which creates a perverse incentive for brands to pursue above-cost product hopping strategies to thwart substitution (and competition). Indeed, the

district court found that this dynamic contributed to the plausibility of plaintiff's claims in its motion to dismiss ruling. MTD Op. at 683–84.

But consider the following illustration, which ignores the price disconnect. Assume it costs Reckitt $21 to market a tablet, and that generic entry would reduce the price of tablets to consumers by 85%, which is standard. *See* Fed. Trade Comm'n, Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions 7 (Jan. 2010) ("[I]n a mature generic market, generic prices are, on average, 85% lower than the pre-entry branded drug price."). Assume further that Reckitt engages in the alleged product hopping scheme and (1) initially prices tablets at $18 (i.e. $3 below cost), (2) introduces film at $18 and incrementally raises the price of tablets to $20 (still $1 below cost), and (3) affords rebates and coupons to patients that effectively lower the price of film by $4, to $14 (i.e. substantially less than tablets). *See* Reckitt Br. at 15. In other words, assume that both tablets and film are priced below cost at all times.

Under competition on the merits, the price of tablets would fall 85% from $20 to $3, saving consumers $17. Under the product hopping scheme, the price of tablets would remain at $20. Under either scenario, the price of film remains unchanged, at $14.

Now assume instead that Reckitt (1) initially prices tablets at $36, (2) introduces film at $36 and incrementally raises the price of tablets to $40, and (3)

affords rebates and coupons to patients that effectively lower the price of film by $8, to $28. In other words, assume a similar pricing relationship between tablets and film, but that both are priced above cost at all times.

Under competition on the merits, the price of tablets would fall 85% from $40 to $6, saving consumers $34. Under the product hopping scheme, the price of tablets remains at $40. The price of film again remains at $28.

Note that, notwithstanding that price remains entirely above cost in the latter illustration, competition is still seriously injured, because Reckitt's conduct prevents the market price of tablets from being competed down below $40 to more closely approximate the $6 price after generic entry. Consequently, consumers are still deprived of substantial savings and still pay significantly higher drug prices. There is no price cut, and no risk that a discount will be discouraged.

Reckitt's argument fails because, as these illustrations show, the ratio of price to cost has no bearing on the fundamentally anticompetitive nature of Reckitt's product-hopping scheme. The Court thus should categorically reject Reckitt's predatory pricing argument if it reaches the merits, which are not properly before it.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's class certification order.

Respectfully submitted,

/s/ Randy M. Stutz
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 905-5420

Dated: March 12, 2020

CERTIFICATE OF COUNSEL

I, Randy M. Stutz, hereby certify that:

1. Pursuant to Third Circuit Local Appellate Rule 46.1(e), I filed an application for admission to the bar of the United States Court of Appeals for the Third Circuit on March 9, 2020.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

4. Pursuant to Third Circuit Local Appellate Rule 31.1(c), the PDF file and the text of the paper version of the brief are identical. The electronic version of the brief has been scanned for viruses by OPSWAT MetaDefender Cloud (current version) and no viruses were found.

/s/ Randy M. Stutz

Dated: March 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Randy M. Stutz

Dated: March 12, 2020