No. 22-55413

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATIVE HEALTH, LLC,
Plaintiff-Appellant,

v.

BIOSENSE WEBSTER, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California, No. 8:19-cv-01984-JVS-KES

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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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]

AAI submits this brief because the antitrust laws cannot protect competition if claims supported by direct and unambiguous evidence of anticompetitive effects are summarily rejected on market definition grounds.

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[1] Amicus states that all parties consent to the filing of this amicus brief because Plaintiff-Appellant states that it consents and Defendant-Appellee states that it takes no position but represents that amicus curiae may file without leave of court for purposes of complying with Rule 29(a)(2). 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. Certain members of AAI's Board of Directors or Advisory Board, or their law firms, represent Plaintiff-Appellant, but they played no role in AAI's deliberations with respect to the filing of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this aftermarket tying case, the plaintiff alleges harm to competition among an original equipment manufacturer (OEM) of aftermarket products and rival "reprocessors." The defendant, Biosense Webster, Inc. (Biosense), manufactures and sells the "CARTO 3," a leading cardiac mapping system, to hospitals throughout the United States. Biosense also provides clinical support services for the CARTO 3, including technicians trained to operate the system. And Biosense makes and sells new, disposable, single-use catheters compatible with the CARTO 3.

The plaintiff, Innovative Health LLC (Innovative), is a reprocessor. Once a hospital has purchased or leased the CARTO 3 and its doctors have used Biosense's new catheters to perform heart-mapping procedures (with clinical support from Biosense or "self-support" from trained hospital staff), Innovative reprocesses the catheters so they can be used again in future procedures. It markets reprocessed catheters for sale to hospitals at a discount, in competition with Biosense. Innovative's reprocessed catheters are FDA approved and certified as substantially equivalent to Biosense's catheters. The discount price of Innovative's catheters is substantially below the price of Biosense's new catheters.

Innovative argues that Biosense illegally tied the sale of CARTO 3 clinical support services to the sale of Biosense's catheters, in violation of Section 2 of the

Sherman Act. Beginning in 2014, Biosense changed its policy on providing clinical support services. Whereas for years Biosense had provided clinical support services to its CARTO 3 customers regardless of where they purchased their CARTO 3 catheters, in 2014 it began to withhold clinical support services to hospital customers unless they purchased their CARTO 3 catheters from Biosense.

In support of its tying claim, Innovative alleges that Biosense's tie directly caused unambiguous anticompetitive effects. Innovative presented evidence that, before the tie, competition between Biosense and independent reprocessors established a benchmark competitive price for CARTO 3 catheters. Pl.'s Red'd Opp. to SJ at 15-17, ECF No. 135-1. Innovative also presented evidence that, after the tie, competition from the reprocessors was eliminated, and the market price of CARTO 3 catheters increased substantially and sustainably above the level that competition had established. *Id.* at 15–17, 28–29. After competition was eliminated, Biosense did not lose catheter sales despite the increased market price of catheters. Slip op. at 7.

Innovative's unambiguous, retrospective evidence of a competitive benchmark price before the tie and a supracompetitive price after the tie, without lost sales, is direct evidence that Biosense had a sufficient degree of market power to generate anticompetitive effects. Nevertheless, the district court granted summary

judgment to Biosense. It held that Innovative failed to create a triable factual question on the issue of whether Biosense has market power in a relevant antitrust market for catheters.

The district court erred. Innovative alleged three separate types of relevant antitrust markets in support of its aftermarket tying claim: (1) a foremarket for cardiac mapping systems, including but not limited to the CARTO 3 (the "foremarket"); (2) a "single-brand" aftermarket for clinical support services for the CARTO 3 (the "clinical support services aftermarket"); and (3) multi-product aftermarkets for catheters used with the CARTO 3 (the "catheters aftermarkets" or "catheters markets"). It is "clearly reasonable" to infer that Biosense has the ability to raise prices and drive out competition in the catheters aftermarkets, since Innovative offers direct and unambiguous evidence that it did so. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 477 (1992).

I. In any antitrust case, findings of fact and conclusions of law on the issues of market power, market definition, and competitive effects must be mutually accommodating. In other words, they must fit together economically and logically. This is a low bar, but it is non-negotiable. If a court's findings and conclusions on market power, market definition, and competitive effects are not mutually accommodating, then the results of its analysis are guaranteed to yield an absurdity. Market power, market definition, and competitive effects are inextricably intertwined.

The analysis of market power and the analysis of market definition must be mutually accommodating because it is impossible for market power to exist *other than* in a relevant market. Market power cannot exist without a relevant antitrust market, nor can it exist in a state of limbo. Accordingly, if a court is to make a finding that market power exists, then it *must* also accept that the power necessarily exists within some identifiable relevant market.

Similarly, market power and competitive effects analyses must be mutually accommodating because anticompetitive effects cannot be caused other than by a firm (or group of firms) with market power in a relevant market. If a court is to make a finding that anticompetitive effects exist, then it *must* necessarily allow that market power in a relevant market exists, too. If anything other than market power in a relevant market causes the effects, then by definition they are not anticompetitive effects. If they are anticompetitive effects, then by definition they *are* caused by market power in a relevant market.

II. Here, the district court's analyses of market power, market definition, and anticompetitive effects do not add up. There cannot be direct and unambiguous evidence of anticompetitive effects in the sale of catheters *without* market power in a relevant market. Those two conclusions are mutually exclusive, yet the district court arrived at them both. It necessarily erred.

II.A. Relevant markets are defined to "measure" market power, and they do not need to measure market power with precision. They need only support a reasonable inference of market power. Because market power is the "ability" to control prices or exclude competition, it is sometimes susceptible, like any other "ability," to being *witnessed* in addition to being measured. Witnessing an ability can reveal its existence at least as well as inferring its existence from measurements. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986).

Consider, by analogy, NBA basketball star Lebron James. We can assess Lebron's ability to dunk a basketball by measuring, in feet and inches, his height, the reach of his right arm, and the height of his vertical leap, and we could then confirm that the sum exceeds the height of a basketball rim. But we can also assess Lebron's dunking ability by handing him a basketball and watching him dunk, thereby confirming his ability to dunk without ever taking measurements in feet and inches. We can witness his dunking ability.

Unambiguous direct evidence of anticompetitive effects is like a Lebron James dunk. We can safely conclude that the firm causing the effects must have a sufficiently high degree of market power in an appropriately defined relevant market, just as we can safely conclude that the combined height of Lebron's height, reach, and vertical leap must necessarily exceed the height of a basketball rim. In-

deed, it would be absurd to conclude otherwise. If our measurements told us Lebron James is unable dunk, we would infer from watching him dunk that our measurements are wrong.

II.B. The Supreme Court has held that it is "clearly reasonable" to send a case to a jury if the plaintiff can establish market power using direct evidence of anticompetitive effects. On summary judgment, direct evidence therefore shifts the burden of proof to the defendant. Here, the burden should have shifted to Biosense to prove its principal defense: that competition in the foremarket for cardiac mapping systems disciplines competition in the catheters' aftermarkets. *Kodak*, 504 U.S. at 469 ("Kodak, then, bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable."). Biosense has not carried this burden. It has not shown that competition in the foremarket disciplines competition in the catheters markets *in fact*. Given Innovative's direct evidence that Biosense raised catheter prices and excluded rivals without losing sales, how could it?

II.C. The district court reached its conclusion by determining that the catheters markets are single-brand markets. It then relied heavily on a recurring dictum in case law that "single-brand markets are disfavored." Slip op. at 5–6. However, that dictum applies to drawing *legal* conclusions from allegations of single-brand

markets, including the inference of market power. It does not apply to making fact-findings. It would be anathema to fundamental judicial methods to "disfavor" facts.

Market-definition is a deeply fact-intensive inquiry because we do not know, *ex ante*, whether any two products are in the same market until we see, as a matter of fact, whether and under what conditions consumers treat them as substitutes. Consumer decision-making on product substitution, when seen in retrospect, does not always conform to preconceived expectations or what common sense might predict. Accordingly, relevant markets defined by unexpected or counterintuitive consumer switching behavior are routinely found across the Circuits. *See infra* II.C (citing cases).

When information about actual, empirical consumer switching behavior is unavailable, "disfavoring" inferences of market power from circumstantial evidence of a high market share in a single-brand market is defensible. The same can be said when otherwise direct-seeming evidence is rendered ambiguous by extrinsic market facts. That may occur, for example, when changes in demand or product quality make it difficult or impossible to identify a competitive benchmark against which direct effects evidence can be assessed. *See Ohio v. Am. Express*

Co., 138 S. Ct. 2274, 2288 (2018) (Direct pricing evidence was rendered ambiguous where defendant introduced evidence that output was expanding at the same time prices were increasing.) (citation omitted).

But where the alleged anticompetitive effects are supported by direct evidence that is retrospective and unambiguous (and where the evidence must be credited on summary judgment), "disfavoring" the relevant market that those effects reveal is senseless. When we have the gift of hindsight, and we can *see* that market power exists, to disfavor the relevant market that we know must likewise exist is to improperly disfavor fact-findings, not legal conclusions.

II.D. The district court also misdiagnosed the catheters markets as single-brand markets. A *single*-brand market cannot be found in the presence of *inter*-brand competition. Those two conclusions do not add up. They are also directly foreclosed by the Supreme Court's holding in *Kodak*. Yet here the district court found them both. Again, it necessarily erred.

The aftermarket competition between Biosense, Innovative, and Stryker is horizontal interbrand competition under *Kodak*. The *Kodak* Court squarely held that horizontal aftermarket competition among independent rivals is interbrand competition. 504 U.S. at 471 n.18 ("Kodak and the ISO's are direct competitors; their relationship is horizontal. The interbrand competition at issue here is [aftermarket] competition over the provision of service."). The aftermarket competition

for catheters is exactly the same as the aftermarket competition for service in *Kodak*. It is horizontal interbrand competition over the provision of catheters.

* * *

If one takes measurements and concludes that Lebron James cannot dunk, the correct response is to wonder where the measurements went wrong, not to disbelieve one's eyes. So too with the ability to control prices and exclude competition. The district court here elevated theory over fact and assumed away direct proof that market power in a relevant market necessarily exists.

This Court should reverse and recognize that direct and unambiguous evidence of anticompetitive effects is the most reliable possible basis for establishing market power in a relevant market. At a minimum, such evidence "commands an explanation." Andrew I. Gavil, *A Comment on the Seventh Circuit* Republic Tobacco *Decision: On the Utility of "Direct Evidence of Anticompetitive Effects*," 19 Antitrust ABA 59, 63 (2005). Cases involving such evidence are therefore "poor candidates for summary judgment." *Id.*

ARGUMENT

I. MARKET DEFINITION, MARKET POWER, AND COMPETITIVE EFFECTS MUST COHERE IN AN ANTITRUST CASE

Most Sherman Act claims have some form of a market power requirement. The "power" required is "the ability to raise price profitably above the competitive

level." John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. Rev. 1169, 1172 n.12 (2018) (summarizing the "canonical" definition). In Section 1 cases, courts use the term "market power" directly, although courts sometimes define the term differently depending on the context in which it arises. *Compare, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 109 n.38 (1984) ("Market power is the ability to raise prices above those that would be charged in a competitive market."), *with Am. Express Co.*, 138 S. Ct. at 2288 ("Market power is the ability to raise price profitably by restricting output.") (internal quotation omitted; emphasis omitted); *Kodak*, 504 U.S. at 464 (Market power is "the power to force a purchaser to do something that he would not do in a competitive market.").

In Section 2 cases, courts use the term "monopoly power" to describe the market-power requirement. The Supreme Court has said that "[m]onopoly power is the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Analytically, however, monopoly power and market power are identical concepts. *See, e.g.*, *Cost Mgmt. Servs. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 950 n.15 (9th Cir. 1996) (The terms are "used interchangeably."); *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986, 994 n.12 (11th Cir. 1993) ("The terms 'monopoly power' and 'market power' are synony-

mous[.]"); Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 246 (1987) ("[M]arket power and monopoly power are qualitatively identical concepts"); *see also* Kirkwood, 98 B.U. L. Rev. at 1173 n.14.

To the extent market power and monopoly power differ, it is as a matter of degree. *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 967 (10th Cir. 1990) ("Market and monopoly power only differ in degree—monopoly power is commonly thought of as 'substantial' market power."); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level."); *see also Kodak*, 504 U.S. at 481; Kirkwood, 98 B.U. L. Rev. at 1173, n.14.

Market definition is a tool for measuring market power. That is its purpose. Courts require market definition because, "'[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.'" *Am. Express Co.*, 138 S. Ct. at 2285 (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)) (alterations in original). Likewise, without the ability to lesson or destroy competition, there is no way a market can be defined. Market power is an "ability," and market definition "measures" the ability.

Accordingly, in practice, the market power requirement in antitrust cases requires a plaintiff to show that "a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008). A "relevant market" is an "'area of effective competition.'" *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (quoting *Am. Express Co.*, 138 S. Ct. at 2285) (citation omitted). Competition is considered "effective" when it has "competitive effects." Competitive effects are generally economic welfare effects, and the antitrust laws are said to be a consumer-welfare prescription insofar as effective competition presumptively generates welfare effects that benefit consumers, such as lower prices, higher output, or improved product quality. *See NCAA v. Alston*, 141 S. Ct. 2141, 2151 (2021) ("[T]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.") (internal citation omitted).

When competition is effective, and therefore sets a competitive benchmark price, there is a presumption that the competition improves consumer welfare. *Id.*, 141 S. Ct. at 2147 ("In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the *belief* that market forces yield the best allocation of the Nation's resources.") (emphasis added); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been *faith* in

the value of competition.") (emphasis added). Moreover, the presumption is a conclusive one. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.").

Accordingly, behavior that thwarts effective competition and harms consumer welfare by raising market prices, reducing market output, or lowering product quality in the market, such as a successful tie, violates the Sherman Act. *See, e.g.*, *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14–15 (1984) (When market power in the tying market "is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures … [a]nd from the standpoint of the consumer—whose interests the statute was especially intended to serve—the freedom to select the best bargain in the second market is impaired[.]").

When the meanings of the terms "market power," "relevant market," and "effective competition" are properly understood, certain logical necessities or "first principles" follow accordingly. *See* Steven C. Salop, *The First Principles Approach to Antitrust,* Kodak*, and Antitrust at the Millennium*, 68 Antitrust L.J. 187, 189 (2000) ("The first principles approach provides a framework for carrying out a

more accurate analysis. By following this more careful approach, courts can maintain logic and consistency while avoiding analytic traps and factual errors.”). One such principle is that the analysis of market power and market definition must be integrated; they cannot be evaluated independently of one another. The principle arises from the recognition that it is impossible to conceive of market power without also conceiving of a relevant market in which the power exists. *Id.* at 191; Jonathan B. Baker, *Product Differentiation Through Space and Time: Some Antitrust Policy Issues*, 1997 Antitrust Bull. 177, 185 (1997) (“If competition will be harmed, some market must exist within which competition takes place.”); David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 Antitrust L.J. 293, 312 (2020) (“[M]arket definition can never be separated from the act of hypothesizing a specific competitive concern.”). Economically and legally, in other words, the concepts of market power and a relevant market are inseparable.

Another first principle in antitrust cases is that the analysis of market power and market definition cannot be divorced from the analysis of competitive effects. Salop, 68 Antitrust L.J. at 202 (A “first principles approach…will ensure that the analysis of market power is not only consistent with, but also furthers, a correct evaluation of the effects of alleged anticompetitive conduct.”); Glasner & Sullivan, 83 Antitrust L.J. at 312.

The presence of a powerful firm (or group of firms) exercising market power in a relevant market necessarily generates anticompetitive effects, and the presence of anticompetitive effects necessarily means a powerful firm (or group of firms) has exercised market power in a relevant market to generate them. Thus, much as it is impossible to conceive of market power without a relevant market, it is impossible to conceive of anticompetitive effects produced by something *other than* a dominant firm (or group of firms) exercising market power. The idea that a firm could cause anticompetitive effects without market power is illogical.

The upshot of these axioms of coherent antitrust analysis is that, when all is said and done, a court's conclusions on market power, market definition, and competitive effects analysis must cohere. If the court's opinion is to make sense, its findings as to any one must logically *allow* for its findings as to the others. Thus, if a court finds market power, it also *must* logically accept that a relevant market exists, since market power cannot exist other than in a relevant market. If the court finds that conduct caused anticompetitive effects, it also *must* accept that *both* market power and a relevant market exist. Conduct cannot cause anticompetitive effects without market power, and market power cannot exist other than in a relevant market.

If a court breaks these analytical rules, it guarantees error. If the market power, market definition, and competitive effects findings are not mutually accommodating, the analysis is doomed to economic irrationality and will invariably yield an absurdity. As a prophylactic against holdings supported by fallacious reasoning, then, first principles help courts. They show courts how to check their math to ensure that their antitrust rulings add up.

II. UNAMBIGUOUS DIRECT EVIDENCE OF ANTICOMPETITIVE EFFECTS ESTABLISHES MARKET POWER IN A RELEVANT MARKET

The district court here did not check its math. Innovative apparently presented unambiguous direct evidence that Biosense's policy change directly caused the market price of CARTO 3 catheters to increase and prevented Biosense's independent horizontal rivals from selling reprocessed catheters to hospitals, contrary to hospitals' revealed preferences. By logical necessity, an established anticompetitive effect necessarily creates, at a minimum, triable questions on the issues of market definition and market power. When an anticompetitive effect can be *observed*, no other conclusion adds up. Anticompetitive effects cannot exist without market power, and market power cannot exist other than in a relevant market. Because we know (or, on summary judgment, are required to infer) that unambiguous anticompetitive effects in the catheters markets exist, we *know* (or are required to infer) that market power in a relevant market *must* also exist.

The district court apparently credited Innovative's direct evidence of anti-competitive effects, but it also ruled that Innovative failed to raise a material factual question on the issue of market definition. Together, those two conclusions create a logical impossibility. They are mutually exclusive. The district court should be reversed.

A. The Ability to Control Prices or Exclude Competition Can Be Directly Observed

The important thing to remember about market definition is that it "measures" an "ability." Obviously, "ability" is an intangible quality; it is susceptible only to ordinal measurement, not cardinal measurement. A court cannot use a desk ruler to measure a firm's "ability" to control prices or exclude competition in feet and inches.

Accordingly, courts recognize that defining the relevant product market is "always an inexact science." *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 364 (9th Cir. 1988); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611 (1953) ("The 'market,' as most concepts in law or economics, cannot be measured by metes and bounds."). An antitrust plaintiff does not have to prove a relevant market "in the same way the *corpus delicti* must be proved to establish a crime." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). Sometimes, even proving the "rough contours" of the relevant market is sufficient. *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004).

As relevant here, a plaintiff who can show unambiguous direct evidence of anticompetitive effects can prove the "ability" to control prices and exclude competition and the "rough contours" of a relevant market without taking any "measurements." Like a Lebron James dunk, such ability can be witnessed. Accordingly, it is black letter law that plaintiffs can "carr[y] their initial burden" to create a reasonable inference of market power "directly or indirectly." *Am. Express Co.*, 138 S. Ct. at 2284; *Kodak*, 504 U.S. at 465; *Ind. Fed'n of Dentists*, 476 U.S. at 460; *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 99 (1984); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 237 (1899); *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1001 (9th Cir. 2008); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *see also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007); *Todd v. Exxon Corp.*, 275 F.3d 191, 202-04 (2d Cir. 2001); *Toys 'R' Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016-19 (6th Cir. 1999); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97-98 (2d Cir. 1998); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

B. Direct Evidence of Market Power Shifts the Burden of Proof to the Defendant

Because Biosense's argument on summary judgment rests on Innovative's inability to establish that Biosense can control prices and exclude competition for CARTO 3 catheters, Innovative's direct and unambiguous evidence that Biosense

did so is extremely inconvenient for Biosense. Biosense's solution to the problem of unambiguous direct evidence of its market power was to emphasize that single-brand markets are disfavored. That approach should not have worked.

Biosense argued in its summary judgment motion that *Kodak* sets forth a "narrow exception" to a "rule" that "single-brand markets are disfavored." Def.'s Red'd Mot. for Summ. J. 12, ECF No. 114. The district court embraced this framing, apparently believing that *Kodak* and *Newcal* adopted a four-factor legal "test" that sets forth the only permissible method of establishing a single-brand market. Slip op. at 5–6. Accordingly, it held that "*Innovative*…must raise a triable issue with regard to…required conditions in the foremarket"—the last of the four factors. Slip op. at 5 (emphasis added). The district court erred. It ignored direct evidence and misallocated the burden of proof.

Kodak holds unequivocally that direct evidence is sufficient to establish market power in an aftermarket. Accordingly, on summary judgment, such evidence shifts the burden of proof to the *defendant* to show that competition in the foremarket disciplines competition in the aftermarket. The Court held:

> "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury."…
>
> "It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so."…

> Kodak, then, bears a substantial burden in showing that it is entitled to summary judgment. *It* must show that *despite evidence of increased prices and excluded competition*, an inference of market power is unreasonable."

Kodak, 504 U.S. at 468–69, 477 (emphasis added); *cf. Newcal*, 513 F.3d at 1050 (denying motion to dismiss notwithstanding that "Newcal does not allege that…IKON holds power in the primary market").

Here, the district court plainly erred by giving the burden of proof to the plaintiff to disprove the disciplining effect of foremarket competition in the aftermarket despite the plaintiff's direct evidence of market power. *See* Slip op. at 5–6 ("Innovative has not necessarily established…that '[c]ompetition in the initial market…does not necessarily suffice to discipline anticompetitive practices in the aftermarket.'"). The "substantial burden" to prove the disciplining effect of foremarket competition despite direct evidence of anticompetitive effects was Biosense's. And, Biosense did not carry it.

Biosense made no evidentiary showing at all—direct or circumstantial—that competition in the foremarket for mapping systems disciplines competition in catheters markets *in fact*, such that a finding of market power would be unreasonable. The district court found that Biosense "faces" competition in the foremarket, but not that this competition prevented price increases in catheters markets. Slip op. at 8. It found that neither switching costs nor information costs in the foremarket are

prohibitive, but not that low switching costs or lifecycle pricing prevented price increases in the aftermarket. Slip op. at 9. It found that physician preferences do not contribute to locking-in hospital customers, but not that hospitals successfully switched in response to price increases. Slip op. at 10. Biosense's circumstantial evidence of *possible* disciplining effects from mapping-system competitors in the foremarket thus creates a triable question of fact on the issue of market power in a relevant market. It cannot resolve that question because Innovative presented direct evidence that Biosense's tie raised prices and excluded independent rivals.

C. The District Court Disfavored Fact Findings in Defining the Catheters Aftermarkets

Despite the district court's misplaced reliance on a "rule" that "single-product markets are disfavored," it did allow that, in "unforeseen circumstances, a relevant market may consist of only one brand of a product." Slip op. at 6 (citation omitted). However, the district court ignored the circumstances that can render relevant markets "unforeseen." Unforeseen relevant markets are possible because market definition is a deeply fact-intensive inquiry that is determined by empirical evidence of demand substitution. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 380 (1956); *see also* U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4, at 7 (2010).

When a relevant market is unforeseen *ex ante*, it is because the actual, empirical switching behavior of consumers sometimes proves surprising as a factual

matter. *See* Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 Geo. L.J. 2055, 2084 (2012) ("[C]onsumers' beliefs about products can drive purchasing behavior even if those beliefs are not based in reality."); U.S Dep't of Just. & Fed. Trade Comm'n, 2010 Horizontal Merger Guidelines§ 4, at 8 ("Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive."); *see Kodak*, 504 U.S. at 460 ("'[M]arket imperfections can keep economic theories about how consumers will act from mirroring reality.'").

For example, in *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485 (2d Cir. 2004), the Second Circuit found separate relevant markets for generic and branded versions of the same pharmaceutical drug, notwithstanding that this "seem[ed] paradoxical." *Id.* at 496. The court was understandably perplexed that a significant group of patients presented with the choice between functionally identical branded and generic versions of the same drug—versions which were certified as therapeutical equivalents by the FDA—would choose the former when the latter were offered "at about 70 percent" of the price. *Id.* at 496. Yet, the facts showed unambiguously that consumers persistently failed to behave in ways that accorded with what function, price, or common sense might predict. *Id.* at 497 ("[A] substantial customer base" counterintuitively remained loyal to the brand "despite

conspicuously high prices" more than three years later); *see also, e.g.*, *FTC v. Staples*, 970 F. Supp. 1066, 1075, 1078 (1997) (It was "difficult to overcome the first blush or initial gut reaction" that "the sale of consumable office supplies through office superstores" does not form a distinct relevant product market, but the facts showed "certain consumers do not go elsewhere for their supplies.").

Numerous other examples of markets that were defined by unexpected or counterintuitive consumer switching behavior abound. *See, e.g.*, *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1039 (2008) (recognizing separate market for "core customers" of "premium, natural and organic supermarkets" where "the FTC documented exactly the kind of price discrimination that enables a firm to profit from core customers for whom it is the sole supplier"); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 713 (7th Cir. 1979) (defining separate market for "Drive-thru photo processing" where the record showed they maintained prices approximately 20% or more above conventional processors and continued to grow market share despite significantly higher prices).

The important point is that, even if a court suspects it is unwise for consumers to continue purchasing a firm's seemingly overpriced product, or it thinks that consumers logically could or should switch to an alternative product and are behaving irrationally, those intuitions are totally irrelevant to the market-definition inquiry if consumers do not reliably switch *in fact*. When it is empirically evident

in retrospect that a firm is able to maintain prices above competitive levels without losing sales to rivals over time, the firm unquestionably has market power. Accordingly, a relevant antitrust market necessarily *must* exist.

Because market definition depends on actual consumer switching behavior *ex post*, it should strike fact-finders as strange that whole categories of relevant markets could ever be "disfavored" *ex ante*. After all, the market definition inquiry does not pose a normative question; it poses a factual one. It is not a question of what consumers *should* do, it is a question of what they *do*. "Disfavoring" a relevant market *ex ante* therefore comes dangerously close to disfavoring objective fact-finding. *See McWane, Inc. v. FTC*, 783 F.3d 814, 826 (11th Cir. 2015) (case law treats "a determination that a defendant possesses market power…as a factual finding.").

Although the idea of disfavoring market definitions *ex ante* is controversial, it at least arguably can make sense in certain cases involving *prospective* competitive effects, like merger challenges under Section 7 of the Clayton Act. Because mergers are typically challenged prior to consummation, the litigants and the court are often forced to conjecture about likely demand responses from consumers in the future, after the firms have merged their assets. Because assumptions are unavoidable in those situations, it arguably makes sense to disfavor narrow-seeming, single-brand markets on grounds that we should consciously choose assumptions

that accord with common sense or rational-seeming behavior, like the assumption that consumers will switch to a generic version of a product in response to a future increase in the brand price. *But see generally* Daniel Kahneman, Thinking, Fast and Slow (2011) (cataloguing seemingly innumerable ways in which human beings consistently fail to behave rationally).

For the same reason, disfavoring single-brand markets can arguably make sense in cases that require inferences to be drawn from *ambiguous* evidence. As a practical matter, because direct effects evidence is rarely available, the vast majority of antitrust cases turn on ambiguous, circumstantial evidence, like market-share evidence. But even if direct evidence is available, it sometimes can be rendered ambiguous by the absence of a clear "benchmark" that would reliably show prices both with competition and without. *See* Eric L. Cramer & Daniel Berger, *The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs*, 39 U.S.F. L. Rev. 81, 100 (2004). ("In most antitrust cases, detailed pricing and cost data reflecting the marketplace with and without the alleged competitive restraint is unavailable, unusable, or ambiguous."). Because ambiguous evidence likewise can force us into choosing assumptions, one can at least argue, again, that it is better to assume that consumers behave rationally.

But a bias against defining single-product aftermarkets makes no sense at all in cases like this one. Where, as here, the direct evidence of anticompetitive effects is both unambiguous and retrospective, "disfavoring" the relevant market disfavors *facts* and violates first principles. The key distinction in prospective-effects and ambiguous-evidence cases is that we lack an accurate competitive benchmark to measure the alleged price increase against, and thus "the relevant question is a comparison between reality and a *hypothetical* state of affairs." *Am. Express Co.*, 138 S. Ct. at 2302 (Breyer, J., dissenting) (emphasis added). By contrast, when we know the competitive benchmark, and the plaintiff can plausibly allege and show direct evidence of unambiguous anticompetitive effects in retrospect, it makes no sense to disfavor the relevant market that this evidence *confirms*. *See* Douglas Richards, *Is Market Definition Necessary in Sherman Act Cases When Anticompetitive Effects Can Be Shown with Direct Evidence?*, 26 Antitrust ABA 53 (2012); Gavil, 19 Antitrust ABA at 63. In such cases, there is no comparison to be drawn between reality and a hypothetical state; there is only reality.

When consumers demonstrate through their past behavior that they reliably and persistently do not switch to alternatives after the price of a product is increased above the competitive level, there is no sensible way to avoid the conclusion that the firm imposing the price increase has market power. Even if we may privately think consumers are crazy or just plain wrong to behave as they reliably

and sustainably do, it would be foolish to deny market power when it is staring us in the face. Particularly on summary judgment, reality should not be "disfavored" when drawing *factual* inferences from evidence.

D. The District Court Defined Single-Brand Markets Despite Interbrand Competition

The district court also appeared to fundamentally misunderstand "single-brand markets," because it held that the catheters aftermarkets were single-brand markets despite interbrand competition. Slip op. at 5. The alleged clinical support services aftermarket is a single-brand market, but the alleged catheters aftermarkets include multiple independent sellers who compete horizontally on price and quality. That is the definition of *inter*brand competition under *Kodak*. 504 U.S. at 471 n.18. *Single*-brand markets and *inter*brand competition are fundamentally incompatible. They do not add up.

The reason courts are reluctant to draw legal inferences of market power from circumstantial evidence of a high market share in a single-brand market is the risk that it will lead to an erroneous finding of market power based solely on the success of the "manufacturer's own products" rather than the success of the manufacturer's products in relation to rivals' products. *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008) (quoting *Green Country Food Mkt, Inc. v. Bottling Grp.*, 371 F.3d 1275, 1282 (10th Cir. 2004)). But where, as here, the plaintiff alleges a market that *includes* both the manufacturer's own products and

its rivals' products, that risk cannot materialize because the competition is not "intrabrand." *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977) ("Intrabrand competition is the competition between the distributors—wholesale or retail—of the product of a particular manufacturer.").

There are no allegations that Innovative or Stryker has a vertical contractual relationship with Biosense. Neither is a wholesaler or distributor of Biosense's *own* catheters. Biosense not only does not own or authorize the sale of Innovative's and Stryker's catheters, it has actively sought to exclude them from the market by tying its clinical support services to the use of its own catheters. Biosense thus has a horizontal relationship with Innovative and Stryker.

The same issue arose in *Kodak*. There, the Court confirmed that a horizontal relationship among the rivals in the aftermarket is the relevant difference between interbrand and intrabrand competition. Because the rival service providers were not cooperating vertical affiliates of *Kodak*, the defendant could not "transform [the] case into one over an agreement the manufacturer has with its dealers that would fall under the rubric of *Cont'l T. V.*" *Kodak*, 504 U.S. at 471 n.18. The Court explained that "this case does not concern vertical relationships between parties on different levels of the same distribution chain. In the relevant market, service, Kodak and the ISO's are direct competitors; their relationship is horizontal.

The interbrand competition at issue here is competition over the provision of service." *Id.*

The same is true here. Biosense and Innovative are not in a cooperative vertical relationship; they do not share the same distribution chain. In the relevant market, catheters, Biosense and Innovative are competitors; their relationship is horizontal. The interbrand competition at issue here is competition over the provision of catheters.

The district court concluded that the catheters markets are single-brand markets based on its observation that "the three catheter markets that Innovative purports to define includes only one product *from* one brand (Biosense)." Slip op. at 5 (emphasis added). For one thing, the observation is wrong. Innovative, not Biosense, is the legal manufacturer of record for Innovative's reprocessed catheters. Slip op. at 2. The reprocessed catheters that Innovative sells to hospitals thus come "from" Innovative and are sold to hospitals as Innovative-brand catheters, not Biosense-brand catheters. Nobody argues that the brands are differentiated more strenuously than Biosense, which attempts to defend its exclusionary tying arrangement on grounds that Innovative's catheters are inferior and unsafe (despite FDA approval). Def.'s Red'd Mot. for Summ. J. 3, 21, 22, 27-30.

More fundamentally, the observation that demand for both Biosense and Innovative catheters is derived "from" the CARTO 3 is meaningless. *All* aftermarkets are derived from a single product in the foremarket. That is what makes them aftermarkets. If the district court based its finding that the catheters markets are single-brand markets on the tautology that they are derived from a single product in the foremarket, it erred. Not all aftermarkets are single-brand markets, as *Kodak* confirms.

Innovative competes horizontally against Biosense as a matter of both form and function. It is the manufacturer of record for its own reprocessed catheters, and its catheters demonstrably generate effective competition, which is to say competition from independent firms selling differentiated products that leads to lower market prices and more choices for hospitals—choices that hospitals demonstrably valued before they were foreclosed by Biosense's tie. If Innovative's direct evidence of price increases and diminished horizontal interbrand competition does not establish that Biosense has market power in a relevant aftermarket for CARTO 3 catheters, it raises a triable question at summary judgment.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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